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THE

WEEKLY REPORTER,

1895-96

(FORTY-FOURTH YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1895, TO THE 12TH OF AUGUST, 1896.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. XLIV.

EDITED BY
MARTIN JOSEPH BLAKE,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

In the forty-fourth volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest this year contains, in the same form as last year, a summary of all the cases published from the 24th of October, 1895, to the end of August, 1896, in the WEEKLY REPORTER, and in the Law Reports, the Law Journal Reports, and the Law Times Reports, besides some of those given in the Irish Law Reports. In the body of the Digest, figures following the name of a case denote the page in the WEEKLY REPORTER at which it will be found. Where the name of a case has no figures attached, the case is not reported in this volume of the WEEKLY REPORTER; but the references to the case in other series of Reports will be found in the Tabular Index to the Names of Cases.

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1895—96.

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MARTIN JOSEPH BLAKE,

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	Mr. Justice Kekewich	FRANCIS THEODORE DUKA and CHARLES CARRINGTON HENSLEY, Barristers-at-Law.
	Mr. Justice Romer	JAMES WILLIAM GREIG and J. ARTHUR PRICE, Barristers-at-Law.
	Mr. Justice Vaughan Williams	VILLIERS DE SAUSSURE FOWKE, Barrister-at-Law.
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CROWN CASES RESERVED		THOMAS REGINALD COLQUHOUN DILL, Barrister-at-Law.

A. P

A TABLE

OF

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WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

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——— v Trustees Insurance Corporation	CH.D. KEK.J.	237	29	65 L. J. Ch. 66
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Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) Aug. 1, 2.

ROBINS & Co. *v.* GRAY. (*a*.)

Innkeeper — Lien — Commercial traveller — Goods the property of a third person.

A commercial traveller, whilst staying at an inn for the purpose of carrying on his business, had sent to him by his employers certain goods for sale, which goods the innkeeper, at the time they were received, knew did not belong to the traveller, but to his employers. On the traveller failing to pay for his board and lodging, the innkeeper detained certain of the said goods, claiming a lien on them.

Held, that the innkeeper had a good lien upon the goods in respect of the debt incurred by the traveller.

This was an appeal by the plaintiffs in an action tried before Wills, J., without a jury, May 16, 1895: [1895] 2 Q. B. 78, 43 W. R. Dig. 82.

The plaintiffs, who dealt in sewing machines and other articles, had in their employment one Edward Green as a commercial traveller, and it was part of his duty to canvass for orders and sell goods upon commission.

In April, 1894, Green, for the purposes of carrying out his duties as commercial traveller, went to the defendant's hotel and remained there until the end of July. During his stay there, the plaintiffs from time to time sent down to him certain sewing machines and other goods for the purpose of his selling them. At the end of July Green was indebted to the defendant for board and lodging to the amount of £4 0s. 8d., and this sum he neglected to pay. Thereupon the defendant detained certain of the goods which had been sent by the plaintiffs to Green, claiming a lien upon them in respect of the debt incurred by the latter. It appeared at the trial that before the goods were received into the defendant's hotel, and before the said debt had been incurred, the defendant had been expressly informed by the plaintiffs that the goods were the plaintiffs' property and not the property of Green.

The plaintiffs brought an action in detinue.

Wills, J., gave judgment for the defendant, holding that he had a lien upon the goods in respect of the debt.

From this decision the plaintiffs now appealed.

Arthur Powell, for the appellants.—The defendant had received the goods into his inn, knowing that they were not the goods of the guest but of a third person. He, therefore, has no lien upon them: *Turrell* v. *Crawley*, 18 L. J. Q. B. 155. [Lord ESHER, M.R. —There is not one single word in the judgment of Wills, J., about such knowledge of the innkeeper.] He has a lien when he is bound to take the goods in, but not otherwise. Here he was not bound to take these goods in: *Broadwood* v. *Granara*, 3 W. R. 25, 10 Exch. 417. [KAY, L.J.—An innkeeper is bound to receive the goods, to a reasonable amount, of commercial travellers who put up at his inn.] If the innkeeper knows the goods are not the property of the traveller he has no lien because he knows the traveller could not pledge them: *Threfall* v. *Borwick*, 20 W. R. 1032, L. R. 7 Q. B. 711, and 23 W. R. 312, L. R. 10 Q. B. 210; *Gordon* v. *Silber*, 39 W. R. 111, 25 Q. B. D. 491; *Robinson* v. *Waller*, 1 Rolle, 449, 3 Bulst. 269.

Hume Williams and *Shaw*, for the respondent, were not called upon.

Lord ESHER, M.R.—From the first I have not had a shadow of doubt about this case. An innkeeper has his duties and his rights, which are dependent upon the custom of the realm. If a traveller comes to an inn with luggage, the innkeeper is bound to take him in and his luggage also. He cannot discriminate between the two and say, "I will take you but not your luggage." There is no foundation for the proposition that he can refuse to take in the luggage. And further, I will say, the innkeeper has no right to inquire whether the goods are the property of the traveller or not. If a person were to bring goods that are so bulky that there is no room for them in the inn, or if he were to bring something dangerous, such for instance as a tiger or dynamite, the innkeeper need not take in the guest or his goods, but the custom of the realm is that except in unreasonable cases he is bound to take in the guests and their luggage. The guest may be travelling with somebody else's luggage, and say so, yet, the innkeeper must take them in. Now what is the innkeeper's liability when once he has taken in the goods? He is bound to keep them safe, and is liable for their loss, unless lost through the fault of the guest. That is a very great liability, but on the other hand, in respect of this obligation and liability, the innkeeper has a lien for his charges on the goods of the guest for taking care of them, and by virtue of the law of the realm he has such lien not only as against the guest, but also against the true owner of the goods brought to the inn by the guest. This has been the custom of the realm for hundreds of years, and there is no authority to show that the innkeeper has not got such lien. The case of *Broadwood* v. *Granara* has been cited, but that case does not say that the innkeeper has not such

(*a*.) Reported by T. MATHEW, Esq., Barrister-at-Law.

a lien. It is not an authority which helps the appellant at all, because there the decision was not upon the law of innkeeper and guest, but upon the particular facts of the case, and to those facts the law of innkeeper and guest does not apply. The piano in that case was not sent in as part of the goods of the guest.

In this case the innkeeper was bound to take in the goods of the guest, and he accordingly has his lien on them in respect of the charges incurred by the guest, therefore this appeal must be dismissed.

KAY, L.J.—I am of the same opinion. It is said that the innkeeper was told that the goods did not belong to the guest, but that is immaterial. The traveller was already staying in the inn when these further sewing machines were sent to him, and the innkeeper took them in as part of the original luggage the guest had brought with him. Long and elaborate arguments have been addressed us, but not one single authority has been cited, nor as far as I know can be cited, in support of the appellants' contention.

The innkeeper is not bound to inquire who is the true owner of the goods brought to his inn, but he is bound to take them in. In *Broadwood* v. *Granara* the guest hired a piano from a tradesman, and the innkeeper took it in knowing it was only for the temporary use of the guest, and it was held that the innkeeper had no lien on it. Baron Parke says, "The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn." There may, it is true, be circumstances when goods are sent to the guest only for a special and temporary purpose, for instance, jewels sent on approval, and then the innkeeper would not receive them as the goods of the guest, and he would have no lien on them. But in the present case the innkeeper did receive the goods as the goods of the guest and as the sort of goods the guest was accustomed to take about with him. Innkeepers have always relied on the supposition that they have a lien in these cases, and I think they have such lien. I agree with the Master of the Rolls that the appeal must be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. The obligation of the innkeeper is such that he is bound to take in the commercial traveller, he is bound to take his goods in, and he is bound to take care of them. That obligation is imposed upon him by the custom of the realm, and in return he has given him a lien on such goods in respect of his charges against the traveller.

I entirely agree with the law as laid down by Lord Justice Lopes in *Gordon* v. *Silber*, 39 W. R. 111. But it is said here that that law does not apply if the innkeeper knows that the goods are not the goods of the guest. No authority, however, has been cited to show that that is so. As regards the question raised by counsel that there can be no lien where the guest is not in a position to pledge the goods, that has nothing to do with this case. This case is entirely regulated by the custom of the realm. I think this appeal must, therefore, be dismissed.

Appeal dismissed.

Solicitor for the plaintiffs, *W. Wilkins.*

Solicitors for the defendant, *Colyer, Bristow, & Russell,* for *F. Hall,* Folkestone.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) July 26.

OWNERS OF CARGO LATELY ON BOARD THE SS. "MAORI KING" v. HUGHES. (a.)

Ship — Bill of lading — Cargo of frozen meat — Refrigerating machinery—Implied warranty of fitness at time of shipment.

In a bill of lading stated to be for the carriage of a cargo of frozen meat there is an implied warranty that the ship is, at the time of shipment, fit to carry such a cargo. Exceptions in the bill of lading freeing the shipowner from liability for damage from a failure of machinery do not apply to the condition of the machinery at the commencement of the voyage, but only to contingencies which may occur during the progress of the voyage.

Appeal of the defendants from the judgment of Mathew, J., on a preliminary question of law arising in the pleadings.

The action was brought to recover damages for breach of contract and breach of duty in and about the carriage of goods by sea. The defendants were the owners of the steamship *Maori King.* In November, 1894, the plaintiffs shipped some frozen meat on *The Maori King* at Melbourne to be carried to England. The vessel proceeded from Melbourne to other ports taking in a further cargo of frozen meat, and on the arrival of the vessel at Sydney, it was discovered that the refrigerating machinery in the vessel had broken down, and it became necessary to remove the cargo from the vessel. As there was not sufficient cold storage for the whole cargo, a portion of it, including the plaintiffs' meat, had to be sold at once owing to its liability to speedy decomposition.

The plaintiffs alleged that it was an implied term in the undertaking contained in the bill of lading under which the plaintiffs' meat was shipped that the ship and the refrigerating machinery therein were at the time of shipment fit to carry the frozen meat to Europe; that the ship and the machinery were not in fact so fit, and that owing to the improper construction of the machine it failed to keep the meat frozen, and that the meat was sold at a loss to the plaintiffs.

The defendants by their defence (*inter alia*) denied that there was any such implied term in the bill of lading as alleged.

The defendants further said that at the commencement of the voyage the steamer was fitted with refrigerating machinery of a proper construction and before the voyage commenced the defendants used all due diligence with reference to the care and condition of the machinery, and that by the express terms of the bill of lading they were not accountable for damage or loss occasioned by the failure or breakdown thereof or for accidents to or defects in the machinery.

The terms of the bill of lading so far as material were as follows:—"Refrigerator Bill. Shipped in apparent good order and condition . . . on board the steamship *Maori King* . . . for London . . . the following goods—viz., 4,553 carcases of hard frozen mutton . . . to be delivered (subject to the exceptions and conditions hereinafter mentioned) in the like good order and condition. . . . Steamer shall not be accountable for the condition of the goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery, insulation

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

or other appliances, nor for detention nor for the consequences of any act, neglect, default or error of judgment of the master, officers, engineers, crew, or other persons in the service of the owners, nor for any other cause whatsoever, and steamer shall be at liberty to jettison the whole or any part thereof if considered necessary on account of decomposition . . . loss or damage resulting from any of the following causes or perils are excepted . . . accidents to or defects in hull, tackle, boilers or machinery, or their appurtenances."

The action was placed in the commercial list and the following preliminary question of law was ordered to be decided: "Whether it was an implied term of the bill of lading that *The Maori King* and the refrigerating machinery therein was at the time of the shipment fit to carry the frozen meat to Europe."

Mathew, J., decided the point in favour of the plaintiffs.

The defendants appealed.

Moulton, Q.C., Joseph Walton, Q.C. (with them *James Fox*), for the defendant.—There was no such implied warranty in the bill of lading as is suggested, The only implied warranty is as to seaworthiness, and that does not cover this case, but only relates to fitness for transit. This ship would have been equally seaworthy whether the refrigerating machinery was in good condition or not. The only duty upon the shipowners was to take reasonable care that the machinery was fit for the work. Their obligation is analogous to that of a warehouseman. Secondly, the defendants are protected from liability by the exceptions in the bill of lading which are not confined to events which happen after the commencement of the voyage.

Bigham, Q.C., and *Scrutton*, for the plaintiffs.—It is an implied term in every bill of lading that not only is the ship seaworthy in the sense that it will float, but also that it is fit to carry the particular cargo referred to in the bill of lading: *Tattersall* v. *National Steamship Co.*, 32 W. R. 566, 12 Q. B. D. 297. This case does not come within the exception which cannot have been intended to cover the case of insufficient or improper machinery at the commencement of the voyage.

Fox replied.

Lord ESHER, M.R.—The question in this case is whether under the circumstances which existed at the time the contract was made, there is contained in the bill of lading a warranty that the refrigerating machinery was at the time of shipment fit to carry frozen meat to Europe. That obligation in the shipowner if it existed must be inferred from the terms of the bill of lading and must have been intended by both parties to form part of the contract. Now the bill of lading is headed by the words "Refrigerator bill." These words must have some meaning, and their necessary meaning is that there was on board such machinery as is required for the purpose of keeping frozen meat, for the bill of lading states in express terms that 5,000 frozen carcases are delivered on board. Both parties must, therefore, have contemplated that the refrigerating machinery was at the time of shipment in a fit condition, for the shipper knows that if that is not the case the meat will spoil and the shipowner knows that the shipper will not ship frozen meat and pay an increased freight for it unless there is on board the requisite machinery, and if the refrigerating machinery is not in proper working order it is just as useless as if there were none at all. Therefore, that implied obligation on the shipowner must be read into the bill of lading, but the obligation can only be implied as to the state of things at the commencement of the voyage, and it does not refer to anything which might happen after the start. If the exceptions on the bills of lading are inconsistent with this obligation, it cannot be implied for the exceptions are express terms. But in this case the exceptions as in the ordinary bills of lading are exceptions only as to matters which may happen during the voyage; they are exceptions to the liability of the shipowner to deliver the cargo in the same condition at the end of the voyage as at the commencement.

I am, therefore, of opinion that the decision of Mathew, J., was right, and this appeal must be dismissed.

In cases such as this, where a preliminary question of law is ordered to be tried before the questions of fact in the action, if an appeal is brought upon the preliminary question of law, that is an interlocutory appeal, and the remaining questions in the action will not be tried until the preliminary question has been finally decided in this court or in the House of Lords, as the case may be.

KAY, L.J.—In this case we have to deal with a bill of lading of frozen meat. The bill of lading is headed "Refrigerator bill," and the cargo is stated to be hard frozen mutton, and the bill of lading says in express terms that, subject to the exceptions, the mutton is to be delivered in as good order and condition as it was received on board. Then follow various conditions which, however, do not relate to the state of the goods at the time of shipment, but only during the voyage.

A question of an implied warranty has arisen, and it has been treated as a warranty of seaworthiness. Strictly speaking it is a warranty as to the shipowner's duty with regard to the carrying of the goods, but the authorities do appear to have treated that duty as coming within the meaning of the term "seaworthy." In *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, at p. 76, 26 W. R. Dig. 216, Lord Cairns, after reading the affirmative part of a bill of lading, which was in the same terms as the one in this case, says, "What is the meaning of the contract created by these words, supposing they stood alone? I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and an engagement—a contract—by the shipowner that the ship in which the wheat is placed is, at the time of its departure, reasonably fit for accomplishing the service which the shipowner engages to perform. Reasonably fit to accomplish that service, the ship cannot be unless it is seaworthy." Then on p. 77 he points out that, if there is that obligation on the shipowner "it must be from this, and only from this, that in a contract of this kind there is implied an engagement that the ship shall be reasonably fit for performing the service which she undertook." Then in the same case Lord Blackburn, at p. 86, says: "I take it to be quite clear that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that the ship shall be seaworthy." Now in this case it has been argued that there is no contract that the ship shall be fit for the purpose for which it is intended, but that the contract is that the shipowner will take all reasonable steps to make it so. Lord Blackburn lays it down that the obligation is

not to do everything that is reasonable, but is to have the ship absolutely fit for the intended purpose. In this case the bill of lading is called a refrigerator bill, and it is for the carriage of frozen meat to be delivered in the same good order and condition as when received on board. There is a clear implication from that that the shipowner represented that the ship was in good order to carry out that voyage, and if the refrigerating machinery was not at the time the voyage began in a condition to perform the service contemplated by the bill of lading, there would be a breach of the implied warranty.

A. L. SMITH, L.J.—I am of opinion that the decision of Mathew, J., on this preliminary point of law was right. The question is whether there was in this bill of lading an implied warranty that the ship, or the part of the ship where the meat was, was at the time of sailing fit for the purpose for which both parties were contracting, that is, the carriage of frozen meat from Australia to England. I think there was such an implied warranty. I think that I stated the law correctly in *Tattersall* v. *National Steamship Co.*, for what I there said is no more than was said by Lord Cairns and Lord Blackburn in *Steel* v. *State Line Steamship Co.* KAY, L.J., has read their observations and therefore I will not again refer to them. With regard to the exceptions in the bill of lading, I do not think they show that there can be no implied warranty. The exceptions only apply to contingencies which may happen after the vessel has sailed.

Appeal dismissed.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, *Parker, Garrett, & Parker.*

From Q. B. D.
(Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.)

July 23.

BOWER & CO. *v.* HETT. (*a.*)

Bankruptcy—Execution—Money paid "under an execution"—"To avoid sale"—Payment to sheriff before seizure—Bankruptcy of debtor—Right of execution creditor—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* 2.

Where the amount of a judgment debt is paid to the sheriff, before the judgment debtor's goods have been seized in execution, in order to prevent a seizure, the money is not paid "under an execution in order to avoid sale" within the meaning of section 11, *sub-section* 2, *of the Bankruptcy Act*, 1890, *and, therefore, the sheriff, upon a bankruptcy petition being presented against the debtor within fourteen days, is not justified in paying the money to the official receiver, but must pay it over to the execution creditor.*

Appeal from the judgment of the Queen's Bench Division (reported 43 W. R. 557; [1895] 2 Q. B. 51), reversing the decision of the judge of the Hull County Court in an action against the high bailiff of the Brigg County Court to recover £23 15s. 8d.

The plaintiffs had recovered judgment in the Brigg County Court against one Denton for £23 15s. 8d., and on the 29th of September, 1894, a warrant of execution was delivered to the defendant to levy the amount of the judgment.

On the 1st of October the defendant went to Denton's premises, and seized the goods, but an arrangement was come to between the defendant and Denton, whereby it was agreed that the defendant should not remain in possession, but that he should be at liberty to re-take possession whenever he chose to do so. The defendant then went out of possession, and Denton continued to carry on his business there until the 2nd of October, when he absconded.

On the 3rd of October Denton's manager locked up the premises and handed the key to the defendant, and on the same day Denton's father went to the defendant and promised to pay the amount of the judgment if the key was given up to him. The defendant accordingly gave up the key to the father, and on the 4th of October, the father paid the defendant the amount of the judgment.

On the 15th of October a bankruptcy petition was presented against Denton, of which notice was given to the defendant on the 16th of October, and he was adjudicated bankrupt.

On the 12th of November the defendant paid to the official receiver the money received from Denton's father. The plaintiffs thereupon brought this action to recover the above amount as money had and received to their use.

The county court judge gave judgment for the defendant.

The Divisional Court entered judgment for the plaintiffs.

By section 11, sub-section 2, of the Bankruptcy Act, 1890, "where, under an execution in respect of a judgment for a sum exceeding £20, the goods of a debtor are sold or money is paid to avoid sale," the sheriff shall deduct his charges and retain the balance for fourteen days, and if, within that time, notice is served on him of a bankruptcy petition against or by the debtor, and a receiving order is made, the sheriff shall pay the balance to the official receiver.

C. Dodd, Q.C., for the defendant.

Montague Lush and Sidney Clarke, for the plaintiffs, were not called upon.

Lord ESHER, M.R.—In my opinion this appeal must be dismissed. The facts as found by the county court and as appearing on the evidence were that the defendant seized under the warrant of execution on the 1st of October, but went out of possession under an agreement between him and the judgment debtor that he might retake possession whenever he chose, that is, that he might reseize the goods. The defendant under that agreement might have retaken possession under the warrant. But he never retook possession. What happened was that the debtor's manager locked up the premises and brought him the key, but the defendant did not go in again and seize the goods, and, therefore, he was not in possession of them and not in a position to sell them. The debtor's father then came to the defendant and offered to pay him the amount of the judgment debt if he would hand over the key, that is to say, if he would not retake possession and seize the goods. The defendant accordingly handed the key to the father, who on the 4th of October paid him the money. That money was paid to the defendant for the purpose of the latter handing it over to the execution creditors, and the defendant received and held the money on those terms, as money received by him on behalf of the execution creditors. Then came the bankruptcy petition against the judgment debtor on the 15th of October. It is obvious that the defendant cannot escape from his obligation to pay over the money to the execution creditors unless section 11, sub-section 2, of the Bankruptcy Act, 1890, applies. In my opinion this money was not paid "under an execution." There was no execution

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

in when the money was paid. Even assuming, however, that the money was paid under an execution, it was not paid "to avoid sale." It was paid to avoid a seizure, which is a different matter. I agree, therefore, with the Divisional Court that the case does not come within section 11, sub-section 2. The money was paid to the defendant for the execution creditors, and the defendant was bound to pay it to them, and section 11, sub-section 2, afforded no excuse for paying it to the official receiver. The appeal must, therefore, by dismissed.

KAY, L.J.—I am of the same opinion. By section 11, sub-section 2, the money must be paid under an execution and in order to avoid a sale. This money was not paid under an execution, because there was no execution in existence at the time when the money was paid. The high bailiff had gone out of possession, and he had the key of the premises and an agreement with the debtor that he might re-take possession whenever he chose. I fail to see how, by taking the key, the high bailiff was in possession. There being then no execution in existence, the payment could not have been made to avoid a sale. Those words apply where the sheriff is in possession, and is proceeding to sell. The high bailiff here was not in possession, and was not proceeding to sell. Therefore the case does not come within the section. I desire to reserve my opinion upon the question whether if the money is paid under an execution and to avoid a sale the money must be the debtor's money. The section does not say whose money it must be, and I express no opinion upon that point.

A. L. SMITH, L.J.—I am of the same opinion. The two conditions to be complied with to make the section applicable are that the goods must be sold or money paid to avoid a sale, and that this must be done under an execution. In my opinion on the 4th of October, when this money was paid, the goods were not in fact taken in execution, nor was the money paid to avoid a sale. The defendant, therefore, cannot bring the case within section 11, sub-section 2, of the Bankruptcy Act, 1890.

Appeal dismissed.

Solicitors for the plaintiffs, *Oldhan, Clabburn, & Co.*, for *C. E. Gresham*, Hull.

Solicitors for the defendant, *Collyer, Bristow & Co.*, for *Laverack & Son*, Hull.

From Q. B. Div.
(Lord Esher, M.R., and Kay, and A. L. Smith, L.JJ.) June 15.

PETERSEN *v.* FREEBODY & Co. (*a*.)

Ship—Charter-party—Demurrage—Discharge of cargo—Joint operation—Duty of shipowner—Duty of consignee—Cargo of timber spars—Custom of timber trade.

The operation of discharging the cargo of a ship is a joint operation in which it is the duty of both the shipowner and the consignee to take part. This applies as well to a cargo of timber as to other kinds of cargo. Where a charter-party provides that the ship shall discharge a cargo of timber spars overside into lighters, the shipowner is not bound to do more than place the spars over the side of the ship in such a position that they may be within reach of the lighter; it is then the duty of the consignee to receive the spars and place them in the lighter.

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Appeal from the judgment of Kennedy, J., at the trial of the action without a jury.

The action was brought by a shipowner under a charter-party for demurrage in respect of delay at the port of discharge. The charter-party provided that the ship should load a cargo of timber in Norway and carry the same to London, and contained the following clauses:—"The discharging to take place in eight days. . . . The cargo to be brought to and taken from alongside the ship at merchants' risk and expense. The ship to deliver the cargo with such dispatch that unnecessary delay can be avoided. The ship to discharge overside in the river or dock, into lighters or otherwise, if required by consignees. The usual custom of the wood trade of each port to be observed by each party in cases where not specially expressed." The cargo was consigned to the defendants under a bill of lading subject to the conditions of the charty-party.

The ship arrived in the Surrey Commercial Docks on the 18th of May, 1894, and was ready to commence the discharge of her cargo on the afternoon of the 24th of May. Some of the timber was discharged into the water direct, in accordance with what was stated to be the custom of the trade. Spars under a certain thickness were discharged into lighters. The defendants sent a lighter alongside the ship, and the spars were passed through one of the ship's portholes on to a stage at the side of the ship, and thence to the lighter. The defendants at first sent only one man in charge of the lighter which was at work, but they subsequently sent two men. These men received the spars in the lighter and stowed them in the bottom. The captain, finding that the work was proceding slowly, complained that the defendants did not send a sufficient number to complete the discharge within the eight days, and subsequently he sent two of his crew to help in the lighter, besides one man who was working on the stage. The lay days ended on the 2nd of June, but the discharge was not completed till the afternoon of the 11th of June.

At the trial of the action the learned judge gave judgment for the plaintiff for nine days' demurrage.

The defendants appealed.

Joseph Walton, Q.C., and *Scrutton*, for the defendants.—According to the custom of the timber trade, the shipowner is entitled to discharge spars of a certain thickness direct into the water; but with regard to spars of a lesser thickness it is his duty to get them out of the ship and to place them on the quay or in barges, as the case may be. Here the charter-party expressly provides that the ship is to discharge overside into lighters. It is not sufficient for the ship's crew to place the spars over the side and let the lighterman draw them down into the lighter. The shipowner is bound to put the spars out of the ship and into the barge. Therefore in this case the delay was owing to the default of the shipowner, and he is not entitled to demurrage.

Robson, Q.C., and *Carver*, for the plaintiff.

Lord ESHER, M.R.—This is an action by a shipowner against charterers for demurrage. The delay of which the plaintiff complains took place in the operation of discharging a cargo of timber. The charter-party allowed eight days for the discharging of the cargo, but it took a longer time, and the question arises, Whose fault was that? If it was the fault of the ship, the owner cannot call upon the charterers to pay demurrage; but if it was not the fault of the ship, the charterers are bound to pay demurrage. The charter-party provided that the ship was "to discharge overside in the river or dock.

into lighters or otherwise if required by the consignees." The charter-party also spoke of the ship delivering the cargo, so that the same operation was spoken of indifferently as discharging the cargo and delivering the cargo, and that operation was to take place in eight days. The operation of discharging or delivering a cargo is an operation to be performed by the shipowner and the consignee. Whichever word is used, the same operation is referred to. One party gives delivery, and the other party takes delivery, and they do that at the same time and by one operation. The performance of this joint operation is a matter of common occurrence—viz., whenever a cargo has to be discharged. Sometimes the delivery is into barges or lighters, sometimes it is into another ship, sometimes it is on to a quay. But in any case both parties must be present to take part in performing the one operation. The shipowner has to deliver, and, of course, he has to deliver from the ship, and, therefore, he has to act on the ship. The consignee has to take delivery, and, therefore, he must be alongside the ship, on the thing or place—that is to say, on the barge, or lighter, or ship, or quay—on which delivery has to be taken. If the shipowner simply puts the goods on the rail of the ship, that is not delivery. If the consignee simply takes his place alongside and does nothing more, that is not taking delivery. The shipowner must get the goods over the rail of the ship, and put them into such a position that the consignee can begin to take delivery. The consignee cannot act while the goods are out of his reach, but, when they come within his reach, he is bound to begin his part of the joint operation. If the goods are in slings, the ship works a derrick, and lowers them gradually over the side; and as a mattter of business those on board must help those who are taking delivery by guiding the things as they come down. But as soon as they are within the reach of the consignee, he must join in the operation.

The operation in this case was to get spars of timber out of the ship, and to get them into barges. And, unless spars of timber are to be treated differently from bales of goods, the operation must be a joint operation. The shipowner had to put the spars out of the ship. While they were on the stage, which belonged to the ship, the delivery was not complete; but when they were tipped over so as to come within reach of the consignee, the shipowner had done his part, and it was the duty of the consignee to assist in the joint operation by taking delivery as quickly as possible. It was his duty to have a sufficient number of men to receive the spars and stow them in the barges within the time allowed. Here the men whom he supplied were not able to take delivery quickly enough. Thereupon the captain did that which he was not bound to do—he put two of his own men into the barge to help in doing that part of the work which ought to have been done by the consignee. It is now argued that it was his duty to put these men on the barge, and the suggestion is that it was not merely a case of helping the consignee, but that the captain was bound to perform the whole operation of getting the spars out of the ship and putting them into the barges. In my opinion there is no ground for that contention. The delay occurred because the defendants did not supply enough men for the work, and, the ship not being in the wrong, the plaintiffs are entitled to demurrage.

The appeal must therefore be dismissed.

KAY and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Stokes, Saunders, & Stokes.*

Solicitors for the defendants, *Trinder & Capron.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 12, 13, 26.

SELIGMAN *v.* PRINCE & Co. (LIMITED). (*a*.)

Company—Borrowing powers—Issue of debentures in satisfaction of debt—Fraudulent preference—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 164.

P., carrying on business as P. & Co., borrowed £150 *from S. for the purposes of his business without security. S., not having been repaid, brought an action against P., and was in a position to sign judgment for the full amount. P. about this time formed a company to take over his business. The memorandum of association contained a clause authorizing the company to borrow or raise money by the issue of debentures and otherwise. The company was bound to indemnify P. against his debts and liabilities, as shown in the balance-sheet.*

S. accepted, in discharge of his debt and interest, 7 per cent. first mortgage debentures of the company to the nominal value of £175. *Proceedings were shortly afterwards taken to wind up the company, and S. commenced an action on behalf of himself and all other debenture-holders to enforce his security.*

Held, that the directors were authorised and empowered to issue such debentures in satisfaction of the debt of P., and their validity was not affected because no money was actually raised or borrowed upon them. P. not being a bankrupt, the Bankruptcy Act and the doctrine of fraudulent preference cannot be applied in favour of his unpreferred creditors as such.

In re Inns of Court Hotel Co., *L. R.* 6 *Eq.* 82, 16 *W. R. Ch. Dig.* 65; *and* Howard *v.* Patent Ivory Manufacturing Co., 36 *W. R.* 801, 38 *Ch. D.* 156, *approved.*

Appeal from a decision of Vaughan Williams, J., who dismissed with costs an ordinary debenture-holder's action.

The defences raised by the pleadings were substantially as follows: (1) That no consideration was given for the debentures, and that the directors of the company had no power to issue them; (2) that, if they had such power, it was improperly and irregularly exercised, and that the debentures were invalid on that ground; (3) that the company was being wound up and was insolvent, and that the issue of the debentures was a fraudulent preference. The learned judge held that there was no fraudulent preference, but he refused relief to the plaintiff on the other grounds relied upon by the company.

In 1892 one Llewellyn Prince commenced carrying on business as a tailor in the West-end of London. In August of the same year he borrowed £600 from the plaintiff's brother, Oscar Seligman, upon terms contained in a deed dated the 24th of August, 1892. By this deed Prince mortgaged his business premises and book debts and goodwill to Oscar Seligman as a security for £600, and covenanted to pay that sum within three months after notice in writing requiring payment thereof; but payment was not to be required for eighteen months, and Prince was not to be entitled to pay off the loan for twenty years. Prince then covenanted to carry on the business, to keep and furnish proper accounts, and to pay Oscar Seligman three-sevenths of the net profits in lieu of interest. In July, 1893, Prince applied to the plaintiff for a loan of £150, and the plaintiff lent him that sum without security, but upon a verbal understanding that the loan should be repaid as soon as sufficient money could be got by Prince from his customers. On the 26th of September, 1893, the plaintiff issued

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

a writ to obtain repayment of his loan, and he was in a position to sign judgment against Prince for the amount.

At about this time Prince determined to form a company to take over his business. A balance-sheet showing the state of the business on the 30th of September, 1893, was prepared. According to this balance-sheet there was an excess of assets over liabilities, but only £150 was allowed for bad debts off the sum of £2,339 due from customers, and which was the main asset of the business. The evidence showed that the bad debts ought to have been put down at a much larger figure. On the 17th of November, 1893, an agreement was signed between Llewellyn Prince and Oscar Seligman for the formation of a company to take over the business. Prince was to form the company. Oscar Seligman was to release his security. Prince was to accept and give him a bill at three months for £1,100, and at the maturity of the bill Oscar Seligman was to accept first mortgage debentures of the company for £925, bearing interest at 7 per cent., in satisfaction of the bill. These debenture were to be part of an aggregate of like debentures for £1,300. It was part of this agreement that Prince should be the managing director of the company, and should vote for the issue of these debentures to Oscar Seligman, and he was to have power to nominate a director so long as his debentures were unpaid, and there were to be only two directors of the company. The plaintiff was not a party to this agreement, but he knew that an attempt was to be made to form a company, and that he was willing to take its debentures in satisfaction of Prince's debt to him.

On the 1st of November, 1893, the company was registered. The memorandum of association contained (*inter alia*) the following clauses, defining the objects for which the company was incorporated:—(A.) "To purchase or otherwise acquire as a going concern the business of a tailor and outfitter now carried on by Llewellyn Prince, under the name and style of Prince & Co., in London, and all or any of the assets or liabilities of the said Llewellyn Prince in relation to the said business, and with a view thereto to enter into and carry into effect, with or without modification, the agreement, a draft of which has been initialled by two of the subscribers hereto for identification." (I.) "To sell, exchange, mortgage (with or without a power of sale), assign, lease, sub-let, and generally otherwise deal with the whole or any part of the business, estates, property, or undertaking of the company as a going concern or otherwise, to any person or persons, association or associations, or otherwise, for such consideration as the company may think fit, and either for cash or for shares, debentures, or securities of any other company having objects including the objects of this company, and to hold and distribute among the members in specie the whole or part of the consideration for such sale." (K.) "To borrow or raise money on any terms or conditions, by the issue of, or upon, bonds, debentures, debenture stock, perpetual or otherwise, certificates, bills of exchange, promissory notes, or other obligations or securities of the company, or by mortgage, charge, hypothecation, or pledge of all or any of the company's property (both present and future), including its uncalled capital, or in such other manner as the company may think fit."

The articles of association of the company provided that:—"The regulations contained in Table A of the first schedule to the Companies Act, 1862, shall apply to this company, and, subject as hereby modified, such regulations shall be the regulations of the company." Table A contains the following clauses:—(52) "The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association." (53) "Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors." (55) "The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made." The special articles contained (*inter alia*) the following clauses:—(3) "The directors shall forthwith enter into, on behalf of the company, an agreement with Llewellyn Prince, in the terms of the draft which, for the purpose of identification, has been initialed by two of the subscribers to the memorandum of association, and the board shall carry the same into effect, subject to any modification thereof which the board may approve." (7) "The qualification of a director shall be the holding in his own right of 100 shares, and this qualification shall apply as well to first directors as to all future directors; but the first directors shall be allowed a period of three months in which to obtain their qualification shares." (8) "The first directors shall continue in office till the first ordinary general meeting of the company in the year 1894, and one of the first directors shall be Llewellyn Prince, who shall be managing director." (10) "No director shall vote on any question in which he has a personal interest apart from the members at large." (13) "One director shall be a *quorum* for a board meeting. The seal of the company shall be affixed in the presence of and countersigned by one director and the secretary." (16) "The directors shall have power to borrow or raise money by the issue of debentures or otherwise, as they shall think proper, and on the issue of any new shares the same shall, in the first instance, be offered to the members of the company for the time being, in proportion to their respective holdings."

The memorandum was signed by seven persons for one share each. Llewellyn Prince and a brother of his (J. R. Prince) were two of the subscribers. The other persons were clerks or servants in the business. On the same day a three months' bill for £1,100 was given by Prince to Oscar Seligman. This would fall due on the 21st of February, 1894. On the 28th of November, 1893, a meeting of two directors—viz., the two Princes, the secretary, and the solicitors of the company—was held, and it was resolved that the seal of the company should be affixed to the contract referred to in the memorandum of association. On the same day the agreement was sealed accordingly. The agreement was between Llewellyn Prince and the company, and by it the company agreed to buy his business, and business premises and assets, for £3,600, to be paid by 720 fully paid-up shares of £5 each. Prince was to be managing director. The company was to indemnify him from his debts and liabilities shown in the balance-sheet. No mention was made in this agreement of either of the Seligmans, nor was there any mention of debentures. This agreement was duly filed at the proper office, and on the 4th of December, 1893, another meeting was held of the two Princes as directors, the secretary and the solicitor of the company. Oscar Seligman and one Warner were also present. Warner was then a solicitor's clerk and

acted for Oscar Seligman, and also, according to the evidence, for the plaintiff. At this meeting it was resolved that the 720 shares mentioned in the agreement for sale should be allotted as fully paid-up (in accordance with Llewellyn Prince's request), thus —500 to Llewellyn Prince, 120 to Oscar Seligman, and 100 to J. R. Prince. It was stated at that meeting that L. Seligman was in a position to sign judgment for a debt of £150 taken over by the company, but that he had offered to accept in discharge of that debt and interest seven per cent. first mortgage debentures of the company (provided that the issue did not exceed £1,300) to the nominal value of £175. It was also stated that Llewellyn Prince had borrowed for the purpose of the business, since the 30th of September, 1893, £125 from Warner on condition that Warner would accept debentures similar to those issued to L. Seligman for £200. It was also stated that the company had the option to repay cash or issue the debentures. It was resolved to elect to issue debentures. It was further resolved that a debenture issue of £1,300 in 52 debentures of £25 each be created in accordance with the powers contained in the memorandum and articles of association, carrying 7 per cent. interest. It was also resolved to issue six debentures to L. Seligman, and eight to Warner. There was no allusion in these minutes to the payment of Oscar Seligman. Pursuant to the above resolution debentures for £175 were issued to the plaintiff, and those were the debentures in respect of which he sued. They were in the ordinary form, but made payable if an order was made or resolution passed to wind up the company. On the 4th of January, 1894, the bill for £1,100 held by Oscar Seligman still not having become due, debentures for £925 were issued to him, and the bill was given up. Shortly after this proceedings were taken to wind up the company.

On the 31st of January, 1894, a petition was present by the company.

On the 1st of February, 1894, the plaintiff commenced his action, on behalf of himself and the other debenture-holders. On the 5th a receiver and manager was appointed in that action. On the 6th the company resolved to wind up voluntarily. On the 14th an order was made for the winding up by the court.

The action commenced by the plaintiff was proceeded with in the usual way, and ultimately was dismissed with costs.

Grosvenor Woods, Q.C., and *Whinney*, for the appellant.—The directors had power to issue debentures for the purpose of raising and borrowing money, and, though no money was actually borrowed on these debentures, they were issued in satisfaction of an existing debt, and are, therefore, valid: *In re Inns of Court Hotel Co.*, L. R. 6 Eq. 82, 16 W. R. Ch. Dig. 65; *Howard* v. *Patent Ivory Manufacturing Co.*, 36 W. R. 801, 38 Ch. D. 156. The debentures were not issued irregularly, and the directors had full power to issue them at a discount: *Anglo-Danubian Steam Navigation and Colliery Co.*, 23 W. R. 783, L. R. 20 Eq. 339; *Davies* v. *R. Bolton & Co.*, 43 W. R. 171, [1894] 3 Ch. 678. We submit that the issue was a proper exercise of the Parliamentary powers. Further, there could have been no fraudulent preference, because at the date of the issue the plaintiff was the only creditor of the company.

Farwell, Q.C., and *Ribton*, for the respondents, referred to *In re George Newman & Co.*, 43 W. R. 483, [1895] 1 Ch. 674, and *In re Pyle Works*, 39 W. R. 235, [1891] 1 Ch. 173.

Cur. adv. vult.

26th June.—LINDLEY, L.J., stated the facts as above set out, and continued:—Such being the facts, it is necessary to consider the legal position of the plaintiff. He is the holder of debentures issued by the directors of the company under the seal of the company, and which have become payable by the company according to their terms. Unless, therefore, they can be successfully impeached, the plaintiff is entitled to judgment. It is said, first of all, that the directors had no power to issue debentures, except for the purpose of raising and borrowing money (see Article 16), and that the debentures issued to the plaintiff were not issued for any such purpose. Literally this is true; but to hold the debentures invalid on this ground would be to sacrifice substance to form. It is true that the plaintiff was not a creditor of the company, but he was a creditor of Prince's, and the company was to indemnify Prince against his debt to the plaintiff. If the company had borrowed money from the plaintiff or any one else, and with the money so raised had paid off the debt owing to the plaintiff by Prince, the debentures would have been perfectly valid, and would have been within the very terms of Article 16. What was done was in substance, though not in form, the same thing; and the decisions of Giffard, V.C., in *In re The Inns of Court Hotel Co.* and of Kay, L.J., in *Howard* v. *Patent Ivory Manufacturing Co.* support this view of the case and show that these debentures are not invalid on the ground that no money was actually borrowed or raised upon them. But, even if this point were more open to doubt than it is, all doubt is removed by clause (*i*) of the company's memorandum and Article 55 of Table A to the Companies Act, 1862. Although clause (*i*) is not one of those matters required by statute to be in the memorandum of association, and such a clause derives no greater efficacy by being put into the memorandum rather than into the articles of association, still, it is as valid as if it were one of such articles, and it cannot be said that the issue of debentures to the plaintiff was without consideration. If the plaintiff had refused to accept debentures Prince would have required the company to pay the plaintiff in cash, and the consideration moving from the plaintiff to the company was relief from this necessity.

Next, it is contended that these debentures were issued by Prince improperly, and acting as an individual in his own interest, and not *bonâ fide* in the interest of the company, and that the plaintiff knew this to be the case. It is, however, impossible to ignore the existence of the company as a corporate body distinct from Prince, and impossible to ignore the company's memorandum and articles of association. According to them the issue of debentures was left to the directors, and by article 13 one was a quorum, and one could authorize the company's seal to be affixed. Further, the company was formed for the express purpose of taking over Prince's business on the terms of paying his business debts. It is plain that these debentures were issued in order to carry out this object, and in order to bind the company on the one hand and to relieve it from pressure on the other; and, although no doubt Prince was acting in his own interest in this matter, his interest and the interest of the company as a body corporate and existing for the purposes mentioned in the memorandum were not conflicting interests, but were similar in all respects. Nor does the fact that the draft of the resolutions of the 4th of December, 1893, was prepared by Warner in the interests of the two Seligmans in any way prove the contrary. By adopting the resolutions he had prepared, Prince and his brother were not betraying the company or abusing

the powers conferred upon them. They were exercising those powers for the purposes for which they were created. I cannot, therefore, come to the conclusion that the debentures issued to the plaintiff are invalid as against the company upon the ground that the power to issue them was not so exercised as to bind the company.

With respect to fraudulent preference, the view taken by the learned judge was quite correct. Prince is not a bankrupt, and the Bankruptcy Act and the doctrine of fraudulent preference cannot be applied in favour of his unpreferred creditors as such. The company having been ordered to be wound up so soon after the debentures were issued is, by section 164 of the Companies Act, 1862, to be treated as a bankrupt person, but when these debentures were issued to the plaintiff the company's only creditor was Prince, and if a man has only one creditor and pays him that payment cannot be set aside as a fraudulent preference simply because other debts are afterwards contracted. Besides which no fraud on creditors was really contemplated by any one, and the pressure put by Prince on the company to give debentures to the plaintiff would be enough to enable the plaintiff to have them treated as valid, even if the company had had other creditors than Prince when the debentures were issued. For the reasons above stated I have come to the conclusion that the appeal must be allowed and the judgment be reversed, and the usual judgment in a debenture-holder's action be substituted for it, and the plaintiff is entitled to the costs of the appeal. This decision in no way conflicts with the decisions of this court in *In re George Newman & Co.*, or in *Broderip* v. *Salomon & Co.*, 43 W. R. 612. The company is recognized as a corporate body distinct from Prince, and there are no proceedings against Prince as there were against Salomon entitling the company to set aside the agreement for the sale of the business to acquire which the company was formed, or to be indemnified by the vendor against the debts with which he endeavoured to saddle the company. No such fraud as was proved in Salomon's case is proved in this case, and on the materials before us the plaintiff is entitled to the usual judgment in a debenture-holder's action, with costs of the appeal.

LOPES, L.J.—It is said the debentures are invalid on two grounds. First, on the ground that the directors had no power to issue them; and secondly, on the ground that if they had, they improperly exercised that power.

There was another question raised to the effect that the debentures were a fraudulent preference. The last question was decided by the learned judge in favour of the defendant, and I agree with the decision; the two former in favour of the plaintiff, and I am unable to agree with the view he has taken.

The facts have been very fully stated. I will very shortly state my reason for differing from the learned judge. The plaintiff is holder of these debentures which are unimpeachable so far as their form is concerned. But it is said they are not issued to any creditor of the company, they are issued to the plaintiff, who is not a creditor of the company, but a creditor of Prince, and are issued not for the purposes of the company but to discharge a private liability of Prince. But is this really the case when the whole transaction is carefully looked at? The company had indemnified Prince against his liabilities, and one of those liabilities was his debt to the plaintiff. Suppose the company had issued the debentures in question to Prince, as they might have done, as part of the consideration for the purchase of his business, and Prince had taken them to his bankers and raised the amount of the debt upon them and then handed it over to the plaintiff; no question could then have been raised as to the validity of the transaction. Having regard to the fact that the company had indemnified Prince, was not what was done practically the same thing, but done in a less circuitous mode?

I am of opinion that the directors had power to issue these debentures to the plaintiff, and that they were not issued without consideration. But it is said that the directors improperly exercised this power, that they did not issue the debentures *quâ* directors but in their individual capacity. How can this be successfully urged? Every formality was complied with. Every requirement in the memorandum and articles of association was observed. The debentures were issued in the interest of the company quite as much as in the interest of Prince. They relieved the company from pressure from Prince who was entitled to be indemnified against his liability to the plaintiff, and they released Prince from pressure from the plaintiff, who was entitled to proceed upon his judgment.

The debentures were issued to carry out the object for which the company was formed—viz., the acquisition of Prince's business; and I am unable to say that the directors improperly exercised their powers in issuing them to the plaintiff. This case is entirely different from *Salomon's case*. The learned judge did not consider that there was anything dishonest or fraudulent or against the policy of the Joint Stock Companies Acts in the formation of the company, as there was in the last-named case.

The appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. In the consideration of this case the learned judge has found, and we are unable to differ from him on that point, that in the formation of the company there was no fraud intended; and he seems, amongst other things, to have drawn the conclusion that I should have drawn myself: that it was intended on the part of all the persons concerned in forming the company that the business should be carried on.

Now, with reference to the debentures allotted on the 4th of December to the plaintiff in the debenture action, I have come to the conclusion that there was no bargain, properly so called, between him and Prince which would bind him to accept the debentures or bind Prince to give them. No doubt through Warner he had been brought to say that he would accept debentures, but that was only an offer. He might have withdrawn that offer. So that there was no bargain antecedent to the formation of the company about these particular debentures. Under these circumstances I cannot but think that under the combined operation of the memorandum and articles of association as quoted by Lindley, L.J., there was power to do what the directors did on the 4th of December.

Then it is said that they did not exercise their power for the benefit of the company, but for the individual benefit of Llewellyn Prince himself. If that were so, I do not see there is anything to invalidate the other properly appointed directors, but I may say that I do not see anything to invalidate Llewellyn Prince's action. If he had a personal interest, apart from the members at large, it might be so: but I do not see that he had that personal interest. He had a personal interest along with the others, because it is perfectly plain that the company, as a company, could not have gone on at all if it had not been for the arrangement made about these debentures, or some other arrangement of a similar character.

I think that disposes of the ground upon which the learned judge found these debentures invalid, and on the question of fraudulent preference I agree with what has been already said and with what the learned judge himself said. There is no preferring of these creditors of the company to other creditors of the company. Seligman was no doubt a creditor of Prince's, but he was not a creditor of the company and he was not, in that capacity, preferred to any other creditors of the company, if indeed there were other creditors of the company, which must have been to a very small amount, the company having been formed on the 18th, the agreement sealed on the 28th of November, and this resolution of the 4th of December passed so short a time afterwards. At that time I do not think that any person contemplated the winding up of the company. It was only that it was found impracticable to raise further cash, and that at once would show that the company was not in a position to pay off Seligman and the other Seligman or Warner otherwise than in some such way as they did.

I agree that the appeal ought to be allowed, and that the order of Lindley, L.J., is right in this case.

Appeal allowed.

Solicitors for the appellant, *Warner & Seligman.*

Solicitors for the company, *Thomson, Brooks, & Danby.*

High Court of Justice.

Chan. Div. }
Stirling, J. } April 23, 24; July 27.

In re J. H. JONES. (*a*)

Solicitor—Agreement with client as to costs—Payment—Work done before magistrates and quarter sessions in respect of a criminal charge—Jurisdiction to set aside—Solicitors and Attorneys Act, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 8, 10.

A person, the subject of a charge of a criminal nature pending before a stipendiary magistrate, retained a solicitor to defend him, and paid him £25 down, and signed a document by which he agreed to pay for costs a lump sum of £75 in addition to the £25 already paid. He subsequently was committed for trial at quarter sessions, and was there acquitted.

Held, that although the above-mentioned document was not signed by the solicitor, yet that it was an agreement within the meaning of the Attorneys and Solicitors Act, 1870.

Held, further, that the High Court has jurisdiction to set aside such an agreement, and to order delivery of a bill of costs, and taxation.

This was a summons by a client against his solicitor asking for the delivery and taxation of a bill of costs.

The facts are stated in the judgment of Stirling, J.

Ashton Cross, for the applicant.

Dunham, for the respondent, took the preliminary objection that there had been an agreement between the solicitor and client as to these costs, and that this court had no jurisdiction to set that agreement aside and order delivery or taxation of a bill in respect of work done at quarter sessions.

(*a*.) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

Ashton Cross.—Under the statute, 2 Geo. 2, c. 23, the Court of King's Bench had power to tax such bills: *Clarke* v. *Donovan*, 1 Esp. 137; *Ex parte Williams, Sylvester* v. *Webster*, 9 Bing. 388. The jurisdiction has now been transferred to the High Court: *In re Howell Thomas*, 41 W. R. 524, [1893] 1 Q. B. 670. Was the business done in a "court." Can any distinction be drawn between contentious business and criminal business. *In re Andrews*, 2 W. R. 46, 17 Beav. 510, shows that a revising barristers' court is a court for this purpose: *Rees* v. *Williams*, 23 W. R. 550, L. R. 10 Exch. 200; *Midland Railway Co.* v. *Guardians of Edmonton*, 43 W. R. 309, [1895] 1 Q. B. 357. Further, the Act of 1881, having by section 2 given power to make a general order, "in respect of other business not being business in an action or transacted in any court or in the chambers of any judge or master, and not being otherwise contentious business," and as no such order has been made the old practice continues. As the agreement here is not signed by both parties it is not within the Act of 1870: *In re Lewis, Ex parte Munro*, 24 W. R. 1017, 1 Q. B. D. 724; *In re Russell, Son, & Scott*, 33 W. R. 815, 30 Ch. D. 114; *In re West, King, & Adams*, 40 W. R. 644, [1892] 2 Q. B. 102; *In re Frape*, 41 W. R. 417; [1893] 2 Ch. 284. The case of *In re Thompson*, 42 W. R. 462, [1894] 1 Q. B. 462, is inconsistent with every reported case. There is nothing in the Act of 1870 to exclude the inherent jurisdiction of the court to tax a solicitor's bill: *Storer* v. *Johnson*, 38 W. R. 756, 15 App. Cas. 203. The preliminary objection goes merely to taxation: *Duffett* v. *McEvoy*, 10 App. Cas. 300, 33 W. R. Dig. 238.

Dunham.—The Act of 1843 is altogether superseded by the Act of 1881. Here the business was done in part before the magistrates' court and in part before quarter sessions, and therefore its jurisdiction is altogether excluded by section 15, and if the court resorts to its inherent jurisdiction the effect will be to violate the spirit of that section.

July 27.— STIRLING, J.—Certain preliminary objections were raised, with which I have now to deal. It appears that the applicant was in October, 1893, along with certain other persons brought before the stipendiary magistrate at Cardiff on the criminal charge of being concerned in the theft of certain timber. He was committed for trial to quarter sessions, which was held on the 11th of November, and retained the solicitor to defend him. On the 19th of October he paid the solicitor £25 on account of costs, and on the 21st he signed a document stipulating that the costs would be a lump sum of £75 in addition to that already paid. He was tried and acquitted and subsequently paid the £75, and now, being discontented, he has taken out this summons.

The first preliminary objection was that the document which he signed not being signed by the solicitor was not an agreement within the Attorney and Solicitors Act, 1870, that it related to business done, and could not, having regard to section 8 of that Act, be set aside. Section 4 of the Act is as follows:—

"An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum or by commission or percentage, or by a salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he

would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained."

The meaning of this agreement in writing has been considered by the court, and there is some doubt as to what the true meaning is. It is not, however, necessary for me to go through the whole of the decisions, because it seems to me that I am bound by a decision of the Divisional Court: *In re R. G. Thompson, Ex parte Baylis*, where all the previous cases are considered. There the document was signed by the client only. In his judgment Baron Pollock says: "It is said on the authority of the decision in *In re Lewis, Ex parte Munro*, that the document signed by this gentleman's client is not an agreement in writing within section 4 of the Attorneys and Solicitors Act, 1870, because it is not signed also by him. In that case the agreement was signed by the solicitor only, and the reason given for requiring the client to sign also is that 'otherwise it would always be possible for a solicitor to place a document signed by himself only and containing terms favourable to him before a client, and then to contend that the client was bound by it.' This observation has plainly no bearing on the present case. It is said that the dictum has been assented to in subsequent decisions, but I do not find this to be the case. It has been quoted, not unnaturally, in judgments in which the effect of the language of the statute has not been carefully considered, but in *Bewley* v. *Atkinson*, 28 W. R. 638, 13 Ch. D. 283, Thesiger, L.J., points out that the expressions used are wider than was necessary for the decision, and it is not supported by *In re Raven, Ex parte Pitt*, 30 W. R. 134, 45 L. T. N. S. 742, in which Fry, J., merely held that a letter written by a client to a solicitor did not show 'accession in writing.' I think that the document satisfies the statute, and that the client is not now entitled to have the agreement examined by the officer of the court." Charles, J., gives judgment to the same effect. I consider I am bound by that to hold the document to be an agreement within the Act.

Then the next question is whether the court has jurisdiction to set aside this agreement. Now that is a question entirely novel, and though this Act was passed twenty-five years ago and has been the subject of discussion in many cases, and, as I am informed, by the masters of the Crown office, agreements relating to costs in criminal actions are repeatedly before the courts, such as was the case of *In re Lewis, Ex parte Munro*, referred to in the above judgment, this point has never arisen. The material parts of the Act to be considered are sections 4, 8, 10, and 15. I have already read the first part of the 4th section, but the proviso is very important. It is as follows:—"Provided always that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement, and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a court or a judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled, and the costs, fees, charges, and disbursements, in respect of the business done to be taxed in the same manner as if no such agreement had been made."

Sections 8, 10, 15 are as follows:—

8. "No action or suit shall be brought or instituted upon any such agreement, but every question respecting the validity or effect of any such agreement may be enforced or set aside without suit or action on motion or petition of any person or the representative of any person a party to such agreement, or being or alleged to be liable to pay or being or claiming to be entitled to be paid the costs, fees, charges, or disbursements in respect of which the agreement is made by the court in which the business, or any part thereof, was done, or a judge thereof, or if the business was not done in any court, then where the amount payable under the agreement exceeds £50, by any superior court of law or equity or a judge thereof, and where such amount does not exceed £50, by the judge of county court which would have jurisdiction in an action upon the agreement."

10. "Where the amount agreed for under any such agreement has been paid by or on behalf of the client or by any person chargeable with or entitled to pay the same, any court or judge having jurisdiction to examine and enforce such an agreement may upon application by the person who has paid such amount within twelve months after the payment thereof, if it appears to such court or judge that the special circumstances of the case require the agreement to be reopened, reopen the same, and order the costs, fees, charges, and disbursements to be taxed, and the whole or any portion of the amount received by the attorney or solicitor to be repaid by him on such terms and conditions as to the court or judge may seem just."

15. "Except as in this part of this Act provided the bill of an attorney or solicitor for the amount due under an agreement made in pursuance of the provisions of this Act shall not be subject to any taxation nor to the provisions of the Act of the 6 & 7 Vict. c. 73, and the Acts amending the same respectively, the signing and delivery of the bill of an attorney or solicitor."

The contention is that the court having jurisdiction to examine the force of the agreement within section 8 is either the court of the magistrate or quarter sessions, and consequently that under section 10 one or other of these courts is the proper tribunal, and that the jurisdiction of this court is excluded by section 15. The words of the other part of section 4 are very wide and seem to include all questions of taxation, and it has been already held in *In re Lewis, Ex parte Munro* that a bill of costs before magistrates is subject to taxation, I think, therefore, it is within the Act. Section 8 says that it may be set aside by the court in which the business . . . was done or a judge thereof. Now it is contended that the word court in this section includes the court of quarter sessions and of a police magistrate. If the word includes quarter sessions who are the judges of that court? It seems that by the use of the word judge the application must be made not only to every justice sitting on the trial of any particular case, but also to every justice capable of sitting. So that the application might be made by petition to any such justice. I cannot think that such a result was intended. It seems to me that the courts spoken of in the Act are courts presided over by judges, and I do not think that justices of the peace in quarter sessions can be designated in the ordinary sense judges. At all events I think that what in this Act is referred to as a court is one of the same type as those in which actions at law or suits in equity may be brought. Where the words "court or a judge" first occur in the proviso to section 4, the section is there dealing with the business on petition or motion in those matters, and the courts and judges there spoken of

are those who have power to deal with them. It appears to me that a like meaning must attach throughout the Act to the words "court or judge," and that courts of quarter sessions, therefore, were not in contemplation, and are not such a court.

Being of this opinion, it seems to me that the same conclusion must be arrived at as regards the magistrates. The power to appoint stipendiary borough magistrates is conferred by 26 & 27 Vict. c. 97, and it is evident from the preamble and clause 5 of that Act that when appointed they simply perform the duties of justices to the peace. I come, therefore, to the conclusion that the objections must be removed, and the summons restored to the paper.

Solicitors, *Vallance & Vallance; Riddell, Vaisey, & Smith*, agents for *J. H. Jones*, Cardiff.

Chan. Div. }
Stirling, J. } April 26; May 17.

BOTTON *v.* CITY AND SUBURBAN PERMANENT BUILDING SOCIETY. (*a*)

Building society—Withdrawing member—Repayment of advances — Priorities — Instrument of dissolution — Building Societies Act, 1874, *ss.* 18, 32.

The priorities, under the rules of a building society, of the withdrawing members over those who have given no notice of withdrawal cannot be varied by an instrument of dissolution executed under the Building Societies Act, 1874, *unless such variation has been previously sanctioned by a special meeting of the society summoned and held in accordance with the rules of the society and the terms of section* 18 *of the Act.*

This was a motion by the plaintiff, a member of the above society, the object whereof was to have it determined whether the right as to priory of repayment given to withdrawing members under the rules of the society were liable to be overridden by the provisions of an instrument of dissolution executed under section 32 of the Building Societies Act of 1874.

The plaintiff also sought an injunction to restrain the defendants from paying away the moneys of the society except to the plaintiff and to such withdrawing members of the society as still remained unpaid in accordance with their priority, and from in any manner dealing with the moneys of the society contrary to rule 5 of the society's rules, which was as follows:—

"Upon giving one month's notice in writing of his intention so to do, any member may withdraw his investments at any monthly meeting of the society the amount to be repaid out of the moneys received from members in repayment of advances on the night for withdrawal, but should the repayments not be sufficient, the balance shall be paid from the same fund on the next or following monthly night. If several members shall give notice to withdraw within any one month they shall be paid *pro rata*."

The directors, however, were to have power upon a resolution of the board to use the monthly subscriptions to assist in repaying withdrawals. The other rules of the society relevant to the present case were to the effect that the society was to be dissolved, if its funds should not be sufficient to meet the claims made upon them, or if any other cause rendered dissolution absolutely necessary, and that the rules of the society should only be altered, rescinded, or repealed by a general meeting properly convened, and no such alterations or repeals should be properly made except with the concurrence of three-fourths of the members then present.

The society was established in 1865 under the statute 6 & 7 Will. 4, c. 32, and in 1887 was incorporated under the Building Societies Act, 1874. The plaintiff was the owner of five fully paid-up shares of £50 each in the society, and on the 20th of January, 1891, he gave notice of withdrawal of his investments under rule 5 aforesaid. This notice of withdrawal became effective one month after the date thereof, that is to say, on the 20th of February, 1891, but the plaintiff had never been able to recover the sums of money due to him in respect of his said five shares. An application had been made by the plaintiff to the court to enforce his rights, and the Court of Appeal had decided that, under the said notice of withdrawal and according to the interpretation which the court put upon the society's rules, the plaintiff was entitled to be repaid his investments out of all moneys received from members in repayment of advances on and subsequent to the 20th of February, 1891, subject to the claims of all members who had given notices which became effective before that date, and *pari passu* with members who had given notices which became effective on that date, and in priority to members who had given notices which became effective subsequently.

Immediately after this decision of the Court of Appeal, by an instrument of dissolution executed on the 13th of February, 1895, under section 32 of the Building Societies Act, 1874, it was decided to wind up the society, and it was provided (*inter alia*) by the said instrument that, after payment of the claims of the depositors and other creditors, the funds and property of the society should, subject to the prior payment of costs and expenses, be divided among the members in proportion to the amounts standing to their credit in the books, and further, that the word "member" should include all members, whether they had or had not given notice of withdrawal, and that those members who had given such notice of withdrawal were not to take priority over those who had not, but all were to rank *pari passu*.

As soon as the plaintiff became aware of the execution of the instrument of dissolution aforesaid, and learnt its provisions, he gave notice of this motion.

The real question for the decision of the court was whether the plaintiff's rights under the rules in respect of his notice of withdrawal, as declared by the Court of Appeal, were extinguished by the said instrument of dissolution.

Hastings, Q.C., and *C. E. Bovill*, for the motion.—The rights of members of the society under the rules cannot be altered by an instrument of dissolution. The case of *Kemp* v. *Wright*, [1894] 2 Ch. 462, 43 W. R. 213, cannot be relied on, having regard to the remarks of Herschell, L.C., in the appeal on the same case. The fact that the appeal was on another point does not affect the cogency of the remarks.

Buckley, Q.C., and *Montagu Lush*, for the respondents.—The decision in the Court of Appeal in *Kemp* v. *Wright* does not apply here, but the decision of the judge in the court below is exactly in point.

Hastings, Q.C., replied.

STIRLING, J., stated the facts as above set out, and continued:—From the balance-sheet of the society published in the years 1891 and 1892 it appears that there are, or at any rate ought to be, funds in the coffers of the society applicable to the satisfaction of the plaintiff's claim, and if the society had been ordered to be wound up the plaintiff's right

(*a*.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

to have those funds so applied would not have been affected by any such order: *Walton* v. *Edge*, 33 W. R. 417, 10 App. Cas. 33; *In re Alliance Society*, 28 Ch. D. 559, 33 W. R. Dig. 48.

It was contended, however, by the defendants at the hearing of the motion that the plaintiff's rights were put an end to by the instrument of dissolution, and in support of that view they relied on the case of *Kemp* v. *Wright*.

The judgment of the learned judge in the court below in that case seems to me to be based on these two propositions: (1) that what was done in *Kemp* v. *Wright* could have been validly done by an alteration in the rules; and (2) that, that being so, it could be done with equal efficacy by an instrument of dissolution under section 32 of the Building Societies Act of 1874. In principle these propositions cover the present case; but it is said that the second one is inconsistent with what was laid down by the Lord Chancellor on appeal in the same case (43 W. R. 213, [1895] 1 Ch. 121).

Now I have carefully considered the Lord Chancellor's judgment, and I am of opinion that it expresses a different view of the effect of an instrument of dissolution from that taken by Kekewich, J., in the court below. Consequently, the second proposition cannot be relied on.

By section 18 of the Act of 1874, which is the statutory enactment as to the alteration of rules, it is provided that an alteration is to be made only with the sanction of a meeting of which notice must be given in the manner provided by the rules. Now no such meeting has been held in this case. It is further to be noticed that an instrument of dissolution might be duly executed in accordance with section 32 without any meeting being called at all. Now the courts have always attached importance to the due observance of rules relating to general meetings, at which any shareholder affected may, if he be so inclined, express his views, and if there is one case more than another in which such rules ought to be rigidly followed it seems to me to be where vested rights of a shareholder or class of shareholders are sought to be taken away by the alteration of an existing rule. In such a case I think alterations in rules can only be held binding where they are made *modâ et formâ* as prescribed by the Legislature.

If the defendants are right, then in a case where a small number of members have given notice of withdrawals, and these have exhausted the funds of the society, it would be possible for the remaining members, without even hearing their fellow shareholders, to deprive them of the advantage they have gained, and of the fruits of their diligence.

I cannot think that that was intended, and I am of opinion that the plaintiff is entitled to the injunction for which he asks.

Solicitors, *Skipper & Tucker; Piesse & Son.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Charles, J.) May 21; July 31.

ATTORNEY-GENERAL *v.* ELLIS (*a*).

Inland revenue — Account stamp duty — Voluntary transfer — Customs and Inland Revenue Acts, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-section* 1, 2 (b); 1889 (52 & 53 *Vict. c.* 7), *s.* 11.

The Customs and Inland Revenue Act, 1881, *s.* 38, *sub-section* 2 (b), *enacts that account stamp duty shall be paid upon any property "voluntarily" transferred by the deceased into the joint names of himself and another person so that the beneficial interest in such property accrues by survivorship to such other person.*

Held, the word "voluntarily" is used in this sub-section in its ordinary meaning of "without compulsion" or "without obligation," and does not mean "without consideration."

Information against the executors of Arthur Ellis, deceased, to recover account stamp duty in respect of certain railway stock standing at the time of his death in the joint names of the deceased and his wife.

The facts and the sections of the statutes are fully set out in the judgment of the court.

Sir R. T. Reid, A.G., and *Vaughan Hawkins* (with them *Sir F. Lockwood, S.G.*), appeared for the Crown.

Farwell, Q.C., and *Lawrence Jenkins*, for the executors.

Cur. adv. vult.

July 31.—The judgment of the Court (Lord RUSSELL of Killowen, C.J., and CHARLES, J.) was read by

Lord RUSSELL, of Killowen, C.J.—This was an information against the executors of Arthur Ellis to recover account stamp duty in respect of certain railway stocks standing at the time of his death in the joint names of his wife and himself. No part of these stocks had been bought solely with money belonging to Arthur Ellis; all of them had, in fact, been bought with moneys contributed in equal shares by him and his wife out of her separate estate. These investments were made from time to time in pursuance of a verbal arrangement that they should, on the decease of such one of the parties as should first die, belong to the survivor absolutely. Arthur Ellis died on the 11th of February, 1891. By his will he devised and bequeathed his residuary estate for the benefit of his wife during widowhood and afterwards for his children. The will then declared that his wife and himself had from time to time invested moneys partly belonging to him and partly to her in various railway stocks and shares, which were registered in their joint names "such investments having been made on the express agreement that the survivor of them should be entitled by right of survivorship to the stocks and shares so bought," and proceeded to direct that the income of the residuary estate should be enjoyed by her on condition of her transferring all such stocks and shares to his executors and trustees to be by them held on the same trusts as the rest of his residuary estate. In fulfilment of this condition the various stocks and shares were duly transferred into the names of the defendants, the executors and trustees of Arthur Ellis. It was now sought to charge account stamp duty on so much of the stocks and shares as had been bought by Arthur Ellis out of his own moneys. The defendants refused to pay the duty claimed, on the ground that the investment of the moneys by Arthur Ellis was made in pursuance of a contract for value, and not "voluntarily" within the meaning of the Customs and Inland Revenue Acts, 1881 and 1889, and this was the question to be determined.

By the Customs and Inland Revenue Act, 1881, s. 38, sub-section 1, it is enacted as follows:—"Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or movable property to be included therein according to the value thereof." Sub-section 2, "The personal or

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

movable property to be included in an account shall be" [amongst other property] "of the following description":—(*b*) "Any property which a person dying on or after the 1st of June, 1881, having been absolutely entitled thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person." By the Customs and Inland Revenue Act, 1889, s. 11, it is enacted that the description of property marked (*b*) in the Customs and Inland Revenue Act, 1881, s. 38, "shall be construed as if the expression 'to be transferred to or vested in himself and any other person' included also any purchase or investment effected by the person who was absolutely entitled to the property, either by himself alone or in concert or by arrangement with any other person." It was contended on behalf of the Crown that the act of Arthur Ellis was "voluntarily" done, inasmuch as it had not been done in pursuance of any obligation previously incurred, either by common law, statute, or contract. Had Arthur Ellis acted alone, it was pointed out, there could not have been any doubt that the transfer would have been voluntarily effected, and it was urged that, even under the words of the earlier statute, the circumstance that the wife brought in equivalent sums could make no difference. She, too, was not acting under any precedent obligation.

Further, it was said that the amending statute made the matter perfectly clear. Arthur Ellis had done the very thing contemplated; he had effected a purchase "in concert or by arrangement with" his wife of securities the beneficial interest in which accrued by survivorship to her on his death; and that it by no means followed that, because there might have been consideration between the parties, the acts could not properly be considered to have been "voluntarily" done within the meaning of the Act: see *Crossman* v. *The Queen*, 35 W. R. 303, 18 Q. B. D. 256. The respondent, on the other hand, contended that "voluntarily" meant "gratuitously," or "without consideration," and that here the transfer was not gratuitous, but for valuable consideration. The funds were contributed in consideration of mutual promises. The husband and wife had contracted with each other for value, and, except in so far as every contract is in one sense voluntary, as being the result of an exercise of the will, the act of neither was "voluntarily" done: see *In re New University Club*, 35 W. R. 774, 18 Q. B. D. 720. We are, however, of opinion that in the section under consideration the word "voluntarily" is not used in the sense of "without consideration," but in its ordinary sense of "freely," "without compulsion," and "not under any obligation": see *Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 868; *Art Union* v. *Savoy*, 42 W. R. 690, [1894] 2 Q. B. 609. We think that this is not only the true construction, but that it is that best calculated to carry out the object of the Act, which was to fix with liability to duty all dispositions "which, while preserving to a man the enjoyment of personal property to the day of his death, make the same property pass on his death to some one else, and so become substitutes for wills": *Attorney-General* v. *Gosling*, 40 W. R. 366, [1892] 1 Q. B. 545. It is, moreover, a construction which makes it possible to put a reasonable interpretation on the amending Act, section 11 relating to property marked (*b*), whereas if "voluntarily" means "without consideration" it is difficult to give effect to the words in the last-mentioned section, "in concert or by arrangement with"—words which would appear to point to the existence of some contractual obligation. Our judgment must therefore be for the Crown.

Judgment for the Crown.

Solicitors for the Crown, *The Solicitor for Inland Revenue.*

Solicitors for the defendants, *Walker, Son, & Field*, for *Field, Son, & Hannay*, Liverpool.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Charles, J.) — May 17, 18, 20; July 31.

PALMER v. DAY & SONS. (*a*.)

Bankruptcy—Sale of goods of bankrupt by auctioneer—Auctioneer's lien—"Giving of credit"—"Mutual dealings"—Section 38 *of the Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52).

One L. instructed a firm of auctioneers to sell certain property, and a sum of money became due to them in respect of their charges in connection with such sale. Subsequently L. delivered to them certain goods as bailees with authority to sell them. L. became bankrupt, without having revoked the authority.

Held, that the credit given by the auctioneers to L. in respect of their charges, and the credit given by L. to the auctioneers in respect of the goods to be sold and the money to be realized by such sale, was a giving of credit to the auctioneers, and constituted "mutual dealings" between them and L. within the meaning of section 38 *of the Bankruptcy Act*, 1883.

The facts of the case as set out in the judgment are as follows.

The plaintiff in this case, as trustee of one D. W. Langton, a bankrupt, sought to recover a sum of £31 10s. 9d. from the defendants, a firm of auctioneers, under the following circumstances.

On the 29th of September, 1894, Langton gave instructions to the defendants to sell the furniture of his freehold house, and he also gave him instructions to sell the house itself.

The furniture sale took place on the 15th and 19th of October.

The house was put up for sale on the 8th of November, but no sale was effected.

The furniture sale account showed a balance due to the auctioneers of £7 4s. 9d. Their charges, in respect of the abortive sale of the house amounted to £24 6s., these two sums amounting to the sum now in question—viz., £31 10s. 9d.

Between the date of the furniture sale and the unsuccessful attempt to sell the house, some pictures, which had been at the house of Langton and had been bought in at the furniture sale, were sent by him to the defendants' premises for the purpose of their being sold by the defendant. It was thought that there was a better chance of selling them, if sent there, than if left at Langton's house, but although they were thus sent, there was no absolute right in the auctioneers to sell them without the approval of Langton as to price.

On the 15th of November a receiving order was made against Langton.

The plaintiff was appointed trustee on the 1st of January, 1895, and on the 2nd of January Langton was adjudicated bankrupt.

On the 30th of January the trustee wrote to the defendants requesting them to remove some furniture,

(*a*.) Reported by T. MATHEW, Esq., Barrister-at-Law.

which had been bought in at the sale to their premises and dispose of it, together with the pictures already at their office. The trustee added that any rights the defendants might have by way of lien upon the goods or proceeds of sale should not be prejudiced. The defendants, accordingly, sold and claimed to deduct from the proceeds the two sums due to them in respect of the furniture sale and of the attempted sale of the house. The trustee disputed their right to do so, and brought this action in the county court at Maidstone to recover the amount sought to be deducted—viz., the sum of £31 10s. 9d., that amount being made up of the £7 4s. 9d. due on the furniture sale, and the £24 6s. due on the abortive house sale. The learned judge gave judgment for the defendants, on the ground that there was one entire and indivisible contract between Langton and the defendants for the sale of the furniture and the house, and that they were, therefore, entitled by virtue of their auctioneers' lien to retain their charges in respect of both sales. He negatived a contention by the defendants that they were under any circumstances, whether the contract was one entire contract or not, entitled to a set-off in bankruptcy by virtue of section 38 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). The plaintiff appealed from this decision.

E. Bray, for the appellant.—This is not a "mutual credit" within the meaning of section 38 of the Bankruptcy Act, 1883. The trustee was entitled to have these pictures returned to him, and could maintain an action in detinue to recover them, therefore the "account" mentioned in section 38 could not be taken.

Counsel cited *Eberles Hotels Co.* v. *Jonas*, 35 W. R. 469, 18 Q. B. D. 459.

Hohler, for the respondent.—The debt due by the bankrupt to the defendant is a credit from the defendant to the bankrupt on the one hand, and the delivery of pictures by the bankrupt, with instructions to sell, is on the other hand a credit given by the bankrupt to the defendant. Section 38, therefore, applies, as there was a mutual credit within that section: *Rose* v. *Hart*, 8 Taunt. 499; *Peat* v. *Jones*, 30 W. R. 433, 8 Q. B. D. 147; *Smith* v. *Hodson*, 4 T. R. 211; *Booth* v. *Hutchinson*, 21 W. R. 116, L. R. 15 Eq. 30, Sm. L. C. 9th ed., vol. 2, p. 344. At the date of the receiving order the authority given to the defendants to keep the pictures for the purpose of sale became irrevocable as against the rights of the defendants under section 38: *Naoroji* v. *Chartered Bank of India*, 16 W. R. 791, L. R. 3 C. P. 444; *Astley* v. *Gurney*, 18 W. R. 44, L. R. 4 C. P. 714.

Bray, in reply.

Cur. adv. vult.

July 31.—Lord RUSSELL, C.J., read the judgment of the court. After stating the facts as set out above, the learned judge proceeded as follows:—We are unable to concur in the view of the learned judge of the county court that there was one entire and indivisible contract between Langton and the defendants in reference to both sales. We think, on the whole, that the evidence does not warrant that conclusion. The case appears to us the ordinary one of auctioneers being instructed to sell, first, the furniture, and, secondly, the house. The mere fact that the instructions were given at or about the same time does not, in our opinion, justify the inference that the two sales took place under a single and indivisible contract. The circumstances of the two sales were different; they took place at different times and under different conditions. It therefore becomes necessary to consider whether his judgment can be supported on the other ground (that of mutual dealings) relied upon. Section 38 of the Bankruptcy Act, 1883, so far as is material, is as follows:—

"Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made and any other person proving, or claiming to prove, a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against the sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

This is a re-enactment in substance of section 39 of the Act of 1869, where for the first time the words "mutual dealings" were added to the words "mutual credits" and "mutual debts," which are alone used in the earlier statutes regulating the right of set-off in bankruptcy. The additional words undoubtedly have extended the right conferred by the earlier statutes. Under their provisions it had been considered from the year 1818, when *Rose* v. *Hart*, 8 Taunt. 499, was decided, that although "mutual credits" is a wider term than "mutual debts," the credits must be such as either must terminate in debts, or have a natural tendency to terminate in debts, and must not be such as terminate in claims differing in nature from debts: see Smith's Leading Cases, 9th ed., vol. 2, p. 336. The section in its present shape, however, has been held applicable to all demands provable in bankruptcy, and so to include claims as well in respect of debts as of damages liquidated or unliquidated, provided they arise out of contract. Thus, in *Booth* v. *Hutchinson*, damages for breach of covenant unascertained at the date of a deed of arrangement incorporating the enactments of the Bankruptcy Act, 1869, were allowed to be set off against a claim for accruing rent. And in *Peat* v. *Jones* the Court of Appeal followed *Booth* v. *Hutchinson* in holding the mutual credit clause in the Act of 1869 applicable to a claim for unliquidated damages, and held that such a claim might be set off in an action brought by a trustee without recourse to the Court of Bankruptcy. The same rule is applicable not only to actual breaches of contract, but also to breaches of obligations arising out of contract. It was accordingly held that in *Jack* v. *Kipping*, 30 W. R. 441, 9 Q. B. D. 113, that a claim for fraudulent misrepresentation on the sale of a chattel by a bankrupt could be set off against a claim by the trustee for the price.

But whilst the right of set-off has been thus widely extended, it is still subject to the limitation that the "dealings" must be such that in the result the account contemplated in the section can be taken in the way therein described. In other words, the "dealings" must be such as will end on each side in a money claim. Otherwise the claims are incommensurable. It was upon this ground that the Court of Appeal in *Eberles Hotel Co.* v. *Jonas*, held that the defendant could not set off a debt due from the plaintiff company to him under section 38, the claim of the plaintiffs against him being for the return of chattels in specie in an action of detinue.

There could not be an "account" as between goods and money, and no balance could be struck.

It was contended by the plaintiff in the present case that the authority last referred to was in point. At the date of the receiving order (which, it was admitted, was the date at which the rights of the parties must be determined) the bankrupt, it was said, had a right to maintain an action of detinue for the return of the pictures in specie, and nothing else. Such a claim (it was argued) did not arise from a

"dealing" within the true meaning of that term as used in section 38. It was the result of an interference with a right of property, and would not end in a money claim, and the case relied upon is, no doubt, an authority for that proposition. The defendants, on the other hand, contended that at the date of the receiving order no action for the return of the goods could have been maintained unless Langton had taken some step to alter the terms upon which the pictures had been deposited with them. Their position, they said, was that of bailees of the pictures with an authority to sell them so that there was a "mutual credit" or "mutual dealing" then existing between the bankrupt and themselves—a credit on the one hand by them to him in respect of the sums due to them on the furniture sale account and in respect of their charges for the attempted sale of the house, and a credit on the other hand by the bankrupt to them in respect of the pictures and the moneys to be realized by the sale. We think that the latter is the true view of the relations between the parties. No action could, in our opinion, have been maintained by Langton when the receiving order was made. He had done nothing to revoke the authority conferred upon the defendants to keep the pictures on their premises for the purpose of sale, and the circumstance that he retained a control over the price does not seem to us to make any difference. The defendants were the depositaries of the pictures with an authority to sell them at approved prices, and as auctioneers they would certainly be entitled to receive for the vendor from the purchaser the amount realized. This authority could have been revoked, but until revoked the deposit, with such an authority to sell and receive the proceeds, constituted, in our opinion, a giving of "credit" to the defendants (see *Naoroji* v. *Chartered Bank of India*, approved in *Astley* v. *Gurney*). There was a debt on one side and a delivery of property with directions to turn it into money on the other.

Upon the ground, therefore, that section 38 of the Bankruptcy Act of 1883 applies to this case, while we cannot agree with the reasons given in the court below for the judgment, we think that this appeal must be dismissed with costs on the grounds we have stated.

Appeal dismissed; leave to appeal refused.

Solicitors for the appellant, *Sole, Turner, & Knight*, for *W. C. Cripps & Sons.*

Solicitor for the respondent, *Walter Day*, Maidstone.

Q. B. Div.
(Wright and Kennedy, JJ.) } June 17, 18; July 4.

REG. *v.* VESTRY OF ST. GEORGE, HANOVER SQUARE. (*a*)

Metropolis Management — Sewers — London County Council—Power of county council to order vestries to construct sewers—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 170), *s.* 138.

The London County Council have no power, under section 138 *of the Metropolis Local Management Act*, 1855, *to order the vestry of a parish in the metropolis, in which parish certain houses are situate which discharge their sewage directly into the River Thames, to construct a new sewer for the purpose of receiving the drainage of such houses and preventing its discharge into the river.*

(*a*.) Reported by T. MATHEW, Esq., Barrister-at-Law.

In this case a rule *nisi* for a *mandamus* had been obtained at the instance of the London County Council directed to the Vestry of St. George, Hanover-square, in the county of London, calling upon them to show cause why they should not comply with an order made on the 4th of December, 1894, by the London County Council, directing them to construct a sewer therein described, or to execute sufficient works to secure the communication with the main sewers of the metropolis of the sewer or drain receiving the sewerage from certain premises in the said order mentioned.

The question that was raised before the court was whether the London County Council, as the successors of the Metropolitan Board of Works, had power to order the vestry to construct the sewer.

It appeared that the attention of the county council was called by the Thames Conservators to the fact that the drainage of certain houses, numbered 102, 103, and 104, Grosvenor-road, Pimlico, was discharged into the River Thames. The county council thereupon communicated with the Vestry of St. George, Hanover-square, the local authority, in order that that body should cause the sewage to be diverted into a local sewer, but the vestry refused to execute the work.

The county council thereupon made an order upon the vestry to construct a sewer to receive the drainage of the said houses.

This order the vestry refused to carry out, contending that the London County Council had no jurisdiction to order them to do so.

On the above facts a rule *nisi* was obtained.

Channell, Q.C., and *Macmorran*, showed cause on behalf of the vestry.

Bosanquet, Q.C., and *English Harrison*, appeared on behalf of the county council, in support of the rule.

Cur. adv. vult.

July 4.—WRIGHT, J.—In this case the question we have to decide is whether the London County Council, as representing the old Metropolitan Board of Works, has power to order the vestry to construct a new sewer for the purpose of taking the sewage of certain houses situate on the edge of the Thames Embankment into one of the low level sewers at some distance inland.

By section 69 of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), the duty is placed upon the vestries of constructing sewers for the purpose of carrying local sewerage. As tending to show that the system intended was one which left the initiative to the vestry, and only gave the control to the Metropolitan Board of Works, it is material to observe that the vestry had not the power to construct any local sewers without the previous consent and approval of the Metropolitan Board of Works.

By section 135 of the same Act it was enacted that the Metropolitan Board of Works should have the power, but not that it should be their absolute duty, to construct such main sewers and works "as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the River Thames, in or near the metropolis, and shall also make all such sewers or other works and such diversions or alterations of any existing sewers or works as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis."

By the Act of 1858 (21 & 22 Vict. c. 104) there was imposed upon the Metropolitan Board of Works the duty of constructing a system of sewerage so that the sewage should not pass into the Thames, and then, later, by the Act of 1862 (25 & 26 Vict. c. 102), several amendments in the law were made.

By section 138 of the Act of 1855, which is the section on which the question before us turns, it is enacted that the Metropolitan Board of Works shall "make such general or special order as to them may seem proper for the guidance, direction, and control of the vestries of parishes and district boards in the levels, construction, alteration, and maintenance and cleansing of sewers in their respective parishes or districts, and for securing the proper connection and inter-communication of the sewers of the several parishes and districts and their communications with the main sewers vested in the said metropolitan board, and generally for the guidance, direction, and control of vestries and district boards in the exercise of their powers and duties in relation to sewerage; and all such orders shall be binding upon such vestries and boards."

Does that section authorize the county council, which now represents the Metropolitan Board of Works, to make the order in question?

It appears to me that it does not empower them to take the initiative by ordering specific new works of sewerage. It was only intended for the purposes of control over the construction and arrangement of sewers. If the vestry make a sewer it must be made with the approval of the county council. If the existing or future sewers are at such levels or constructed in such a manner as to prevent their properly communicating with the main sewerage, the county council may order them to be altered so as to communicate properly with the main system, but there is nothing in the section which authorizes the county council to take away from the vestry the initiative as to making new sewers, or which enables the county council to usurp the discretion of the vestry as to what new sewers shall be made.

Section 45 of the Act of 1862 (25 & 26 Vict. c. 102) provides that the vestry must submit plans of the new sewers to the Metropolitan Board of Works and further that "no such sewer or works shall be proceeded with without the approval in writing or contrary to the direction of the said board." It appears to me that these enactments are merely regulative enactments and do not authorize the county council to command the vestry to exercise their powers. The case of *St. Luke's, Chelsea*, 10 W. R. 293, 31 L. J. Q. B. 50, throws some light upon the matter. There a private person obtained a *mandamus* to the vestry to construct sewers in a part of their district and upon demurrer it was held that the *mandamus* ought not to go. It was not however claimed or contended in that case that the Metropolitan Board of Works had the jurisdiction which is now claimed for the county council. The court, as a matter of fact, held that it is the approval of the board that the Act contemplates, and I think the tenor of that judgment supports the view we take in this case.

KENNEDY, J.—I am of the same opinion. It is conceded that the object of the order was for the purpose of preventing the outfall of certain sewage within the metropolis. On looking at the various statutes it appears to me that that is not an order which can be made upon the vestry by the county council.

By section 69 of the Act of 1855 the duty is imposed upon the vestry of every parish mentioned in the schedule, to do such works as may be necessary for effectually draining their parish or district. It appears to me that the general central authority are given the control, direction and supervision of such drainage works, but not the power sought to be enforced here by the order to make certain specific sewers. If the central authority had the power to order the various vestries to construct such works, then the powers given by section 135 to the central authority would be needless. The true construction of the sections taken together appears to me to be that a power of supervision and control is given to the county council as the central authority, but not a power which authorizes them to order a district to carry out such a work as is sought to be enforced here. If the Metropolitan Board of Works or their successors think it is necessary to construct works for preventing the outfall of sewage within the metropolis into the Thames they have power to construct the works themselves, but they are not authorized to order the vestry to do so. Section 83 of 25 & 26 Vict. c. 102, which gives the Metropolitan Board of Works power to make bye-laws for the guidance of the vestry, ought not to be construed as giving the board of works authority to make such an order as is made here—namely, not for the purpose of maintaining the main and general sewerage of the metropolis, but for the purpose of keeping the river within the metropolis clear as specified in section 135 of the Act of 1855. The question we have to decide is whether there is a power given to the county council to make an order for the performance by another body of a duty which is charged upon itself in respect of the construction of a sewer. I think the county council has no such power, and that they have no authority to make the order they have sought to enforce here.

Rule discharged, with costs.

Solicitors for the vestry, *Caprons, Dalton, Hitchins, & Brabant.*

Solicitor for the London County Council, *W. A. Blaxland.*

Lunacy.

(Lindley, Lopes, and Rigby, L.JJ.) Aug. 5, 9, 1895.

In re G. E. BROWN. (*a*.)

Lunacy—Lunatic domiciled in Victoria—Transfer of stock standing in the name of the lunatic—Discretion of the court—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 134.

A., a person domiciled in Victoria, had been there found a lunatic, and B., the Master in Lunacy of the Supreme Court of Victoria, had been appointed, under the Lunacy Act of Victoria, 1890, *to manage A.'s estate B. applied to the English court to have a transfer to him of the capital and dividends of stock standing in the lunatic's name in England.*

Held, that, under section 134 *of the Lunacy Act*, 1890, *the court had a discretion as to making the order, but that, under the circumstances, it was right that both capital and income should be transferred to B.*

This was a petition by T. P. Webb, master in equity and master in lunacy of the Colony of Victoria, by H. L. Taylor, his attorney in this country, asking that some fit person should transfer to him or his attorney certain securities belonging to the above-mentioned Gertrude Emily Brown. The stock in question consisted of £752 9s. 2d. Midland Railway Stock, £104 London and North-Western Railway Stock, and £260 Consols.

By an order of the Supreme Court of Victoria made in lunacy in the matter of the said G. E. Brown, a lunatic patient, and in the matter of the

(*a*.) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

Lunacy Act, 1890 (of Victoria), on the 6th of September, 1894, it was ordered that the master in lunacy should examine the said G. E. Brown and take evidence as to whether she was a lunatic and report thereon to the court. The master accordingly made his report, and thereby found that she was of unsound mind and incapable of managing herself or her affairs, and by an order of the said court made on the 27th of September, 1894, that report was confirmed.

By another order of the same date the court appointed the present petitioner, T. P. Webb, guardian of the person and estate of the said G. E. Brown, and receiver of her estate, and by the same order the care and management of her estate was remitted to him. Mr. Webb duly appointed the said H. L. Taylor his attorney to receive the lunatic's property in the United Kingdom.

Minutes of an order to be made on the present petition had been drawn up and approved by the master in lunacy in this country, which provided for the transfer of the stock and the payment of the dividends to the said H. L. Taylor, but the judge at chambers refused to make such an order and adjourned the matter to be heard in court.

The Lunacy Act of 1890 of the Colony of Victoria provides (section 124) that the court and the master might make orders after the return of the inquisition for the custody of the person and management of the estate of the lunatic; (131) the master in lunacy was empowered and required to undertake the management of the estates of all lunatics in Victoria and to take possession and care of, recover, collect, and preserve and administer their property; (182) the master was to have power with respect to the estates of patients to receive and recover moneys due, demise lands, sell, or convert into money any real or personal property, and surrender any lands, receive all rents, income, and profits of real or personal property, settle or compromise demands, &c. (190), he was to be at liberty to apply money in paying the debts of and maintaining the lunatic and his family and payment of costs of management, to invest the patient's money in Government stock in the name of the treasurer, and the treasurer, at the request of the master, might buy, sell, or transfer such stock; (229) where any stock should be standing in the name of or should be vested in a lunatic beneficially entitled thereto the court might order some fit person to transfer the stock and to receive and pay the dividends as the court might order.

Strickland, for the petitioner. — The point is whether the property has been vested in the person appointed according to the law of Victoria for the management thereof. The Colonial Act does not expressly use the word "vest." [LINDLEY, L.J.—Is not the effect of the Act this, that until a committee is appointed the master is a receiver?] The Act contains no provision for the appointment of a committee. The duties of the master are such that he must have the property vested in himself. The capital is required for maintenance. [LINDLEY, L.J.—The lunatic having been so found there is no difficulty as to income. We will consider the effect of the Colonial Act as regards the capital.]

Aug. 9, 1895.—The judgment of THE COURT was read by

LINDLEY, L.J.—The question to be decided in this case is whether this court sitting in lunacy has jurisdiction under section 134 of the Lunacy Act, 1890, to order certain stocks and shares standing in the name of the lunatic to be transferred into the name of the Master of Lunacy in the colony of Victoria in the common form to be applied by him in the usual way. [His lordship read section 134 of the Lunacy Act, 1890.] The lunatic in this case is residing out of the jurisdiction in Victoria and has been declared a lunatic, and the Master in Lunacy there has been appointed to manage her personal estate. So far there is no difficulty; but such personal estate has not vested in the colonial master in the sense in which it was vested in the lunatic, nor does the master occupy the same position as the personal representative of the lunatic at her death. Section 133 speaks of vesting according to the law of the place where the lunatic lives, and if it only applies where the personal property is "vested" in a person in the strict legal sense attached to it by the courts of law in England, it would not only be inapplicable to this case, but also to the Act of Victoria, for it very rarely happens that property is "vested" by foreign or colonial Acts in that sense.

What is usually done by such Acts is very much like what we do. We appoint a committee with power, if necessary, to sue for any property of the lunatic; but we do not vest the lunatic's property in that person in the strict legal sense of vesting. Unless, therefore, vesting in section 134 is to be construed in its wide sense and not in its strictly legal sense the section would become practically useless. It is obviously the intention of the section to hand over to committees the personal property of the person declared lunatic, and it ought to be so construed as to be made effectual. If now we turn to the previous decisions we shall see that orders have been made for the transfer of stocks of persons resident out of the jurisdiction, although the property did not vest in the persons appointed in the strict sense. Following the chronological order in which they were decided, we have *In re Stark*, 2 Mac. & G. 174 (a Scotch case); *In re Elias*, 3 Mac. & G. 234 (a Dutch case); *In re Garnier*, 20 W. R. 288, L. R. 13 Eq. 532 (a French case); *In re Mitchell*, 17 Ch. D. 515 29 W. R. Dig. 127 (a Scotch case); and *Scott* v. *Bentley*, 3 W. R. 280, 1 K. & J. 281 (also a Scotch case).

In these cases the rights of persons appointed have been carefully considered and fully argued. In *In re Stark* and in *In re Garnier*, the court held that it had a discretion in case of its not being satisfied with the proposed application of the property, and ordered the dividends only to be paid to the curator. In *In re Elias* and *In re Mitchell* the capital was ordered to be transferred to the curator without security being required. In *Scott* v. *Bentley* the stock was in court, so that the case did not turn on the Lunacy Acts. In *In re Barlow's Will*, 35 W. R. 737, 36 Ch. D. 287, a master had been appointed by the Supreme Court of New South Wales, and he applied for the transfer of the stock to him, consisting of £2,250, which had been paid into court by the trustee of the will under the Trustee Relief Act. The beneficiary had not been judicially declared a lunatic, and the court held that the colonial master had no absolute right to have the whole sum transferred, but that there was ground for making such an order as to part of the capital. The lunatic in that case had not been adjudicated a lunatic, and the court felt considerable difficulty in making any order. Obviously, if the lunatic had been so declared and the master appointed as committee, there would have been no difficulty as to the transfer. That, case, however, did not turn on the Lunacy Acts of this country. Here, although the stocks are not vested in the strict legal sense, the Colonial Act clearly gives the master all the powers necessary to dispose of the stock and shares, and as we are satisfied that the money is wanted for maintenance and so forth, the proper order by the master will be made.

Whether, in the circumstances, the colonial master is absolutely entitled to the transfer need not now be decided, as section 134 of the Act of 1890 seems to give us a discretion. But in order to render the order right in the form of it, we propose to say that the stock and shares are vested in the master within the meaning of section 134. The sections of the Colonial Act are, in our opinion, ample for the purpose.

Solicitors, *Roy & Cartwright.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) July 30, 1895.

EARL OF SHREWSBURY *v.* WIRRALL RAILWAYS COMMITTEE. (a.)

Railway company—Arbitration—Umpire's fees paid by landowner — Action to recover — Taxation — Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 34, 35.

A landowner who himself takes up the award of the umpire in an arbitration and pays the umpire's fees cannot recover them from the railway company, though such fees may be costs which, under the statute, are payable by the promoters of the undertaking.

Where such fees have been paid by the landowner and the amount has been disallowed on taxation by the taxing-master, the decision of the taxing-master cannot be reviewed in an action against the railway company.

Appeal from Romer, J.

The plaintiff was a landowner, to whom notice had been given by the defendant railway company that they required some of his land.

The plaintiff claimed £21,700, and the railway company offered £9,500. The plaintiff having given notice to have the amount fixed by arbitration, the amount was fixed by the umpire at £11,865.

The plaintiff took up the umpire's award, and himself paid the umpire's fees, amounting to £410 4s. 6d.

The bill for the costs of and incidental to the arbitration was taxed by one of the taxing-masters, who struck out this item of £410 4s. 6d. as not being costs properly incurred by the plaintiff.

The defendants refused to pay these fees, and the plaintiff brought the present action to recover them.

Romer, J., dismissed the action. The plaintiff appealed.

Section 34 of the Lands Clauses Consolidation Act, 1845, is as follows: "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitration shall be borne by the parties in equal proportions."

Section 35 provides that "the arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected and examined by such party or any person appointed by him for that purpose."

Witt, Q.C., and *T. L. Wilkinson*, for the appellant. —Section 35 is ancillary to section 34, not restrictive of it. No doubt the company in this case might have been compelled to pay the fees, but it was not obligatory upon the plaintiff to compel them. Section 34 gives us a statutory right to these costs, and it is immaterial who first pays them. So far as the taxing-master affected to deal with the liability of the company he exceeded his jurisdiction.

They referred to *Metropolitan District Railway Co.* v. *Sharpe*, 28 W. R. 617, 5 App. Cas. 425; *In re Walker and Brown*, 30 W. R. 703, 9 Q. B. D. 434; *Broadhurst* v. *Darlington*, 2 Dowl. 38; *In re Autothreptic Steam Boiler Co. (Limited) and Townsend, Hook, & Co.*, 21 Q. B. D. 182, 36 W. R. Dig. 55; *In re Holliday and Mayor, &c., of Wakefield*, 20 Q. B. D. 699, 36 W. R. Dig. 8; *In re Sheffield Waterworks Act*, 1864, 14 W. R. 143, L. R. 1 Ex. 54; *In re Owen and London and North-Western Railway Co.*, 16 W. R. 125, L. R. 3 Q. B. 54; *In re Sandback Charity Trustees and North Staffordshire Railway Co.*, 26 W. R. 229, 3 Q. B. D. 1.

Cozens-Hardy, Q.C., and *Macnaghten*, for the respondents.—This is an attempt to obtain review of the taxation. The point was put by Cotton L.J., in *In re Sandback Charity Trustees and North Staffordshire Railway Co.*

Witt, Q.C., replied.

LINDLEY, L.J.—This is a curious action and one which, looking at it from a merely moral point of view, apart from legal principles, one would like to have decided in the plaintiff's favour, but I do not see my way to do so. The defendants took some land belonging to the plaintiff under the Lands Clauses Act. There was an arbitration, a reference to an umpire, and the umpire made an award, giving the plaintiff, it is true, less than he asked for, but a great deal more, or substantially more, than the defendants had offered him for the land which they wanted. Under those circumstances it became the duty of the defendants, under the statute, to pay the costs of and incidental to the arbitration, and that, I take it, included the expenses of the award—the umpire's fees. There is a method (I will read the section presently), pointed out by the statute which, if pursued, would have enabled the plaintiff to compel the defendants to take up that award, pay all those costs and give him a copy of it. That was the plaintiff's right before he paid a farthing. He was under no obligation himself to pay a farthing. He had a right under the statute to compel the defendants to pay the whole amount. But he did not pursue his rights. He did not follow the provisions of the statute at all. He had no right himself to go and get that award; but notwithstanding that, he goes to the arbitrator and says: "If you (the arbitrator) will give me that award, I will pay you £400." Now he wants to make the defendants repay that £400. How is he to do it? I confess, looking at it from that point of view, it appears to me that there is no obligation on the part of the defendants to reimburse him that money. It was paid for a convenience to himself and a convenience which he had no right to obtain, but which he did obtain under the arrangement to which I have alluded.

Now, if we look at the sections of the Lands Clauses Act, we shall see exactly how the matter stands. Section 34 says that all the costs of the arbitration—the words are—"any such arbitration," but I need not comment upon the words "any such," it includes this—"all the costs of the arbitration

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

and incident thereto"—and I think Mr. Witt has given us authority for saying that that covers the umpire's costs and his fees, to be settled by the arbitrators—shall be borne by the promoters of the undertaking. Therefore, we have got this, that under section 34, in the events which have happened, it was the duty of the defendants to pay all the costs of the arbitration and incident thereto. Now section 35 says this. [His lordship read the section, and continued:—] What is the effect of those two sections? The effect of those two sections is, to my mind, tolerably plain. The obligation imposed upon the defendants to pay the costs is not limited or qualified or taken away by section 35, but the combined effect of those two sections appears to be this, that the costs which the defendants are to pay under section 34 are to be regarded as their own costs which they must pay in order to perform the obligations imposed upon them by section 35. That will become important when we deal with the taxing-master, but I am looking now at what I consider to be the broader point, whether there is any obligation on the part of the defendants to pay the plaintiffs; and under the circumstances and for the reasons which I have given, I can find none. But then it is put in this way. These are the plaintiff's costs, and, inasmuch as they are the plaintiff's costs and the defendants are bound to pay them and the plaintiff has had to pay them, the defendants are bound to reimburse the plaintiff his costs. Now if we look at it in that way these costs have been laid before the taxing-master, who was the proper officer, to tax and reduce them if necessary, and he, in the exercise of his jurisdiction, has struck them out. Whether there is or is not any method of compelling him to review that taxation I do not know. It is unnecessary for us to consider. He certainly is not the ordinary taxing-master. That is settled by the decision we have been referred to, the *Sandback Charity case*; and that there is no method of compelling him to review his taxation similar to that which obtains in ordinary taxation is also obvious from the decision in *Sharpe* v. *The Metropolitan District Railway Co.* The point decided in that case was of a different character. The point decided there was that a person could bring an action under this statute for his costs without going to the taxing-master at all; but the decision in that case shows that the taxing-master is not to be treated as a ordinary taxing-master in an action, but as having a jurisdiction imposed or conferred upon him by the statute and which he, being treated as an inferior court, can be compelled to perform either by *mandamus* or *certiorari*, when those are the proper remedies. If you look at it as a taxation of costs, then it does appear to me that the taxing-master's decision, in this proceeding at all events, is incapable of review and is against the plaintiff; but I prefer to put my judgment upon the broader base, that although the plaintiff might have compelled the defendants to pay all the money in the discharge of their duty which they have not done, he has disentitled himself from saying that they are under any obligation to him to repay a sum of money which he choose to pay to get a document which he had no right to get. That is the broad point.

LOPES, L.J.—I feel very sorry for the plaintiff in this case, and, speaking for myself, if I could have possibly seen my way to help him I would have been very glad to avail myself of it; but I fear I can see none. The real truth of the case is that the plaintiff went the wrong way to work. He had the whole matter in his own hands if he had been careful to follow the statute. He ought to have gone under section 35.

I mean by that he ought to have held his hand, and left it to the company to take up this award. If they had not taken it up in a reasonable time he might have gone for a writ of *mandamus* to compel them to take it up; they would then have taken it up and would have paid these fees, and there would have been no difficulty whatever with regard to this matter. But most unfortunately he has not followed the statute. He went to the umpire, and he obtained his award and paid some £400. This was a voluntary payment. According to the statute he ought not to have paid it.

The question now is can he recover? I think he cannot. The effect of sections 34 and 35 appears to me to be this, that they make the costs of the arbitration the costs of the company. But in this case we have the plaintiff paying costs which, in point of fact, are the costs of the company, voluntarily paying costs of the company, and then seeking to recover them back. I do not see how he can do that. It seems to me very much the same as the case which was put by my brother Rigby during the argument, I mean as if the plaintiff had voluntarily paid the costs of some of the valuers during the arbitration and then had sought to recover them back from the defendants. I think on that ground alone this action fails.

But it appears to me there is another ground on which it also fails. It seems to me that really, when this matter came before the master, it was a question of costs, and the attempt which is now being made is an attempt to review his taxation. I know it is an action, but practically it is an attempt to review the taxation of the master. The master, as far as I understand the evidence, heard and considered this question of the attendance on the umpire and the umpire's fees, and when he had heard and considered it he decided that he ought not to allow those matters, and he disallowed them. If that is so this case comes distinctly within the authority of the two cases which have been cited to us: *In re Owen and London and North-Western Railway Co.* and *In re Sandback Charity Trustees and The North Staffordshire Railway Co.* I understand those cases to come to this, that if the master allows costs to one of the parties where the statute does not give them, or disallows them where the statute gives them, the court has no power to interfere with a master's taxation on motion to review, because the master is not acting in the matter *ex officio*, as the officer of the court, but as a person named by the Act. It seems to me that the position of the master is very much the same as that of an arbitrator. He has complete power and control over the matters with which he has to deal. Even if the arbitrator decides on a matter of law wrongly, the award cannot be set aside; neither do I think here that anything which the master has done, even if he has done it wrongly, can be set aside. On both grounds, therefore, I think this action fails.

RIGBY, L.J.—I am of the same opinion. I cannot help regretting it, because I see that by a mere mistake the plaintiff has paid a sum of money which he cannot recover. It could not be argued that this money was paid at the request of the defendants and was recoverable on that score, and consequently the appellant frankly admitted that that could not be so. Then it was said that it was a statutory debt. Let us examine that. What by the statute is given as a debt from the railway company to the plaintiff? Clearly nothing more than his costs of the arbitration, and he chooses voluntarily to pay a part of these costs, there being no obligation whatever to pay any part of them.

The plaintiff, probably misled by the arbitrator sending to him to announce that the award was ready

for him to take up, chose to take it up. He did wrongly. He had no right to do so. I do not mean to say that it was a wrong that would do any great harm to anyone, but he had no right to get the award or to obtain possession of the document at all, and the sum paid by him was money paid in order that he might have what the statute did not intend him to have.

Then, in regard to the taxation part of the question. If these are costs, on the assumption that they were costs of the plaintiff, the master is the proper person to deal with them. No review of that taxation can take place. The only remedy, if remedy there be, is either by a *mandamus* against him to consider that particular question and to tax a particular sum, or by *certiorari*. I do not say that such a remedy exists; but at any rate there is no remedy by review, and no right of action directly against the company; and it appears to me, therefore, that the learned judge's decision is quite right and ought to be supported, and the appeal dismissed.

Appeal dismissed.

Solicitors, *Hadden-Woodward, Macleod, & Blyth; Cunliffes & Davenport*, for *J. B. Pollitt*, Manchester.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) July 13, 1895.

In re MILLS' TRUSTS. (a.)

Bankruptcy—Assignment—Equitable chose in action—*Assignment to trustees — Notice of assignment not given—Disclaimer by trustees—Bankruptcy of assignor —"Possession, order, or disposition of bankrupt"— "Consent of true owner" — Infant beneficiaries— Incapacity to consent—Bankruptcy Act*, 1849 (12 & 13 *Vict. c.* 106), *ss.* 125, 141—*Bankruptcy Act*, 1883, *s.* 44, *sub-section* 3.

The owner of a reversionary interest under a will settled his interest upon his wife and children in the year 1861, *and became bankrupt in the year* 1865. *The trustees of the settlement had no knowledge of its existence till after the settlor's bankruptcy, when they at once "rejected the trusts." Subsequently the reversionary interest fell into possession, when the trustees of the will, who, prior to the bankruptcy, had no notice of the settlement, paid the fund into court under the Trustee Relief Act. Some years afterwards the assignee in bankruptcy claimed the fund.*

Held, that the assignee in bankruptcy had no title to the fund.

By Kekewich, J., *on the ground that the trustees of the will had notice of the settlement before they paid the money into court and before they knew that the assignee in bankruptcy claimed the fund.*

By the Court of Appeal, *because the fund was not, at the date of the bankruptcy, in the "possession, order, or disposition" of the bankrupt settlor "with the consent of the true owner" within the meaning of the Bankruptcy Acts, the "true owners" being the beneficiaries, some of whom were infants, and, therefore, incapable of consenting.*

This was an appeal from a decision of Kekewich, J., dismissing the petition of the assignee in bankruptcy of the estate and effects of John Mills Wills, who was adjudicated a bankrupt on the 3rd of July, 1865, for the payment out of a sum of money paid into court by the trustee of the will of John Mills, under the Trustee Relief Act, in May, 1868.

The facts of the case are as follows: John Mills Wills was the nephew of John Mills, who, by his will dated the 16th of January, 1836, after directing payment of his debts and funeral expenses, gave the residue of his goods, chattels, and effects to John Isaac Hensley and Charles Hensley upon trusts (*inter alia*) after the death of the survivor of his three sisters, Nancy Mills, Lydia Sarah Hensley, and Sarah Wills (the mother of John Mills Wills), to divide the same equally between all the children of his said three sisters.

John Mills, the testator, died on the 8th of September, 1837, and letters of administration with the will annexed were, on the 31st of October, 1837, granted to John Isaac Hensley and Charles Hensley.

John Isaac Hensley died on the 28th of July, 1855, and Sarah Wills, the last survivor of the three sisters, died on the 7th of November, 1866; on which event John Mills Wills became, under the trusts of the will, entitled in possession to one-eighth of the residue of the estate of John Mills.

Some years previously—viz., in the month of February, 1861, John Mills Wills, partly in consideration of his wife having handed him a sum of £600 which she had received under the trusts of her father's will, made a settlement, whereby he assigned his interest under the will of John Mills, as also a contingent interest to which he was entitled under the will of his grandfather, to Thomas Leeman Hensley and John Bickford upon the trusts therein declared in favour of his wife and children. This deed of settlement was not executed by the trustees, who appear to have had no knowledge of its existence until after the bankruptcy of John Mills Wills, and they then "rejected the trusts"; both the trustees had since died.

John Mills Wills was adjudicated bankrupt on the 3rd of July, 1865, and Henry Martin Wills was appointed creditors' assignee and Edward Watkin Edwards official assignee under his bankruptcy.

In the month of May, 1868, Charles Hensley, the surviving trustee of the will of John Mills, after giving Henry Martin Wills and Edward Watkin Edwards notice of his intention so to do, paid the share of the bankrupt in the residuary estate of John Mills into court, under the Trustee Relief Act.

In the affidavit of Charles Hensley, made at the time he paid the fund into court, reference was made to the settlement of February, 1861.

No steps were taken to get the fund out of court until a petition was presented to Kekewich, J., by Peter Paget, who had been appointed on the 6th of December, 1894, sole assignee of the estate and effects in bankruptcy of John Mills Wills. The learned judge required the beneficiaries under the settlement of February, 1861, to be represented at the hearing of the petition. The petitioner relied mainly on a decision of Wood, V.C., in *Hensley v. Wills*, 16 L. T. 582, 15 W. R. Ch. Dig. 147, to the effect that the contingent interest of John Mills Wills under the trusts of his grandfather's will, comprised in the settlement of February, 1861, belonged to the assignees under his bankruptcy and not to the beneficiaries under the settlement, and claimed that the interest of John Mills Wills under the trusts of the will of John Mills also belonged to the assignees under his bankruptcy, that interest having at the date of the bankruptcy been in the possession, order, or disposition of the bankrupt "by the consent and permission of the true owner thereof" within the meaning of the Bankruptcy Act, 1849, section 125, and that the fund in court should, therefore, be paid

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

out to him for distribution amongst the creditors. At the date of the bankruptcy of John Mills Wills, some of the beneficiaries were infants and one was a married woman.

Kekewich, J., was of opinion that neither the settlor nor (under the circumstances) the trustees appointed by him, were the true owners within the meaning of the Bankruptcy Act, and did not think it necessary to determine whether or not the beneficiaries (the wife and children of the settlor) were the "true owners," as from the evidence he came to the conclusion that the trustees of the will of John Mills knew of the existence of the settlement before they paid the money into court, and before they knew that the assignee in bankruptcy claimed any interest in it. He, therefore, held (following the *Stuart* v. *Cockerell*, L. R. 8 Eq. 607, 18 W. R. Ch. Dig. 84) that the beneficiaries under the settlement were entitled to the fund as against the assignee in bankruptcy, and dismissed the petition.

The assignee in bankruptcy appealed.

Muir Mackenzie and *W. Higgins*, for the appellant.

Herbert Reed, Q.C., *Dibdin*, and *Errington*, for the respondents.

Method, for other parties.

LINDLEY, L.J., after stating the facts and reading section 125 of the Bankruptcy Act, 1849, continued: It is not disputed that the interest under the trusts of the will of John Mills came within the term "goods and chattels" as used in that section. What we have to decide is whether the fund was in the bankrupt's "possession, order, or disposition," "by the consent and permission of the true owner thereof." If the persons appointed by the settlor as trustees of the settlement of February, 1861, were the "true owners" within the meaning of the section, they clearly never consented to the fund remaining in the "possession, order, or disposition" of the bankrupt settlor, since they had no knowledge of their having been so appointed trustees until after the settlor became bankrupt. If, as I think, the correct view is that the trustees were not the "true owners," but that the beneficiaries were then inasmuch as one was a married woman and some of them were infants they were incapable of consenting, and it is impossible for the assignee in bankruptcy to successfully contend that the fund remained in the bankrupt's possession with the consent of the beneficiaries. It appears to me that on these grounds without going into the one upon which Kekewich, J., based his decision, this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. So far as we can gather from the evidence the trustees named in the settlement knew nothing about it until after the settlor's bankruptcy, when they at once disclaimed. It is, therefore, clear that they could not be said to be the "true owners." Who were the "true owners"? They were the *cestuis que trust*. And as some of them were infants, they could not consent to the fund remaining in the "order and disposition" of the settlor. It seems to me, therefore, that section 125 of the Bankruptcy Act, 1849, does not apply.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitor for the appellant, *R. Ballard.*

Solicitors for the respondents, *Pitman & Sons*, for *Jones, Macintosh, & Dixon*, Cardiff.

Solicitor for other parties, *The Official Solicitor.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) July 12, 1895.

In re NOTTAGE.
JONES *v.* PALMER. (*a.*)

Will—Construction—Legacy—General or specific—Uncertainty—Charitable legacy—Gift for the encouragement of yacht racing—Validity of.

A testator who had, at the date of his will and at his death, debentures and shares in company A., and debentures and no shares in company B., gave a legacy of "£500 debenture stock or shares" of the A. company and legacies of "350 ordinary shares," 250 "fully-paid shares," and 50 "shares" in the same company. He also gave to his trustees £5,000 "debenture stock or shares" of the A. company, 350 "ordinary shares" in the same company, and £1,500 "debenture stock or shares" of the B. company upon trust to continue the same in their present state of investment, or to sell the same, and to hold the same upon the trusts therein mentioned.

Held (*reversing the decision of* Kekewich, J.), *that the gifts included the debentures in both companies, and upon the whole will that the legacies of debentures and shares were specific and not general legacies.*

The testator gave a legacy of £2,000 to the Yacht Racing Association of Great Britain upon trust for the purpose of providing out of the annual income thereof a cup, to be given each year, for the encouragement of yacht racing; and the testator declared that if the Yacht Racing Association should cease to exist, the trust fund should be made over to the Thames Yacht Club, to be held by them on similar trusts.

Held (*affirming the decision of* Kekewich, J.), *that the gift was not a charitable legacy and was void for perpetuity.*

Charles George Nottage, the testator, by his will dated the 27th of October, 1894, after appointing the plaintiffs executors and trustees thereof and making certain specific bequests, gave the following legacies: "I give to each of my said nephews, Cecil Ernest Palmer and Arthur Nottage Palmer, £500 debenture stock or shares of the London Stereoscopic and Photographic Co. (Limited)." The testator then gave legacies of "350 ordinary shares," "250 fully paid shares," and "50 shares," in the said company; and, after making sundry "pecuniary" bequests, gave the following trust legacy: "I give to my trustees before-named £5,000 Debenture Stock or shares of the London Stereoscopic and Photographic Co. (Limited), 350 ordinary shares in the same company, £1,500 Debenture Stock or shares of the Barton Estate Co. (Limited), whose offices are at No. 4, Tokenhouse-buildings, in the City of London, and 35 shares in the Delaware and Hudson Canal and Railway Co., upon trust to continue the same in their present state of investment or to sell same," such legacy to be held by the trustees upon the trusts therein mentioned.

The will also contained a legacy in the following terms: "I bequeath to the Yacht-Racing Association of Great Britain, out of such part of my estate as may be legally bequeathed for such a purpose, the sum of £2,000 [the same to be invested as therein mentioned]. And I direct that the trustees so to be appointed as aforesaid shall, out of the annual income of the trust funds, purchase annually a cup to be called 'The Nottage Cup,' which is to be given to the most successful yacht of the season of over nineteen rating, or what may in future be held to be the

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

equivalent of that rating, and the council of the said association shall decide annually which yacht has, in their opinion, the best claim to the cup; and, in the event of their being any difference of opinion, the vote of the majority of the said council is to decide the question; or the said council may, if they think fit, order the said cup to be specially raced for; my object in giving this cup is to encourage the sport of yacht-racing. And I declare that, in the event of the Yacht-Racing Association being dissolved or ceasing to exist, the trustees of the said fund shall pay and make over the same to three trustees to be appointed by the council or committee of the Royal Thames Yacht Club, by whom the said fund shall be held upon similar trusts to those hereinbefore declared with regard to the purchase of a cup to be called 'The Nottage Cup.'"

The testator then gave various other "sums" of money, and the residuary gift was as follows:—"I give, devise, and bequeath all my real and personal estate, property, and effects whatsoever and wheresoever, . . . not otherwise disposed of unto my trustees, their heirs, executors, and upon trust that my trustees shall . . . sell, call in, and convert into money the same, . . . and pay or provide for the payment of the pecuniary legacies and sums hereinbefore bequeathed," and then upon the trusts therein mentioned, and the testator declared that his trustees might postpone the sale and conversion of his debentures or shares in the London Stereoscopic and Photographic Co. for as long as they should think fit.

At the date of the will and of his death the testator had 130 £50 debentures, and 3,710 £5 fully paid-up shares in the London Stereoscopic and Photographic Co., and no other interest in the company. There were two classes of debentures in the company—viz., those held by the testator and certain "mortgage debentures" which had priority over them, but there was no "debenture stock," and there were no "debenture shares."

In the Barton Estate Co. he had debentures but no shares.

On the 28th of March, 1895, the executors and trustees of the will took out an originating summons for the purpose of deciding certain questions that had arisen under the will.

Upon this summons Kekewich, J., held (1) that the legacies of shares given by the will were general legacies, but that the legatees of "debenture stock or shares" took nothing under the bequests to them; (2) that the trust legacy bequeathed by the will to the executors was a general legacy as regards the shares comprised therein, but void as regards the £5,000 debenture stock or shares of the London Stereoscopic Photographic Co., and the £1,500 debenture stock or shares of the Barton Estate Co.; and (3) that the legacy of £2,000 given by the will to the Yacht Racing Association of Great Britain was an invalid bequest.

From this decision Cecil Ernest Palmer, one of the legatees of shares and "debenture stock or shares," Edith Marian Bigwood (by an order of Kekewich, J., appointed to represent the trust legatees), and the Yacht Racing Association of Great Britain appealed.

Crackanthorpe, Q.C., and *W. A. Peck*, for C. E. Palmer.

Crackanthorpe, Q.C., and *W. Freeman*, for E. M. Bigwood. — The debentures in both gifts are sufficiently described, and both legacies are specific. In the case of the trust legacy that is clear from the direction to continue in the same state of investment, and in the other case, there are various indications that the gift was intended to be specific.

They referred to *Ashton* v. *Ashton*, 3 P. Wms. 384; *Sleech* v. *Thorrington*, 2 Ves. Sen. 560; and *Door* v. *Geary*, 1 Ves. Sen. 255.

Lopes, L.J., referred to *Trinder* v. *Trinder*, 14 W. R. 557, L. R. 1 Eq. 695.

Pattullo, for residuary legatees.—The legacies are general and, as to the debentures, void for uncertainty.

He referred to *In re Gray, Dresser* v. *Gray*, 35 W. R. 795, 36 Ch. D. 205, and *In re Lane, Luard* v. *Lane*, 28 W. R. 764, 14 Ch. D. 856.

Fawcus, for the executors and trustees.

LINDLEY, L.J.—With regard to these first two appeals, I do not think we shall gain anything further by looking through the will again. I cannot agree with the conclusion arrived at by Kekewich, J., when he goes the length of saying that these two appellants take nothing. I cannot get that out of the will.

This testator seems to have had a good many shares, and, amongst other things, he had an interest in debentures and shares in the Stereoscopic Co.—I call it for shortness—and in the Barton Estate Co. [His lordship stated the facts as to the testator's shares and debentures, and continued:—]

Now let us see what he does about the Stereoscopic Co. He gives to each of his two nephews naming them, Cecil Palmer and Arnold Palmer—I will read it as it runs, and without any stops, because I do not know where to put the stops—"£500 debenture stock or shares of the 'Stereoscopic Co.'" Then he goes on and says, "I give to each of my cousins," naming them, "350 ordinary shares" in the same company. Then he gives to somebody else "250 fully paid shares" in the same company, and he gives to somebody else fifty "shares," without calling them anything, in the same company. Now if one only for a moment bears in mind what there was, and what he had to give, it appears to me that he had, in a very inaccurate way, contrasted the debentures on the one side, which he calls "debenture stock or shares"—not knowing what to call them—with "shares" on the other, which he calls sometimes "ordinary," sometimes "fully paid shares" and sometimes "shares" without any adjective at all. I cannot help thinking that his scheme is that he gives to these two persons what he calls "debenture stock or shares," not knowing what to call it, but meaning something different from "fully paid shares" or "ordinary shares" or "fifty shares."

Now bearing in mind that he had only 130 debentures of £50 each in the Stereoscopic Co., and he had those—I cannot come to the conclusion that Kekewich, J., is right in saying that there is such a defect of description as to destroy the whole legacy which was clearly intended. There is something answering the legacy, although the description of that something is not very happy or accurate.

Now as regards the Barton Estate Co., which is the second appeal, the case is still plainer. This is the language of the will with regard to that. [His lordship read the gift, and continued:—] Now, as regards the Barton Estate Co., he had, as he calls it, "£1,500 debenture stock or shares of the Barton Estate Co. (Limited)." He had nothing there except debentures, and that shows, to my mind, almost conclusively, that he did not know how to describe these debentures. But having got debentures, he leaves what he has got under the description (not very accurate, I admit) of "debenture stock or shares."

Now the remarks I have made about the Stereoscopic Company also apply to this bequest. He contrasts there what he calls "debenture stock or shares,"

with "ordinary shares," and that, I think, fortifies the conclusion at which I have arrived, namely, that he did know that he had different sorts of things—that he had debentures (not knowing whether to call them stocks or shares), and ordinary shares; and when he uses the expression "debenture stock or shares," what he means is, debentures as distinguished from the other shares which he describes sometimes as "fully paid up," and sometimes as "ordinary," and sometimes without any adjective at all. As to the Barton Estate Co. there is no difficulty in it, because he only had debentures. So far, therefore, I think, there is no real difficulty.

The next point, however, arises whether these gifts are specific, or whether they are what are called "general legacies." As to that, with respect to the £5,000 debentures, as I will call them, putting my own construction on this clause—as to the gift of £5,000 debentures and 350 ordinary shares in the Stereoscopic Co., and that of the £1,500 debentures in the Barton Estate Co., there can be no reasonable doubt, because he goes on, as to them, to say that the trustees are to hold these "upon trust to continue the same in their present state of investment." That points, without any ambiguity or any doubt, to the things which he then had in some state of investment. That makes that bequest perfectly specific, and free from any difficulty at all.

As regards his bequest of the £500 in the London Stereoscopic Co., there is more difficulty because there is nothing in the immediate connection of that clause to show that he is dealing with the particular debentures which he had. But bearing in mind what he was doing, bearing in mind that he had debentures, that he is apparently dealing with them, giving them to his relatives and indicating, in one place clearly, that he intends them to be specific, bearing that in mind and then turning to that indication, (I admit somewhat slight) in the gift in the residuary clause to which Mr. Crackanthorpe called our attention, I think we should not be going too far or stretching the doctrines of the court in holding the first bequest to be specific too. When he says, "I give to each of my nephews £500 debentures," I do not think that that is a pecuniary bequest, but something more than that. It is not a sum of money at all. It is not a pecuniary bequest, I think in the view of this testator, because further on he gives a string of what he calls "pecuniary legacies," which are mere sums of money. There is some difficulty about whether it is not a gift of a "sum of money," but I do not think it is. When you come to look at it, it is not a gift of money to be laid out or to be applied in buying debentures—it is a gift of these debentures which the context shows he himself has. If that be right, then the clause about residue does help, because the clause as to residue is this. [His lordship read the clause and continued:] Now, the "pecuniary legacies and sums hereinbefore bequeathed," do not, I think, apply to the bequest of these debentures. I do not think they do. But coupling that with the clause which comes afterwards, which is perhaps not alike, but a little looking in the same direction, namely, that the trustees "may postpone the sale and conversion of my debentures," I think we may say and ought to say, upon the true construction of this will, and taking into account the whole of these clauses, that what he really meant was to give the £500 debentures, part of that which he then held in the company. I think that is right and, therefore, the appeal must be allowed.

LOPES, L.J.—I have great difficulty in understanding how Kekewich, J., arrived at the conclusion which he seems to have arrived at—namely, that these two legatees took nothing. Reading the will carefully, it appears to me that the testator was very mixed in his mind as to the proper designation which he ought to apply to the interest in these companies, which he then possessed. It appears to me that he did not know what to call them, whether to call them "debenture stock" or "debenture shares," or how to designate them. First, with regard to the Stereoscopic Co. he had in that company debentures and ordinary shares, and I do not doubt for a moment, having regard to the words he used (though, no doubt, he was mixed in his mind as to how to designate them), he meant debentures.

With regard to the Barton Estate Co. the language is more clear. In that company he only had debentures, and the difficulty there is not so serious to get over the words. I think there he did mean the debentures that he had in that company.

Then the question arises as to whether these two legacies are to be regarded as specific or general. It seems to me with regard to the Barton Estate, as has been said by Lindley, L.J., that there is very little doubt indeed that the legacy to the legatee of the debentures in that company is a specific gift.

With regard to the Stereoscopic Co., the difficulty is greater; but, having regard to the different parts of the will to which our attention has been called, I am inclined to think that the testator intended that gift to be specific, I mean by that, that he intended it to be a gift of a particular thing which he then possessed, as distinguished from something which was to be provided out of his general estate by his trustees after his death.

I am of opinion, therefore, that this appeal should be allowed.

RIGBY, L.J.—I am of the same opinion. In construing a will we are bound to look to every part of it, and to gather what light we can from one part in attempting to construe another.

Now, here we have a testator who is possessed of debentures in the Stereoscopic Co. He is possessed also of ordinary shares in the Stereoscopic Co., and he is possessed also of debentures in the Barton Estate Co. He appears to be dealing with something that he possesses in each of these cases, because he aims (according to my construction of the particular bequests) at describing something or other and he does not quite know what the description ought to be. He calls it "debenture stock or shares." I read that as meaning "What I possess in the nature of debentures, whether properly called stock or properly called shares, or whatever the description may be." I think he is trying to dispose of something that he has got, and I think that is made a little stronger by referring to the other bequests. Well, already we have got a little way. He is treating it as a specific gift. If we are satisfied that he is trying to describe something that he had, and to dispose of that, we have got a long way; but when we find that in the will he deals with a precisely similar sort of property, and he gives to trustees that property upon trust, to continue the same in their present state of investment, or to sell the same—one is not stronger than the other, I agree—and then afterwards he says, "and to stand possessed of the said stocks and shares, and the proceeds of the sale thereof," we have three several expressions which can only be explained, with reference to that bequest, on the supposition that he was making a specific gift. The trustees were to hold the actual subject of the gift upon trust. Then we find that he gives what he calls, correctly, "pecuniary legacies"; and we find also that he gives in terms "sums of money." As to the sum of £2,000, he does not

include that. I mean that the charitable legacies are not included in "pecuniary legacies," though, of course, they are pecuniary legacies, and if we hold that "debenture stock or shares" were general legacies, perhaps in legal intendment they would come under the meaning of "pecuniary legacies." But that is not a proper way of construing a man's will—first of all to find a legal definition which he has never heard of, and then to put that in the will as if it were part of the will—though he never meant it. We have to deal with the language, and what he calls "pecuniary legacies" are those he designated by that name: and not being quite sure whether the others that he gives in money would be pecuniary legacies in the same sense, he calls them "sums of money."

Then we come to the residue, and we find that the only legacies he wishes to provide for are pecuniary legacies or "sums" and there are words to answer very precisely those descriptions.

Then we come to the investment clauses. I think he shows there an intention to give the trustees special power to retain in their present state of investment, his debentures. Taking it altogether, I think it would be fantastic to suppose that when he had provided in this way, he meant not that the legatees were to have something out of what he had got, but that they were to have something purchased for them, or that that was his idea at all. The thing is totally different when you have a testator saying, for instance, "I give £1,000 Consols." That is such a common case of investment that you cannot derive any conclusion, one way or the other, as to whether he meant Consols which he might happen to have or Consols to be purchased. But when a man has several kinds of investments and he deals with them all, and with some of them in such a manner as to make it absolutely plain that he intended that they should be specific gifts; and with regard to all, there are expressions in the will more suited to the language used on the hypothesis that the gifts in question are specific gifts, I think we may fairly assume that they were specific gifts, and declare accordingly.

Appeal allowed.

The appeal of the Yacht Racing Association of Great Britain was then heard.

Warrington, Q.C., and *Kenyon Parker*, for the appellants.—This gift is a trust for a purpose beneficial to a community: *Commissioners, &c., of Income Tax* v. *Pemsel*, [1891] A. C. 531 (see p. 583), 40 W. R. Dig. 217.

They also referred to *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265; *In re Stephens, Giles* v. *Stephens*, 36 SOLICITORS' JOURNAL, 713, W. N. 1892, p. 140; *Beaumont* v. *Oliveira*, 17 W. R. 269, L. R. 4 Ch. App. 309. [RIGBY, L.J., referred to *Thompson* v. *Shakespear*, 8 W. R. 265, 1 De G. F. & J. 399.]

Patullo, for the residuary legatees, was not called on.

LINDLEY, L.J.—We are all quite aware of the extreme difficulty of drawing a line between gifts which are charitable, in the sense in which lawyers use that term, and gifts which are not, but this is really a new experiment. The testator here tells us exactly what he has in his mind. This is an institution of members for mere sport, it is a mere game, the testator treats it so, and he tells us so himself. At the end of the bequest he says, "My object in giving this cup is to encourage the sport of yacht racing." Taking the wide view, in my opinion, I should say that every healthy sport is good for the nation. I do not draw much distinction between cricket, football, fencing, yachting or anything else. If that were a lawyer's idea of a charity, this would not have been the first time we should have heard of it, and I cannot find any case which tends that way, that is to say, any case which would authorize us in saying that a mere legacy to promote a game or a sport is a charitable legacy within the extended doctrine of the Court of Chancery. I quite agree that I find it very difficult to draw the line, and I do not attempt to draw the line. It is a case in which it is exceedingly difficult to do it. The cases in the books show that sometimes there is a case a little on one side and sometimes one a little on the other of the line: but I take the broad ground that I am not aware of any case which warrants the inference that a legacy for mere sport is a charity. I think that is enough to decide this case.

LOPES, L.J.—It is indeed most difficult to draw a line in this matter, but probably the safest way to deal with this case will be to say what does not come within the definition of a charitable gift. I am clearly of opinion that a gift, the object of which is a mere sport or game, which is primarily calculated to promote the amusement of individuals as distinguished from the community at large, cannot, upon the authorities, be said to be a charitable gift. If we were to hold this a charitable gift, we should indeed open a very wide door, because there would be very great difficulty in saying that a gift for the purpose of promoting bicycling, cricket, football, lawn tennis, or any other game, would not come within the same category, because all those sports are calculated to promote the health, physique, and good constitution of the community at large. But they are not of that kind which can be said to be charitable gifts.

RIGBY, L.J.—I am of the same opinion; I dare say it is impossible, and certainly it would not be advisable, to define in general words what is a charitable bequest. One must always go back to the analogy of the statute, and that is the only test which has ever really been applied. If this could succeed—if the gift of a fund to found a prize for yacht racing could succeed—it must be on the ground that it is for a general public purpose. I know no other head under which it could come. I think the very terms of the will explain that itself. The Yacht Racing Association which is spoken of is an association of yacht owners; and the prizes are to be won by the owners of the yachts. I think, however much we might favour the support of yachting, we cannot go to the extent of saying that it is a general public purpose. There are a great many things which are highly laudable, and in many ways very useful, which are yet not charities within the meaning of the statute, and in my opinion this is one of those things.

Appeal dismissed.

Solicitors, *Barraclough*; *G. H. Barber & Son*; *Lake & Lake*; *Neish, Howell, & Macfarlane.*

From Q. B. Div.
(Lord Esher, M.R., and Kay, and A. L. Smith, L.JJ.) July 10, 1895

ROBB *v.* GREEN. (*a*.)

Master and servant—Confidential employment—Implied contract—Copying list of master's customers—Breach of confidence and trust—Injunction.

The defendant, who was employed by the plaintiff as

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

manager in his business, made a list of the names of the plaintiff's customers from his order-book without the plaintiff's knowledge or authority, with the intention of using it in a rival business after he left the plaintiff's employment, and he did in fact so use it. The plaintiff having claimed damages and an injunction to restrain the defendant from using the list,

Held, that there was an implied term in the contract of service that the servant should act honestly and faithfully towards his master, and that the defendant had committed a breach of that contract, and that damages and an injunction ought to be granted.

Lamb *v.* Evans, 41 *W. R.* 405, [1893] 1 *Ch.* 218, *followed.*

Appeal from the judgment of Hawkins, J., in favour of the plaintiff, at the trial of the action without a jury, reported [1895] 2 Q. B. 1.

The plaintiff claimed an injunction and damages against the defendant, who had been in his service as manager, and who subsequently carried on a similar business, for having, during his service, improperly copied a list of the names of customers from the plaintiff's order book, and used it afterwards in his business for the purpose of soliciting their custom.

The facts as found by the learned judge were as follows:—The plaintiff, who occupied a game farm, was a dealer in live game and eggs, the chief part of his business consisting in procuring the eggs, and in the hatching, rearing, and sale of game birds. He also kept a large stock of laying pheasants, and sold pheasant's eggs, as well as live pheasants for shooting and for stock purposes. His customers were numerous, and their names and addresses were collected in his order-book. In 1890 the plaintiff required a manager, and in July he had an interview with the defendant upon the subject, when he stated that he relied on the defendant to treat everything in connection with the farm in strict confidence. On the 6th of August the plaintiff, by letter, engaged the defendant as his manager, and in September the defendant entered the plaintiff's service. On the 22nd of November, 1893, the defendant gave the plaintiff notice to terminate the service at the end of the year, and that notice was duly accepted. In March, 1894, it came to the knowledge of the plaintiff that the defendant was carrying on a similar business at the Game Farm, Henley, and was sending out circulars, soliciting orders, to a great number of the plaintiff's customers, whose names and addresses the defendant had, while in the plaintiff's service, copied from the plaintiff's order-book clandestinely, without the plaintiff's knowledge or authority, and for the purpose of using it to solicit the customers to give their custom to him. The plaintiff thereupon issued the writ in this action.

HAWKINS, J., gave judgment for the plaintiff for £150 damages, and granted an injunction restraining the defendant from making use of the information so obtained by him; and directed the list of the names and addresses of the plaintiff's customers copied from the plaintiff's order-book to be delivered up to be destroyed. The defendant appealed.

J. W. McCarthy, for the defendant.

R. M. Bray (*Murphy, Q.C.*, with him), for the plaintiff.

Lord ESHER, M.R.—In this case the defendant, while in the plaintiff's service, surreptitiously made a copy of the names of the plaintiff's customers from the plaintiff's order book, not for the advantage of his employer, but for the sole purpose of using the list so made, after he left the plaintiff's service, so as to get orders from those customers in a rival business. Was that or was that not what any person of ordinary honesty would say was a dishonest act towards his employer? Was it not a dereliction of the duty to act in good faith which he owed to his employer? In my opinion the learned judge rightly found that it was a breach of that trust and confidence which his service imposed upon him. It is impossible to say that the defendant had a right to make a copy of the plaintiff's order book for the purpose of using it afterwards against his master's interests, and it is equally impossible to say that it was not a breach of trust. Was it also a breach of the contract of service? That contract was reduced into writing. But that does not prevent a stipulation, not inconsistent with the written contract, from being implied.

It seems to me that a stipulation on the part of a servant in a confidential relation to act in good faith towards his master must be implied in every contract of service, because it must obviously have been the intention of both parties, acting honestly, when making the contract, that such a stipulation should be implied. In *Lamb* v. *Evans*, 41 W. R. 405, [1893] 1 Ch. 218, Bowen, L.J., said: "The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have and without which it would be futile." The transaction here is one of confidential trust, and if there is not to be implied the stipulation of a faithful performance of duty, the contract would be futile. Under these circumstances the learned judge was right in making the implication which he did, and in giving damages for the breach of contract.

There was also, as I have said, a breach of confidence and trust, and, therefore, an injunction is a proper remedy, inasmuch as the defendant, if not stopped, will go on repeating what he has done. Whether the injunction is too wide in its terms I do not stop to enquire. That may arise if it becomes necessary to enforce it.

KAY, L.J.—I am of the same opinion. The order appealed from awards the plaintiff £150 damages, orders the list of customers' names to be delivered up to be destroyed, and grants an injunction restraining the defendant from making use of the information obtained by him. First, as regards the injunction. The learned judge has found that the defendant, while in the plaintiff's employment, surreptitiously copied from his master's order-book a list of his master's customers with the object and intention of using the list after he left his master's employment in a rival business which he was going to set up. He held that that was a breach of his duty towards his master, and granted the relief I have stated. In a matter of this kind one likes to refer to the old authorities to see upon what ground the court grants relief by way of injunction. In *Yovatt* v. *Winyard*, 1 Jac. & W. 394, Lord Eldon granted an injunction to restrain the defendant, who had been an assistant of the plaintiff, from communicating certain recipes for medicines which the defendant, while in the plaintiff's service, had surreptitiously copied from the plaintiff's books, upon the ground that it was a breach of trust and confidence. In *Morison* v. *Moat*, 9 Hare, 241, Turner, V.C., stated the ground upon which the court exercised its jurisdiction. He said: "The plaintiff's case was rested in argument upon the ground that the defendant had obtained this secret by breach of faith or of contract on the part of the plaintiff.

. . . The true question is, whether under the circumstances of this case the court ought to interfere by injunction upon the ground of breach of faith or of contract. That the court has exercised jurisdiction in cases of this nature, does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others again it has been treated as founded upon trust and confidence." And later on he cites Lord Cottenham in *Prince Albert* v. *Strange*, 1 Mac. & G. 25, as saying that "this case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract would of itself entitle the plaintiff to an injunction." In the later case of *Lamb* v. *Evans*, Bowen, L.J., puts it at law, upon the ground of a term implied in the written contract, and not inconsistent with it, arising from the confidential relation of the parties. It is clear to me that an injunction can be granted. It is sufficient to say that when a servant surreptitiously compiles a list for his own use as here, he is guilty of a breach of confidence and trust, whether it is implied in the contract or not; and an injunction is the proper remedy. As regards the form of the injunction, whether the plaintiff will be able to make out that there has been a use of the information so obtained, in breach of the injunction, is still open if the plaintiff applies to enforce the injunction. Next, as to the delivery up of the list, it is clear that, as it was made in breach of trust and confidence, the order is right. Then, as regards the damages, if what the defendant has done is a breach of an implied contract, the damages were rightly given. Bowen, L.J., in *Lamb* v. *Evans* treats it as such, and I entirely agree with him. The appeal must, therefore, be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. In my opinion there is implied in a contract of service, a stipulation that the servant will act in good faith towards his master. That was the proposition laid down in *Lamb* v. *Evans*, and also in *Louis* v. *Smellie*, 11 Times L. R. 515. It is obvious that the defendant has acted here in the worst possible faith towards his master.

Appeal dismissed.

Solicitors for the plaintiff, *Roopers & Whately*

Solicitors for the defendant, *Church, Rendall, Todd, & Co.*

From Q. B. Div.
(Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) June 28, 1895.

RODDICK v. INDEMNITY MUTUAL MARINE INSURANCE CO. (LIMITED). (a.)

Insurance, Marine—Time policy—Hull and machinery —"Warranted uninsured"—"Honour" policy—"Disbursements"—Breach of warranty.

The plaintiff effected a time policy of insurance with the defendants on the hull and machinery of a steamship of the value of £10,000, *and by the policy warranted that* £5,000 *was uninsured. The total amount insured on the hull and machinery was* £5,000, *but the plaintiff effected "honour" policies* (i.e., *policies void under* 19 *Geo.* 2, *c.* 27) *on "disbursements" to the extent of* £2,600. *The disbursements were made in respect of coal, stores, provisions, and port expenses.*

Held (*affirming the decision of* Kennedy, J.), *that the disbursements were not covered by the words hull and machinery, and that there had been no breach of the warranty.*

Quære, *whether the later policy, being null and void at law, could, under any circumstances, constitute an infringement of the warranty in the earlier policy.*

Appeal of the defendant company from the judgment of Kennedy, J., at the trial without a jury.

The plaintiff claimed under a policy of insurance, dated the 8th of January, 1894, declared to be upon the hull and machinery of the steamship *Oxenholme*, which were valued at £10,000, "£5,000 warranted uninsured except for running down clause" for six months from the 9th of January, 1894, to the 8th of July, 1894.

The plaintiff effected policies, including this policy, expressly on hull and machinery to the extent of £5,000 and no more. So far, therefore, as regards policies expressed to be upon hull and machinery he complied with the warranty. But he did effect certain insurances upon "disbursements" to the extent altogether of £2,600. These disbursement policies were p.p.i. or "honour" policies, that is to say policies wherein it was stipulated that the policy should be deemed sufficient proof of interest. They were therefore null and void in law under 19 Geo. 2, c. 37. The intention of the plaintiff in effecting these "honour" policies was to cover certain disbursements for coal, engine-room and deck stores, provisions and cabin stores, port expenses and premiums which he had made in respect of the ship in view of her proceeding from the United Kingdom to the coast of South America, and afterwards trading there. Two witnesses of experience in marine insurance were called on behalf of the plaintiff. Their evidence was to the effect that disbursements constituted, apart from hull and machinery, a common subject of insurance, and were recognized by underwriters as a distinct and different subject from hull and machinery, that they covered all expenditure made or to be made in which the insured had an insurable interest, that an insurance on "hull" according to the well-known practice of underwriters would in a voyage policy include such equipment or outfit in the shape of bunker coal and ordinary deck and engine-room stores as would be necessary for the voyage described in the policy. The witnesses did not, however, state what would be covered by "hull" in a time policy such as the policy in this case.

Kennedy, J., held that the "honour" policies though void in law would have constituted infringement of the warranty, but for the fact that the disbursements insured by the "honour" policies did not cover any part of the subject-matters insured by the policy on "hull and machinery." The learned judge, therefore, gave judgment for the plaintiff.

The defendant company appealed.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the appellants.—The learned judge was wrong in holding that there had been no infringement of the warranty. In order to constitute such an infringement it is only necessary to show that a part of the disbursements, however small, is covered by the words "hull and machinery." Those words do include, at least, so much of the coal as was requisite as outfit or equipment for the voyage to South America. It is submitted "hull and machinery" also includes engine-room stores and provisions. The word "ship" would cover such things: *Brough* v. *Whitmore*, 4 T. R. 206, *Forbes* v. *Aspinall*, 13 East. 323, and "hull and machinery" has acquired as wide a

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

meaning as "ship" in connection with marine insurance.

They also cited *Oppenheim* v. *Fry*, 11 W. R. 725, 12 *ib.* 831, 3 B. & S. 873, 5 *ib.* 348, and the Master of the Rolls referred to *Robertson* v. *Ewer*, 1 T. R. 127.

Pickford, *Q.C.*, and *Horridge*, for the plaintiff, were not called on.

Lord ESHER, M.R.—In this case the court has to determine a question on the law of marine insurance. The business of marine insurance has given rise to different forms of insurance policies, and during a long course of years these policies have undergone various alterations. At one time the word "ship" in a policy had only a limited meaning, and it is still the custom of underwriters at Lloyd's, and probably of many insurance companies when insuring a ship, not to use the word "ship" and nothing else. Some companies, however, do insure a ship under the term "ship" alone, and then it is for the court to determine what is the meaning of the term "ship" in a policy of insurance against the perils of the sea.

It is not necessary in this case to determine how wide a meaning the word has when so used, it is certain it means more than the mere hull, but the question as to how much more, whether it includes such things as provisions and outfit, is not now before the court. For in this case the insurance company have departed from the form of policy which is in frequent though not universal use, and have used the words hull and machinery. These words taken in their ordinary meaning are not applicable to such things as coals and stores. The question we have to determine is whether it has been proved to our satisfaction that these words, when used in a time policy, have universally, as between the insurer and the assured, acquired a meaning different from their natural and ordinary meaning. I do not think that the defendant company have succeeded in doing that, nor do I think that Kennedy, J., was wrong in holding that these words were to have their ordinary meaning in this policy. On the contrary I am convinced that the words "hull and machinery" do not include any of the things which were insured in the "honour" policy under the term disbursements.

It is unnecessary, in the view which I take of this case, to deal with the other point decided by the learned judge in the court below—viz., whether a policy which is null and void at law could have any effect upon the warranty in the earlier policy. But it must not be taken that I accede to the view expressed by the learned judge.

KAY, L.J.—I am of the same opinion. This is an action on a policy of marine insurance, and the question we have to decide is whether, on the true construction of a policy effected upon the hull and machinery of a steamship, the various things which have been insured by the plaintiff under the heading of "disbursements" are covered by the words "hull and machinery." The argument used on behalf of the defendants is to this effect: the word "ship" by itself would, it is said, include these things, and it is the common practice when insuring steamships to use the words "hull and machinery" instead of the word ship, and, therefore, we must construe the words hull and machinery to have the same meaning as ship. No authority has, however, been cited to us for that proposition, and in the absence of authority I am unable to hold that the meaning of the words "hull and machinery" is as wide as that of the word "ship." I, therefore, come to the conclusion that the various things insured by the "honour" policies under the head of "disbursements," are not covered by the policy upon the hull and machinery.

Some evidence was given as to the meaning of the word "hull" in marine insurance, and though that evidence was given on behalf of the plaintiffs it is relied on by the defendant company as establishing a customary use of the word in the wide meaning contended for. That evidence, however, only comes to this, that in a voyage policy an insurance upon the hull would include such equipment and outfit as was necessary for the voyage described in the policy. The witnesses only speak as to the meaning of the word in a voyage policy, which this is not, and, for aught I know, there may be some very good reason for giving the word a different meaning in a voyage policy from that which it has in a time policy. If the defendant company rely on that evidence they must take it as given, and in my view it is no evidence at all as to the meaning of the word "hull" in a time policy.

A. L. SMITH, L.J.—I agree. The defendant company say that the plaintiff has broken his warranty that the ship was uninsured to the extent of £5,000, because the plaintiff effected policies for £2,600 on disbursements, and these disbursements, it is said, covered certain things as to which the plaintiff was insured by the policy on the hull and machinery. The case is not one covered by any authority, and there is no evidence that the words "hull and machinery" are used in the policy in any other than their ordinary meaning. I say no evidence, because the evidence that was given relates to voyage policies and not to time policies. We have, therefore, to consider what is the ordinary meaning of the words "hull and machinery," and in my opinion no one with any knowledge of the Queen's English could suggest that hull and machinery means such things as coal, provisions, or stores. An ingenious argument was made use of. It was said that hull and machinery means the same as ship, and that ship has been decided to cover coals and stores and the like. As to that contention, I am not quite satisfied that the authorities relied on do go so far as to decide that coals and stores are covered by the word "ship," but it is not necessary to decide that point now, for in this case we are not dealing with the word "ship," but with the words "hull and machinery," and I am of opinion that Kennedy, J.'s decision on that point was right.

One word as to the effect of "honour" policies. I am inclined to think, though it is unnecessary now to decide the question, that as the plaintiff could not sue on these policies, they were not an infringement of the warranty that he was uninsured to the extent of £5,000.

Appeal dismissed.

Solicitors for the appellants, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the respondent, *Pritchard, Englefield, & Co.*, for *Simpson, North, Harley, & Birkett*, Liverpool.

From Q. B. Div.
Lord Esher, M.R., and Kay and A. L. Smith, L.JJ. [and Q. B. Div.]

June 17; July 29, 1895.

KERSHAW (*Appellant*) *v.* TAYLOR (*Respondent*). (*a.*)

Metropolis—"Sewer"—"Drain"—Combined system of drainage — Connection with drain made without authority—Nuisance—Metropolis Management Act,

(*a.*) Reported by F. O. ROBINSON and W. F. BARRY, Esqs., Barristers-at-Law.

1855 (18 & 19 *Vict.* c. 120), *s.* 250—*Public Health (London) Act*, 1891 (54 & 55 *Vict.* c. 76), 2.

By section 250 *of the Metropolis Management Act*, 1855, *a drain which, without an order of the sanitary authority, drains more than one house is a sewer; and by the same Act the duty of repairing sewers lies upon the local authority.*

A sanitary authority approved a combined system of drainage submitted by a building owner in respect of certain semi-detached houses about to be built by him, by which each pair of houses was to drain by one drain into the sewer. In building the houses the building-owner departed from this scheme, and drained four houses into one drain. Subsequently the houses were sold without any notice to the purchasers as to the system of drainage. The purchaser of one of the houses was summoned for not complying with a notice under section 1 *of the Public Health (London) Act*, 1891, *requiring him to abate a nuisance arising from defective drainage at his premises.*

Held, that the part of the drain which received the drainage of the other three houses was a sewer, and that the purchaser was not estopped by the default of the building owner from disputing his liability to repair that part of the drain.

Special case stated by a metropolitan magistrate.

The respondent was summoned under the Public Health (London) Act, 1891, by the appellant, a sanitary inspector of the Wandsworth District Board of Works, for that there existed at the respondent's premises known as "Avon," Tankerville-road, Streatham, by reason of the default of the respondent, a nuisance—namely, a foul and defective combined drain, and house drain connected therewith.

The respondent's house was built in 1887 by one Gatfield, the respondent's predecessor in title. Previously to its being built Gatfield gave written notice to the district board of his intention to build six semi-detached houses in Tankerville-road, with a plan showing the proposed system of drainage, which was that each pair of houses should have a combined system of drainage, by means of one drain into the sewer. In August, 1887, the board approved the plan by resolution, subject to the drainage works being executed to the satisfaction of the surveyor. The building of the houses was forthwith proceeded with by Gatfield, and were completed. They included one semi-detached pair called "Clyde" and "Avon" and another pair called "Wye" and "Severn." At a subsequent date the houses were sold without notice to the purchasers as to the drainage, the respondent becoming the owner of "Avon." In October, 1894, a nuisance, was found to exist at "Avon" owing to defective drainage, and the appellant served the respondent with formal notice requiring him to abate the nuisance and for that purpose to execute certain works. The respondent caused the ground to be opened for the purpose of complying with the notice, and it was then discovered by him for the first time that his house "Avon" and the houses "Clyde," "Wye" and "Severn" were all drained by the drain belonging to "Avon." The respondent thereupon refused to proceed with the work of repairing the drain beyond the point at which it received the drainage of the houses "Wye" and "Severn" on the ground that from that point the drain was a sewer, which was vested in and repairable by the local authority. A further notice having been served on the respondent and not complied with, this summons was taken out.

By the Metropolis Management Act, 1855, the duty of repairing sewers lies in the local authority, that of repairing drains in the house-owner, and by section 250 of the same Act the word "drain" shall mean and include any drain used for the drainage of one building only, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board, and the word "sewer" shall mean and include drains of every description, except drains as defined above.

The magistrate dismissed the summons subject to this case, holding that the drain in question was a sewer.

The question for the court was whether he was right in his decision.

Channell, Q.C. (*Earle* with him), for the appellant.—The drain having been improperly constructed by the respondent's predecessor in title, the respondent was estopped from alleging that by reason thereof the drain had become a sewer. Further, this combined drain was made without authority, and it did not vest in the district board. A sewer made without authority does not vest in the local authority. If a stranger connected his drain with another drain without the knowledge of the local authority, the latter drain would not thereby become a sewer.

He referred to *Bateman* v. *Poplar District Board of Works*, 33 Ch. D. 360, 35 W. R. Dig. 131; *Bateman* v. *Poplar District Board of Works* (*No.* 2), 36 W. R. 501, 37 Ch. D. 272.

R. M. Bray, for the respondent, cited *Travis* v. *Uttley*, 42 W. R. 461, [1894] 1 Q. B. 233.

WRIGHT, J.—It is unfortunate that the Metropolis Management Acts are not more complete than they are, but I think that in this case the local authority are without a remedy. If it had been known at the time what Gatfield was doing, the local authority could have proceeded against him under section 73 of the Act of 1855. If they can find him now, and he has got any means, and the Statute of Limitations has not barred their right, they can make the drain as originally ordered and recover the expenses from him, as they could compel Gatfield to do it himself, under section 83, he not having made a drain such as the local authority ordered. The case of *Bateman* v. *Poplar District Board* is abundant authority for saying that where a board or vestry has sanctioned a thing to be done in a particular way that is the same as ordering it to be done in that way, and if proceedings are taken under section 73 or section 83, it would not be in a man's mouth to say that the drain had become a sewer, and that, therefore, he could not be ordered to make it into a drain.

The application in this case is, however, not under these sections, but is under the section of the Public Health Act, 1891, which applies only where the thing is actually a drain and not actually a sewer. Here the thing is actually a sewer within the definition in section 250 of the Act of 1855. I cannot see the least ground in law for the contention which Mr. Channell put forward that there was something in the nature of an estoppel to prevent the present owner or occupier from setting up that this is a sewer. It is not contended that he was in any way privy to any representation made by his predecessor as to the construction of the sewer, even if there had been any such representation. I do not think there was.

There was simply a failure, intentional or otherwise, by his predecessor in title to construct a drain in the way authorized. I see nothing in the nature of an estoppel, and I think that the magistrate was right in the conclusion at which he arrived.

KENNEDY, J.—I agree.

Appeal dismissed.

The appellant appealed to the Court of Appeal.

July 29.—*Channell, Q.C.*, and *R. Cunningham Glen*, for the appellant.

E. Bray, for the respondent.

Lord ESHER, M.R.—The magistrate and the Divisional Court have both held that this is a sewer, that there is nothing to prevent the respondent from saying so, and that the district board must repair it. When the houses were built the building owner prepared a scheme of drainage, and sent the plan to the board, and they passed a resolution sanctioning it, subject to the drainage works being executed to the satisfaction of their surveyor. The plan showed that each pair of houses should have a combined drain. Instead of following the plan the building owner made a drain which drained the sewage of four houses. The surveyor, therefore, did not see that the drain was carried out according to the plan. The building owner, in so doing, made a sewer in fact. When the respondent examined the drain he found that it drained four houses. What, then, is his position as regards the Act of Parliament? He says that it is a sewer within the meaning of the Act, and that the district board is bound to repair it. He has not done anything wrong. He is not estopped from showing the true facts. Under the circumstances of this case—namely, that there was an order of the local board, that the surveyor did not see the work carried out as directed, and that the house is in the possession of a person who is not responsible for what was done—the respondent is not liable to repair this sewer.

We have not to decide what would happen if a stranger had come in and made a connection with the drain. The appeal must, therefore, be dismissed.

KAY, L.J.—I am of the same opinion. The question is, Is this particular conduit, to use a neutral word, a drain or a sewer? If it is a sewer it is vested in the district board, and they must keep it in order; if it is a drain the householder must keep it in order. By section 250 of the Metropolis Management Act, 1855, a drain means a drain which is used for the drainage of one building only, or a drain for draining more than one house by a combined operation under the order of a vestry or district board. Is this a drain draining one building only? or, if it drains more than one, does it do so by a combined operation under an order of the local authority? It is admitted that it is neither the one nor the other. There was a positive order of the district board, founded upon a notice and plan signed by the builder, that not more than two houses should be allowed to use one drain. This plan was sanctioned by the board. It was an order of the board authorizing two houses only to use one drain. The drain, as a matter of fact, drains four houses, and as this was not done under the order of the board, it is not a drain, but a sewer, within the meaning of the Act, and is vested in the board who must repair it. That is sufficient to decide this case.

It is said that the houses were so drained without the knowledge of the board, and that the board ought to be allowed to say that it is not a sewer. I cannot see the reasoning. The question is, *rebus sic stantibus*, Is this a drain or a sewer? The surveyor neglected the duty cast upon him by the order of the board. It may be that the board may have a remedy against some other person.

I do not think it necessary to discuss the case of a stranger forming a connection with a drain and making it into a sewer. It is not this case. The board cannot say that this drain has become a sewer by the respondent's default. The respondent was the purchaser, and had no notice of the improper drainage of these houses, and there is not the slightest ground for suggesting that he is estopped from showing the true facts of the case.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitors for the appellant, *W. W. Young & Son.*

Solicitors for the respondent, *Griffenhoofe & Brewster.*

App. Bankruptcy.
(Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) July 5, 1895.

In re SAUNDERS.
Ex parte SAUNDERS. (*a*.)

Bankruptcy—Jurisdiction—Pension of native officer of Indian Army—Order of court to set aside part of pension—Discretion of the court—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 53, *sub-section* 2—*Indian Pensions Act*, 1871 (*Indian Act No. XXIII.*), *ss.* 11, 12.

Under section 53, *sub-section* 2, *of the Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *the court has jurisdiction to order payment to the trustee in bankruptcy of a pension which, by the Pensions Act*, 1871 (*Indian Act No. XXIII.*), *ss.* 11 *and* 12, *is declared to be inalienable. The discretion of the court to make such an order is absolute, and there is no rule or canon of law that can in the least fetter the exercise of such discretion.*

Dicta *of* Vaughan Williams *and* Kennedy, JJ., [1895] 2 *Q. B., pp.* 120, 122, *that the court ought not to exercise its discretion by making an order under section* 53 *with regard to an Indian pension, overruled.*

This was an appeal by the official receiver from the decision of Vaughan Williams and Kennedy, JJ. in the Divisional Court on the 23rd of May, 1895.

The bankrupt, who was a retired major-general of the Indian Army, was in receipt of a pension amounting, after deductions, to £330 per annum.

This pension had been granted to him under the Indian Pensions Act, 1871 (Indian Act No. XXIII.), in respect of military service in India.

The county court judge sitting at Wandsworth made an order under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), that the bankrupt should pay to the trustee in bankruptcy the sum of £50 per annum out of this pension. By section 53, sub-section 2 of that Act, it is provided that "Where a bankrupt is . . . entitled to any half-pay or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the . . . half-pay, pension, or compensation or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct."

From this order the bankrupt appealed to the Divisional Court, who reversed the decision of the county court judge and allowed the appeal, being of opinion that there was jurisdiction to make the order, but that as its effect would be to defeat the object of the Indian Legislature, the order had been wrongly made and must be set aside, Vaughan Williams, J., expressing his opinion that "the courts ought not, with regard to an Indian pension, to make any order under section 53, although undoubtedly there is jurisdiction to make an order," and Kennedy, J., remarking that "the discretion should not be exercised by making an order under that section": see [1895] 2 Q. B., pp. 120 and 122.

(*a*.) Reported by T. MATHEW, Esq., Barrister-at-Law.

From this decision the official receiver now appealed.

Section 11 of the Pensions Act, 1871, provides as follows:—"No pension granted or continued by Government . . . on account of past services . . . and no money due, or to become due, on account of any such pension, shall be liable to seizure, attachment, or sequestration, by process of any court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such court."

By section 12 it is provided that "All assignments, agreements, orders, sales, and securities of every kind, made by the person entitled to any pension . . . mentioned in section 11, in respect of any money not payable at or before the making thereof, on account of any such pension . . . or for giving or assigning any future interest therein, are null and void."

Section 266 of the Indian Code of Civil Procedure, which deals with attachment of property, in its first proviso provides that "stipends and gratuities allowed to military and civil pensioners of Government, and political pensions" shall not be liable to attachment or sale.

Section 351 gives power to make orders declaring persons to be insolvent, and appointing receivers of their property.

Section 354 provides that "every order under section 351 . . . shall operate to vest in the receiver all the insolvent's property except the particulars specified in the first proviso to section 266."

Carrington, for the appellant.

Muir McKenzie, for the respondent.

Lord ESHER, M.R.—I think it is perfectly clear that the Court of Bankruptcy has, under the circumstances that exist in this case, ample jurisdiction to make an order under section 53, sub-section 2, of the Bankruptcy Act, 1883, and no rule or canon of law can be laid down so as to fetter in the least degree the exercise of the discretion of the court. In this case the learned county court judge has exercised his discretion by making the order to set aside part of this pension, but on the case going to the Divisional Court the judges exercised their discretion by reversing that order, and they were perfectly justified in so doing. Now the case comes to us and we are asked to overrule the exercise of discretion by the Divisional Court. Let us see what the circumstances of this case are.

This Indian officer had, after long service, become entitled to a pension, but, as we understand, he could in case of emergency be called upon to serve again. It is said he has no means of his own besides the pension, and that he had a wife and daughters, the wife owning the house and being in possession of an income that consists of the interest on a sum of £500. Practically, therefore, this officer has nothing beyond his pension. Now the intention of the Indian Legislature in the Pensions Act was that no part of officers' pensions should go to debtors or that the enjoyment of their pensions should be interfered with; but at the same time the Court of Bankruptcy has power to interfere with it: here, by virtue of section 53 of the Bankruptcy Act of 1883, and in India by section 27 of 11 & 12 Vict. c. 21.

In the present case the Divisional Court has exercised its discretion by declining to order part of this officer's pension to be set aside for the benefit of his creditors, and under the circumstances I entirely agree with them in that exercise of discretion. Where the only means of a man for the subsistence of himself and his family is his pension I should not, in the exercise of my discretion, order part of that pension to be set aside for his creditors. But if other circumstances existed, as, for instance, if the wife had such an income that the husband was able to devote the whole of his pension to his own personal expenses, then I should exercise my discretion by ordering part to be set aside. But I lay down no rule of law that will in any way fetter the court in the exercise of its discretion; yet if in any case in which similar circumstances existed to those which exist here, the court ordered part of the pension to be set aside, I should not myself agree with such exercise of discretion.

In the judgment of the Divisional Court there is an expression of opinion made use of by Vaughan Williams, J., that I cannot agree with, and which, I think, goes much too far. He says, "The court ought not, with regard to an Indian pension, to make any order under section 53, although undoubtedly there is jurisdiction to make an order," thus laying down, as it were, the rule that no matter what the circumstances of the case may be yet the court ought not to exercise its discretion in the case of an officer enjoying an Indian pension, by making an order under section 53. Kennedy, J., also at the end of his judgment expresses a similar opinion when he says, "the discretion should not be exercised by making an order under that section."

I think these passages go much to far. I agree, however, with the exercise of discretion by the Divisional Court, therefore this appeal must be set aside with costs.

KAY, L.J.—The words of section 53 of the Bankruptcy Act of 1883 are obviously large, and give the court large discretionary power. Where there is a discretion given to a court by statute I most emphatically say that no court ought to attempt to lay down a rule fettering in any way the exercise of that discretion by any other court under other circumstances. There can hardly be two cases of this kind so exactly alike as to enable any rule to be laid down.

I object most strenuously to any courts attempting to fetter the exercise of our discretion under this section. We have got to look at all the facts and circumstances of this particular case, and having done so, I think that the decision of the Divisional Court was a better exercise of discretion under section 53 than that exercised by the county court, and, therefore, on that ground I think this appeal must be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. I am satisfied that the judges in the Divisional Court never meant to say that, the court has no discretion to interfere under section 53 with an Indian pension. I think, however, that the courts should be loth to interfere with the enjoyment of an Indian pension under the circumstances that exist in this case.

Appeal dismissed with costs.

Solicitors for the appellant, *Ashurst, Morris, Crisp, & Co.*

Solicitors for the respondent, *G. Twyman.*

High Court of Justice.

Chan. Div. } July 5, 1895.
Chitty, J. }

In re BANKS AND JAMES'S TRADE-MARK, No. 52,762. (*a*.)

Trade-mark — Registration — "Fancy word not in common use" — "Shakspeare" cigars — Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57, *s.* 64, *sub-section* 1 (c).

The word "Shakspeare" as applied to cigars is not a fancy word not in common use within the meaning of section 64, *sub-section* 1 (c), *of the Patents, Designs, and Trade-Marks Act*, 1883.

Motion.

This was a motion by Messrs. Anstie, tobacco manufacturers, of Devizes, for the rectification of the register of trade-marks by removing therefrom the above mark, which consisted of the word "Shakspere," to be used for cigars.

The mark was registered in 1886 under the Patents, Designs, and Trade-Marks Act, 1883.

It appeared that the applicants had since 1888 sold cigarettes of their own manufacture bearing their name and also the word "Shakespeare," and Messrs. Banks & James, the owners of the registered mark (who were tobacco manufacturers at Coventry) had commenced proceedings against Messrs. Anstie for the infringement of their mark (52,762), and also of another mark (170,264), registered in 1893, and consisting of "Shakspere" and a device. These proceedings were still pending.

Levett, Q.C., and *Sebastian*, for the applicants.—Shakspeare is a family name in common use now, and not a fancy word at all.

Farwell, Q.C., and *J. Cutler*, for the respondents.—Shakspeare suggests the great dramatist to the ordinary mind, and, as applied to cigars, is a fancy word not in common use within section 64: *In re Van Duzer's Trade-mark*, 35 W. R. 294, 34 Ch. D. 623. If the fancy word must have been an invented word, where was the need of the amending Act of 1888?

They also referred to *In re Densham's Trade-mark* (*Mazawattee*), 43 W. R. 515, [1895] 2 Ch. 176.

Ingle Joyce, for the Comptroller.

CHITTY, J.—The argument in favour of the respondent rests on the meaning of the words "fancy word . . . not in common use," in section 64, sub-section 1 (c) of the Act of 1883. The section has been the subject of much litigation, and the Legislature has very properly, if I may say so, repealed that enactment and expressed itself differently in the subsequent Act of 1888.

Now is Shakspeare a fancy word, whether in common use or not? There can only be one answer in my opinion. The word Shakspeare is well-known in the English language and in common use.

It is said that it is a fancy word because it is fancifully applied. The Court of Appeal in *In re Van Duzer's Trade-Mark* did not accept that proposition as containing the explanation of the intention of the Legislature in the enactment of 1883. It comes to this that every word with no meaning with reference to the article to which it is applied is to be considered a fancy word. That is not to be deduced from the judgment of the Court of Appeal in *Van Duzer's case*.

Shakspeare, spelt in this and other ways, is now a common family name in this country. But it is said that the name as used by the respondents is the name of the great dramatist who overshadows all other Englishmen bearing the name. As to the rhetorical part of that proposition I do not feel called upon to express any dissent from it, but it appears to me that a person cannot take the name of a living person and call it a fancy word not in common use, because it was the name of a very great man many years ago. Thus "Miltonic" or some such name applied to collars would not be good as a mark under section 64. Nor could anyone under that section take the name of any celebrated Englishman living at the present time and register it as used for the first time in reference to some article.

I hold by the Act and decide in conformity with the cases on the subject that Shakspeare is not a "fancy word not in common use" within the meaning of section 64. I therefore make the order asked for to expunge the mark from the register.

Solicitors for the applicants, *Busk & Mellor*, for *Lush*, Devizes.

Solicitor for the respondent, *J. S. Salaman*.

Solicitor for the Comptroller, *Solicitor to the Board of Trade*.

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Chan. Div. } Aug. 6, 7, 1895.
North, J. }

CHILLINGWORTH v. CHAMBERS. (*a*.)

Trustee—Breach of trust—Trustee a beneficiary.

If one of two trustees who have been guilty of a breach of trust is also a beneficiary, he is liable to make good out of his share the whole of the loss that has accrued to the trust fund, and can claim no contribution from his co-trustee, when the breach of trust was committed for his benefit.

Summons by the plaintiff to vary the chief clerk's certificate.

The plaintiff, Chillingworth, was one of the trustees and executors of the will of John Wilson, deceased, and as administrator of his wife had become entitled to a beneficial interest in one-fifth of the estate. The defendant Chambers was the other trustee of the will.

A sum of £8,650 out of the trust funds had been advanced to one mortgagor upon eight mortgages. When the property was realized only £7,070 was obtained, so that a loss of £1,580 was incurred, and the trustees were ordered to pay this sum into court. By an order of the 27th of April, 1893, an inquiry was directed, "How, and in what proportions between the plaintiff and the defendant the sum of £1,580 is to be ultimately borne and paid."

Of the loss, £570 was incurred on advances made during the lifetime of the plaintiff's wife, and £1,010 on advances made since her death.

The chief clerk's certificate dated the 23rd of April, 1893, found that the whole of the £1,580 should be borne and paid by the plaintiff, and this summons sought to vary the certificate by declaring that the loss should be borne and paid by the plaintiff and defendant in equal moieties, or in the alternative that the plaintiff was only liable to pay so much of the £1,580 as represented advances made since the death of his wife.

Vernon Smith, Q.C., and *Hall*, for the plaintiff.—The plaintiff is entitled to contribution. The mort-

(*a*.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

gagor was introduced to him by the defendant, and the plaintiff assented to the defendant's proposals, honestly believing the security to be sufficient. The loss should be borne equally.

Swinfen Eady, Q.C., and *Tebbutt*, for the defendant. —A beneficiary participating in a breach of trust cannot call upon the trustees to make good the loss to the trust fund. They cited *Raby* v. *Ridehalgh*, 3 W. R. 344, 7 De G. M. & G. 104; *Prime* v. *Savell*, W. N. [1867] 227; *Bahin* v. *Hughes*, 34 W. R. 311, 31 Ch. D. 390; and *Evans* v. *Benyon*, 37 Ch. D. 329, 36 W. R. Dig. 208.

Vernon Smith replied.

NORTH, J.—I think that the chief clerk's certificate is right. The plaintiff and defendant were joint trustees, and a loss of £1,580 was incurred. The plaintiff is a beneficiary to the extent of one-fifth of the trust fund, and there ought to have been £1,730 for him and each of the four other beneficiaries. £6,920 ought to have been paid to the other beneficiaries; and the plaintiff should have taken the difference between £1,730 and £1,580—viz., £150. Both trustees are liable to make good the loss. The finding of the chief clerk is that the whole is to be borne by the plaintiff. As I have stated four-fifths of the original fund ought to have been paid to the other beneficiaries, and the residue of the existing fund paid to the plaintiff. He was only a trustee and not a beneficiary when the first four mortgages were made, but *Evans* v. *Benyon* shows that this does not affect the question. At the time the money is distributed he is entitled to a share, and he can take nothing until the breach of trust is made good. Mr. Smith suggests that he is entitled to an indemnity, but the breach of trust was committed for his benefit and he is bound to indemnify the other trustee. It follows that the summons must be dismissed.

Solicitor for the plaintiff, *Brown, Sons, & Vardy.*

Solicitors for the defendant, *Bramall, White, & Saunders.*

Court of Appeal.

From Q. B. Div. (Kay and A. L. Smith, L.JJ.) July 19, 1895.

HOWARTH *v.* SUTCLIFFE. (*a.*)

County court—Costs—Action of tort—Recovery of less than £10—Action which could have been brought in county court—Title to hereditament—Easement—Dispute as to title—County Courts Act, 1888 (51 *& 52 Vict. c.* 43), *ss.* 56, 60, 116.

The plaintiff, being the owner in fee of land of a greater annual value than £50, claimed a right by way of easement to a flow of water through a pipe lying in the defendant's land, and brought an action in the High Court for an interference with that right. The defendant denied the plaintiff's title, but paid £2 into court, which the plaintiff took out in satisfaction of his cause of action.

Held, that, as the plaintiff could not have succeeded without proving his title to the easement, the action could not have been brought in the county court, and, therefore, the plaintiff was entitled to his costs of the action.

Appeal from an order of Pollock, B., at chambers.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The statement of claim alleged that the plaintiff was the owner in fee of a mill and a public-house in the occupation of his tenant, and also a main-pipe running through the land of the defendant, and was entitled by way of easement to the flow and exclusive use of a stream of water conveyed along the said main-pipe to the plaintiff's premises; that the defendant wrongfully tapped the said main-pipe and diverted water conveyed along it and used the same, whereby the plaintiff sustained damage, and his reversionary interest was injured; and he claimed damages and an injunction.

The defendant in his statement of defence did not admit the plaintiff's title, and pleaded leave and licence from the occupier of the premises; and further, while denying liability, he brought into court the sum of forty shillings, and said that sum was sufficient to satisfy the plaintiff's claim.

The plaintiff took the forty shillings out of court, and applied to have his costs of the action taxed. The master refused to tax them on the ground that the plaintiff, having recovered less than £10 in an action of tort, which might have been commenced in the county court, was deprived of costs by section 116 of the County Courts Act, 1888.

Section 60 of the County Courts Act, 1888, enacts that a county court "shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question, whether neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of £50 by the year, or in case of an easement or licence, where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed, shall exceed the sum of £50 by the year."

It was admitted that the annual value of the hereditaments in respect of which the plaintiff claimed his easement was over £50.

Pollock, B., affirmed the decision of the master.

The plaintiff appealed.

Scott Fox, for the plaintiff.

C. A. Russell, for the defendant.

Cur. adv. vult.

July, 19, 1895.—KAY, L.J., read the following judgment:—The master in this case declined to tax the plaintiff's costs of the action, on the ground that the action was for a tort and that the plaintiff only recovered £2 damages. Pollock, B., agreed with the master, but gave leave to appeal. If the action was improperly brought in the High Court, the decision was right. It was an action by one who claimed to be owner in fee simple of a mill and public-house situate at Todmorden, in the county of York, and also claimed to be owner of a pipe passing through the defendant's land, and to the flow of water through it exclusively. The alleged tort was that the defendant had diverted the water from this pipe in his own land. It was argued that this is not like an ordinary action of trespass in which occupation of the tenement is all that need be proved, the title not coming at all in question. The plaintiff was not in occupation. His tenant was, and the plaintiff sued for injury to his reversion. Unless the defendant admitted it, the plaintiff, it was argued, would be obliged to prove his title to the pipe and flow of water through the defendant's land. In fact, the defendant, by his pleading, refused to admit this, but he said that he had diverted the flow of water with the consent of the occupier of the public-house, and that such diversion has since been discontinued during the

lease under which such occupier holds, and he never intended to renew it, and the defendant, denying liability, paid into court forty shillings. The plaintiff was satisfied with this. He took the forty shillings out of court, and applied to have his costs of the action taxed.

Reference is made to sections 56, 60, and 116 of the County Courts Act, 1888, and to various cases which I will proceed to consider, premising only that it seems to me important to put, if possible, such a construction upon the Act as will enable a plaintiff to judge, when he brings his action, whether he should bring it in the High Court or in the County Court. Section 56 of the County Courts Act, 1888, provides that actions for a debt, demand, or damages less than £50 may be commenced in a county court, provided, amongst other things, the title to any corporeal or incorporeal hereditament shall not be in question; unless, by section 60, the annual value of such hereditament shall not be more than £50 a year, or, in the case of an easement, the hereditament in respect of which, or over which, the easement is claimed shall not exceed that annual sum. Then section 116 provides that if, in an action of tort brought in the High Court which could have been commenced in the county court, the plaintiff recovers less than £10, he is not to have any costs unless, amongst other things, the High Court allows costs. In *Sewell* v. *Jones* (19 L. J., Q. B. 372), the action was to recover damages for trespass. A motion was made for a prohibition by the defendant on the ground that the land on which the alleged trespass was committed belonged to him, and the rule for a prohibition was made absolute. In *Latham* v. *Spedding*, 17 Q. B., 440, it was held that, in an action of trespass, a plea of not possessed did not raise a question of title. In *Mountnoy* v. *Collier*, 1 W. R. 179, 1 E. & B. 630, a tenant, in answer to an action for use and occupation, sought to prove that, before the time referred to, his landlord's title had expired, and it was held that this did put the plaintiff's title in question. In *Emery* v. *Barnett*, 6 W. R. 634, 4 C. B. N. S. 423, in an action for rent, the defendant had left the premises, and it was held that if he left voluntarily no question of title was raised, but otherwise if he was ejected by title paramount. In *Williams* v. *Jones*, 15 L. T. N. S. 248, the defendant, in answer to an action for removing stone from the plaintiff's land, set up an Inclosure Act, by which he alleged that the stone was reserved to him. This, it was held, raised a question of title. In *Hawkins* v. *Rutter*, 40 W. R. 238, [1892] 1 Q. B. 668, it was held that, in an ordinary action for trespass, where possession only need be proved by the plaintiff, his title does not come in question; and it was further decided that the easement referred to in section 60 of the County Courts Act, 1888, does not apply to a public right of way, but only to an easement where there is a dominant and servient tenement, and the value of either does not exceed £50 a year. If this were a simple action of trespass, in which the plaintiff need only allege and prove possession, his title would not come in question, even if the defendant pleaded that the plaintiff was not possessed. In such an action the title would only come in question if the defendant set up a title in himself to the *locus in quo*. The plaintiff here sues for injury to his reversion, and the defendant sets up a right to take the water by agreement with a former tenant of the plaintiff. That rises at once the question whether such agreement was binding on the plaintiff; in other words, whether by such an agreement the defendant acquired a title against him, and this is clearly a question of title which, if the plaintiff had not accepted the forty shillings, must have been decided at the trial. I think, therefore, that on these pleadings the plaintiff's title was put in question, and that the case could not be tried in a county court, and that the plaintiff is therefore entitled to the costs of the action.

A. L. SMITH, L.J., read the following judgment. The question is whether this action, which has been brought in the High Court, could, within the meaning of section 116 of the County Courts Act, 1888, have been commenced in a county court, for, if it could, it being an action of tort and the plaintiff having recovered only forty shillings, he is not entitled to any costs, whereas if the action could not have been commenced in a county court the plaintiff is entitled to costs and to have them taxed against the defendant. As I understand the Act and the cases thereon, the law as to whether an action brought in the High Court could have been commenced in a county court depends upon whether, if the action were brought and tried in the county court, the title to a corporeal or incorporeal hereditament exceeding in value £50 by the year would in reality come in question. If it would, then the action could not have been commenced in a county court within the meaning of the section, for by sections 56 and 60 the county court would have no jurisdiction to try it. It is agreed that in this case the value of the hereditament exceeded £50 by the year, but it was argued for the defendant that no title to any hereditament in reality came in question. It has been held, and in this I agree, that the mere assertion by the plaintiff of title to a hereditament of over £50 in value by the year is not sufficient to show that the action could not have been commenced in the county court, but in order to show that the plaintiff could not sue in the county court, he must establish the fact that a question of title did really and *bonâ fide* come in issue, not merely that the defendant has so pleaded that it possibly might do so, but that it in reality must do so, *Latham* v. *Spedding*, 17 Q. B., at p. 444.

Now the plaintiff's case is that at the time of the committing by the defendant of the wrongs complained of, the plaintiff was owner in fee of a mill and of a pipe connected therewith which was situate under the defendant's land, and as such owner was entitled to the exclusive use of the water conveyed by that pipe to his mill for the use of his tenants, and that in the years 1878 and 1882 the defendant secretly and wrongfully bored into the pipe and tapped the water running therein, whereby the plaintiff's title to the pipe and to the exclusive use of the water running therein has been interfered with and his reversion in the mill has been injured. All these allegations are put in issue by the defendant, and in addition he sets up a leave and licence by the plaintiff's tenant to him to do what is complained of, and he also, but without admitting liability, pays forty shillings into court. The question is, could the plaintiff succeed in this action by mere proof that he was, when the wrongful acts were committed, in possession of the mill by his tenants who were then enjoying the use of the water? If such proof would suffice, I should hold again, as I did in *Hawkins* v. *Rutter*, that title to a hereditament did not come into question within the meaning of the sections. But would it suffice? Suppose the plaintiff went to trial merely proving that he was in possession of the mill by his tenants, who were enjoying the water, how would that prove that the pipe under the defendant's land was the plaintiff's property, and that the defendant was in the wrong in boring into the pipe which was upon his own land? It would prove nothing of the kind, and in my judgment if the plaintiff proved nothing more than possession of the mill he ought to be non-

suited. It should be observed that the plaintiff could never prove that he or his tenants were in possession of the pipe, for this was under the defendant's land and not in his possession or that of his tenants. As the plaintiff cannot establish his case by proving a mere possessory title, I am of opinion that he must go further and prove what is his title to the mill and pipe. This being disputed, the title to a hereditament within the meaning of the Act must come in question. It is true that the plaintiff has taken out of court the forty shillings paid in by the defendant with a traverse of the plaintiff's title as adequate damages for the loss he has sustained by the alleged wrongful acts of the defendant; but how does this make the action one which could have been commenced in the county court, for, had it been tried there, the county court would have had no jurisdiction to try even whether the forty shillings was sufficient or not, for this never could have been ascertained until the plaintiff's right to the pipe and mill had been tried out? Kay, L.J., has gone through the cases, and I do not refer to them again. In my judgment, this appeal must be allowed, with costs here and below, and the plaintiff is entitled to have his costs taxed against the defendant.

Appeal allowed.

Solicitor for the plaintiff, *G. Trenam*, for *Sager*, Todmorden.

Solicitor for the defendant, *Kirkman*, for *Eastwoods & Sutcliffes*, Todmorden.

From Q. B. Div. (Lindley, Lopes, and Rigby, L.JJ.) July 15, 1895.

METROPOLITAN COAL CONSUMERS' ASSOCIATION (LIMITED) *v.* J. & A. SCRIMGEOUR & Co. (*a.*)

Company — Winding up — Misapplication of funds— Placing shares—Brokerage—Ultrà vires.

Where brokers are properly employed by the directors in the issue of the capital of a company, and the payment of a commission per share is a fair and just payment for services rendered, such payment is not ultrà vires *on the part of the company.*

Lydney and Wigpool Iron Ore Co. *v.* Bird, 34 *W. R.* 749, 33 *Ch. D.* 85, *and* In re Faure Electric Accumulator Co., 37 *W. R.* 116, 40 *Ch. D.* 141, *distinguished.*

The plaintiff company was incorporated on the 31st of January, 1889, with a capital of £250,000, divided into 50,000 ordinary shares of £1 each, and 20,000 preference shares of £10 each.

The company was, by an order dated the 20th of January, 1890, ordered to be wound up, and this was an action brought by the official liquidator to recover from the defendants, a firm of stockbrokers, the sum of £26 11s. received by them from the company on the 11th of March, 1889, for brokerage or commission.

By the memorandum of association one of the objects of the company was stated to be "to pay out of the funds of the association all brokerages, commissions, legal and other expenses for the issuing of the capital and in respect of the formation of the association."

Article 113 of the articles of association was as follows: "The business of the association shall be managed by the board, who may pay all brokerages, if any, payable in respect of the placing of any of the shares in the association"; and article 120 declared that the board should have power, "out of the first funds of the association, to pay all costs . . . of placing the shares and debentures of the association, and on behalf of the association to make arrangements or enter into any agreement or agreements they think expedient with any person or persons for the purpose of procuring the capital required by the association."

On the 11th, 12th, and 13th of February, 1889, the defendants made application to the company, in the names of certain clients of theirs, for preference and ordinary shares in the company, and shares were allotted to these clients accordingly.

At a meeting of the subscribers to the memorandum and articles of association, of whom the secretary *pro tem.* was one, it was resolved, "That the secretary *pro tem.* be, and he is hereby, authorized to inform any brokers or agents who may be disposed to assist in placing the capital of the association, that the association will pay in consideration of such assistance a brokerage of 5s. per share on preference shares and 6d. per share on ordinary shares."

On the 11th of March, 1889, the secretary forwarded to the defendants a cheque for £26 10s. in respect of brokerage on the above application.

In August, 1892, the fact of the payments for brokerage came to the knowledge of the liquidator, and, the matter having been brought before the chief clerk, the latter gave directions for the present action to be brought.

The trial of the action took place in the Mayor's Court, London, on the 18th of February, 1895, when the Recorder, Sir Charles Hall, gave judgment for the defendants. From that decision the plaintiff company appealed to the Divisional Court, on the ground (1) that there never was any contract between the plaintiff company and the defendants, and that, in the absence of any contract, the defendants became participators in a breach of trust on the part of the directors; and (2) that, even if the £26 10s. had been paid in pursuance of a contract, such payment was *ultrà vires* the association.

The Divisional Court (Day and Wright, JJ.) dismissed the appeal.

The plaintiff company, by leave, appealed.

Swinfen Eady, Q.C., and *R. J. Quin*, for the appellants.—The payment of this brokerages was *ultrà vires*, being equivalent to issuing shares at a discount: *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 34 W. R. 749, 33 Ch. D. 85; *In re Faure Electric Accumulator Co.*, 37 W. R. 116, 40 Ch. D. 141.

They also referred to *In re Licensed Victuallers Mutual Trading Association*, 37 W. R. 674, 42 Ch. D. 1; and *Ooregum Gold Mining Co. of India* v. *Roper*, 41 W. R. 90, [1892] A. C. 125.

RIGBY, L.J., referred to *In re Almada and Tirito Co.*, 36 W. R. 593, 38 Ch. D. 415, and *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409.

Jelf, Q.C., and *Toller*, for the respondents, were not called upon.

LINDLEY, L.J.—This is an attempt to push some sensible and well-recognized doctrines of this court to an absurdity, and I think it is the duty of the court to resist any such extension of these doctrines. The law is clear that limited companies cannot issue shares at a discount. What is the meaning of that? The meaning of that is that shares cannot be issued upon terms which are inconsistent with the provisions of the statute relating to limited companies; or, in other words, the statute having said that every holder of a share shall pay so much of it, the company cannot issue the share upon the the terms that the share-

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

holder shall pay less. That is the whole of the theory of issuing shares at a discount.

Now how can this be said to be issuing shares at a discount? The transaction here is this, that the company have authorized their directors to pay brokers a fair and reasonable commission for their services in procuring people to take shares. That is what they have done. What is there wrong in that? What is there contrary to the Act of Parliament in that? What is there illegal in that in any sense or shape? I confess I cannot see the slightest sign of any such thing. That it may be so manipulated as to lead to the issue of shares at a discount is possible, and when such a case arises we will deal with it; but we are free from everything of the sort here. I do not myself attach the slightest importance to the article in the memorandum of association. That clause saying it shall be one of the objects of the company to pay brokers is, to my mind, clear moonshine; it is an authority to the directors to apply the money of the company in that way if the directors, in their judgment, should think it expedient; but to suppose that a clause is any the better for being in the memorandum would be a grievous legal mistake. The directors are authorized to do it, and they have done it.

Now it is said, not only that the directors are liable for misapplying the funds of the company, but that the recipients of the money are liable. That is a step further than any case has gone yet. I do not mean to say, as a matter of law, a company cannot maintain an action at law to recover money which is its own if it is improperly in the hands of other people. I daresay it can, but I am addressing myself to the root of this question, not to the question of remedy, whether it is legal or equitable, but I am addressing myself to the question whether there is anything wrong in this, or whether there is anything *ultrâ vires*, and I cannot come to the conclusion that there is anything wrong in it at all. My brothers have put a case of paying newspapers for advertising a company, and Mr. Quin felt that the analogy was rather close, and he went the whole length of saying that this is an illegal payment, and that the company could recover back from the newspapers money paid for advertisements. All I can say is it startles me to hear any such doctrine. No court has ever sanctioned such a theory, and I do not suppose any court ever will. But then Mr. Swinfen Eady says that the case has been decided by Kay, L.J., in *Re Faure and the Electric Accumulation Co.*, and also by this court in the *Lydney and Wigpool Iron Ore Co.* v. *Bird*. Now as regards the *Lydney and Wigpool Iron Ore Co.* v. *Bird*, although there is in the judgment in that case a statement to which Mr. Swinfen Eady referred and to which I stand—"that it would be wrong to make the company pay for the issue of its own shares; no part of the capital of the the company could be properly so applied"—it has application, of course, to the circumstances of that case, and the circumstances of that case have not the slightest resemblance to the circumstances in this case. There was a person named James Bird, who was a promoter of the company, and he secretly made a profit, at the expense of the company, of £10,800, and he was made liable for it. He said, "Well, but I have spent £5,000, as a consideration which I gave to Wm. Bird for guaranteeing me that shares should be taken up in this company," and we disallowed James Bird that bill. The whole thing was a juggle from beginning to end, and we disallowed it on the ground that it was an improper transaction, and so it was. It has nothing whatever to do with, and is far away and remote from, such a case as this, where there is no juggle and no impropriety at all.

As regards *In re The Faure Electric Accumulation Co.* no doubt Kay, J. (as he then was), did apparently hold that these brokerage payments were illegal, being paid out of capital certainly, and he made the directors there liable for them. If that decision is understood as going as far as to compel us to hold that the payments in this case are illegal, I should say that I dissent from it, and that it goes a great deal too far. I doubt very much, if you look at the facts, whether the Kay, J., did intend to go as far as that. I doubt whether he regarded the commissions there, as ordinary commissions of a reasonable amount payable in the ordinary course of business. I think he treated them rather as improper payments, rather in the shape of bribes. I have not looked exactly at the amount of the commission, but I think that was what was running in his head, and of course, if he took that view, he was perfectly justified in holding the directors liable to replace the money which they had misapplied. If it is to be understood as going further, then I say it appears to me that there is neither principle nor authority to support such an appeal as this, and it must be dismissed with costs.

I should just add that in the *Lydney & Wigpool Iron Ore Co.* v. *Bird*, the money sought to be recovered was not money which was paid by the company for placing shares, and it was money which they objected to pay in that way. It is wide of this.

LOPES, L.J.—I am of the same opinion. It is said that these payments of commission to brokers for issuing shares of the company are *ultrà vires*, and, therefore, illegal. Now, so far as I can ascertain, no case hitherto seems to have gone that length. The case chiefly relied upon was *In re Faure Electric Accumulation Co.*, and I cannot help thinking, after reading it as well as I can, that that case is different, and that the learned judge, Kay, J., proceeded upon different grounds. I think that what he thought was this: he thought that the payments of commission to brokers there were not *bonâ fide* payments for work and labour done, that they were not payments in the ordinary way of business, but rather in the nature of bribes. I think, if the case is carefully read, that that is the conclusion that anybody so reading it, would arrive at. I do not think for a moment that he regarded the payments there in the same light as we are justified in regarding the payments here; and it is not contended here that these payments to the brokers at any rate were not *bonâ fide* and honest, and really made in respect of services rendered.

In the result I come to the conclusion that, in any case where it is made out—as it is here—that the services of the broker are reasonably necessary, that the brokers are properly employed in the issue of the capital of the company, and that the payment of a commission of so much per share is a fair and just payment for services rendered, there is no ground, either of reason, of justice, or of principle, why the payment should not be held to be *intrà vires* and unimpeachable.

I think, therefore, that the decision of the court below was right, and that this appeal should be dismissed.

RIGBY, L.J.—I am of the same opinion. I do not think that there is anything in the case of *The Lydney & Wigpool Iron Ore Co.* v. *Bird* that would at all justify the decision that we are asked to arrive at in this case. There a sum of £10,800 of concealed property was taken by a promoter out of the capital of the company, under an appearance, which was different from the reality—that appearance being that

it was *bonâ fide* purchase-money. There the only question was, Can he be allowed out of that, a sum he paid to his broker for guaranteeing shares? An absolutely different case from the present.

With reference to *The Faure Electric Accumulator Company's* case I observe that that case is a very peculiar one in some respects. First of all, the man who cast doubt on the company in that case was the broker himself, Pincoffs, who apparently had in his pocket an offer from his client, Morris, to take shares. I say, apparently, I think that was the fact in the case. I do not think he could have been successful in going off for a client and getting him in so short a time; and for that work he got upwards of £20,000. No doubt, looking at it as a percentage on the shares of the company—the nominal value of the shares—that might not be outrageous; but to suppose that a company can fairly pay upwards of £20,000 for work done in that way and call it commission, is at any rate a very different state of things from that which we have to deal with here, where there was actual work done in respect of the shares, and where the brokers were paid what appears to be shown, or is allowed to be, an ordinary brokerage for the work that they did. I confess I am not prepared to hold that any expenditure of a company with a view to having its capital placed is necessarily wrong. If you can place the capital by way of advertisement, I do not see why you cannot incur, in the regular way of expenditure, any brokerage to brokers to procure the applications.

I think for that ground the action altogether fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitors, *Lumley & Lumley; H. B. Wade.*

From Q. B. Div.
(Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) July 3, 1895.

DOBELL & Co. *v.* STEAMSHIP ROSSMORE Co. (*a.*)

Admiralty—Ship—Bill of lading—Liability of owner—Exception — Condition — Due diligence to make ship seaworthy—Want of diligence on part of servant.

A bill of lading contained a clause exempting the shipowner from liability for loss resulting from faults in navigation, provided due diligence was exercised by him to make the ship seaworthy. The ship's carpenter, who was admitted to be a competent workman, omitted to close one of the portholes before the ship started, in consequence of which the ship was rendered unseaworthy.

Held, that the shipowner had not satisfied the proviso on which his exemption from liability depended.

Appeal from a judgment of Lawrance, J.

The action was brought in respect of damage done to the plaintiffs' goods shipped on board the defendants' steamship under a bill of lading for carriage from Baltimore to Liverpool. The goods in question, which were a cargo of oilcake, were put on board the ship through a porthole, and, after the loading was completed, the ship's carpenter omitted to close the porthole, in consequence whereof sea water entered the vessel during the voyage and the plaintiffs' cargo was damaged. The evidence showed that when the vessel started on her voyage it would have been impossible to obtain access to the porthole, for the purpose of closing it, without removing a great quantity of cargo. It was admitted that the carpenter was a competent workman, and it was not suggested that the defendants had been in any way negligent in appointing him.

The bill of lading contained the following exemption clause:—"Neither the vessel, her owners, agents, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel, provided due diligence has been exercised by her owners to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied. It is also mutually agreed that the shipment is subject to all the terms and provisions of, and all the exceptions from liability contained in, the Act of Congress of the United States, approved on the 13th day of February, 1893." This Act of Congress, which is generally known as the Harter Act, contains the following clauses:—(2.) It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence properly to equip, man, provision, and outfit the said vessel, and to make the said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. (3.) If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality, or vice of the things carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the skipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

At the trial of the action Lawrance, J., gave judgment for the plaintiffs for the agreed sum of £70.

The defendants appealed.

Pickford, Q.C., and *Bateson*, for the defendants.—This case is within the exemption clause. The proviso to that clause does not put on the shipowners a liability to make the ship seaworthy, but only to use due diligence to make it so. Here the defendants used due diligence by employing competent agents and workmen.

Joseph Walton, Q.C., and *Carver*, for the plaintiffs.—The defendants have not satisfied the proviso to the exemption clause. The meaning of the proviso is not merely that the owners should be diligent personally, but that they should use diligence by their agents. It is not enough that they should appoint competent agents. Secondly, assuming that the defendants have satisfied the proviso, this case is not within the exemption, which only applies to loss arising from faults in navigation during the voyage, and not to loss arising from unseaworthiness when the ship starts.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The following cases were cited: *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 26 W. R. Dig. 216; *Hedley* v. *Pinkney & Sons Steamship Co.*, 42 W. R. 497, [1894] A. C. 222; *The Warkworth*, 32 W. R. 479, 9 P. D. 20; *Carmichael & Co.* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association*, 35 W. R. 793, 19 Q. B. D. 242; *The Ferro* [1893], P. 38, 41 W. R. Dig. 223.

Lord ESHER, M.R.—We have here to deal with an English bill of lading. The defendants, who are shipowners, undertook to bring a cargo of oilcake from America to England and deliver it. During the voyage the cargo was damaged by reason of sea-water having come through a porthole. For this damage the owners of the cargo have brought an action on the bill of lading. The defendants admit the damage, but they say that the bill of lading contained certain exceptions to their liability, and that this case is within those exceptions. The bill of lading incorporates by reference certain words of an American statute. That statute, as a statute, is of course not binding on the parties, but we must construe this bill of lading by reading into it the words so referred to. The introduction of these words is clumsily done, for it involves a repetition; but the effect is that the exception to the shipowner's liability is made to depend on a condition. If the owner exercises due diligence to make the vessel seaworthy, then the exception is to apply, and the owner is relieved from liability for damage or loss resulting from faults or errors in navigation, or in the management of the vessel.

The defendants say that, if the vessel was in fact not seaworthy, they, at any rate, exercised due diligence to make her seaworthy, and, therefore, satisfied the condition on which the exception depends. But the owners themselves were not present at the port of sailing. Even supposing that, for this purpose, the manager was the owner, he was not there. How can it be contended that it was the intention of the parties that the manager should himself be present at the port of sailing to make the ship seaworthy? The meaning of the condition must be that the owner is, by himself or by the agents whom he employs, to see to the seaworthiness of the ship. Here, if the ship was not seaworthy, it was owing to the fault either of the carpenter or of some agent appointed by the owners to employ a carpenter.

Now, was the ship seaworthy? She started on her voyage with one of her portholes open. If it had been easy by ordinary appliances at any time to close the porthole, the ship would not have been unseaworthy. But she started in such a condition, and with her cargo so stowed, that it would have been impossible to close the porthole except with very great trouble and exertion. She was, therefore, not seaworthy at starting, and she was unseaworthy through the fault of some agent appointed by the owners to make her seaworthy before she started. The defendants, therefore, have failed to satisfy the condition on which their exemption from liability depended, and the decision of the learned judge was right.

The appeal must be dismissed.

KAY, L.J.—This is an inartificial bill of lading incorporating the words of two sections of the American statute called the Harter Act. The shipowners meant to exempt themselves from all liability for damage or loss resulting from faults or errors in navigation or in the management of the ship. That seems to me to mean faults or errors committed during the voyage. But before the owners can be entitled to that exemption, they are to exercise due diligence to make the ship seaworthy. If they fulfil that condition, they are not to be liable for faults in navigation. The plaintiffs say that that of which they complain in this case was not a fault in navigation, and, therefore, is not within the exemption. The cargo was loaded through a porthole, and that porthole was insufficiently fastened down before the ship left the port of loading. In consequence of this sea-water got into the ship and did damage to the cargo. Was that a loss resulting from a fault in the navigation? It is not necessary to decide that question; but I think that faults in navigation are faults in sailing the vessel during the voyage, and, if I am right in that view, the present case would seem not to come within the exemption at all.

But did the shipowners fulfil the condition on which they would be entitled to claim exemption? Did they use due diligence to make the ship seaworthy? She was in fact unseaworthy; for the porthole which had been left unfastened could not have been closed without an expenditure of considerable time and labour. The case of *Steel* v. *State Line Steamship Co.* shows that under such circumstances a ship is unseaworthy. Was that owing to a want of diligence on the part of the owners. They say it was not, because they appointed a competent and proper carpenter. I do not agree with that contention. I think that the meaning of the proviso was that the owners were by their own eyes, or the eyes of others, to see that the ship was seaworthy before she started. This bill of lading does not exempt the owners from liability for the negligence of their agents, merely because they have appointed competent agents. I am of opinion that the negligence of the carpenter in this case was negligence on the part of the owners within the meaning of the proviso to the exemption clause of this bill of lading, and that, therefore, the plaintiffs are entitled to judgment.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Weightman, Pedder, & Co.*

Solicitors for the defendants, *Batesons, Warr, & Wimshurst.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) July 2, 1895.

In re COALPORT CHINA Co. (LIMITED). *Ex parte* MIDDLETON AND BELL. (*a*.)

Company—Transfer of share—Directors' discretion to refuse—Rectification of register—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 35.

Where the directors have a power to refuse to register transfers of shares, whether the power is general or is a power to refuse for stated reasons, it is for those who allege that the directors have not properly exercised the power to give evidence to that effect.

The directors of a company had power to refuse to register any transfer where they were of opinion that the proposed transferee was not a desirable person to admit to membership.

The directors considered the registration of a proposed transfer, and decided to refuse it, but gave no reasons.

Held (*reversing the decision of* Kekewich, J.), *that*

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

the directors had not improperly exercised their power, and that the court could not interfere.

Appeal from a decision of Kekewich, J.

The Coalport China Co. (Limited) was registered under the Companies Acts in 1862.

Most of the £100 shares of which the capital consisted were held by the founder and his family.

Article 33 of the articles of association was as follows: "The directors may refuse any transfer (*a*) where the company has a lien on the shares, (*b*) where it is not proved to their satisfaction that the proposed transferee is a responsible person, (*c*) where the directors are of opinion that the proposed transferee is not a desirable person to admit to membership; but paragraphs (*b*) and (*c*) of this clause shall not apply where the proposed transferee is already a member."

T. A. Middleton, the holder of one share in the company, and an original subscriber to the articles of association, agreed to sell his share to W. Bell for £160, and gave notice to the company of his desire, pursuant to an article which provided that no share should be transferred to a person not a member of the company so long as the founder, or, failing him, some member of the company, was willing to purchase the share. After the expiration of the time limited for the exercise of the option by the founder or other member, Middleton forwarded to the secretary a transfer of the share to Bell at the price of £160.

The secretary, in reply, informed Middleton that the directors were unable to agree to the proposed transfer, and at a meeting of the board a resolution was passed that the transfer be refused. No reason was given for the refusal.

A motion was accordingly made by Middleton and Bell under section 35 of the Companies Act, 1862, for rectification of the register of the company by the substitution of Bell's name for that of Middleton. There was no lien on the share. Evidence was given that Bell was a responsible person, and this the directors did not deny.

Kekewich, J., was of opinion that the directors had only a discretion to refuse a transfer on a particular ground, and that they had not shown that they had properly exercised their discretion. He therefore made the order asked.

The company appealed.

Bramwell Davis, Q.C., and *G. B. Freeman*, for the appellants, referred to *In re Gresham Life Assurance Society, Ex parte Penney*, 21 W. R. 186, L. R. 8 Ch. App. 446.

Warrington, Q.C., and *G. Cave*, for the respondents.—The directors had a special, not a general, discretion, and it does not appear that they made a single inquiry as to the proposed transferee's eligibility.

They referred to *In re Stranton Iron and Steel Co.*, L. R. 16 Eq. 559; *In re Bell Brothers (Limited), Ex parte Hodgson*, 65 L. T. N. S. 245, 40 W. R. Dig. 44; and *Moffat* v. *Farquhar*, 26 W. R. 522, 7 Ch. D. 591.

LINDLEY, L.J.—It appears to me that this appeal must succeed. The question raised is an extremely simple one, and before I read the articles, I will state shortly the principle which I think is applicable to it. Under the articles the directors have a power to refuse a transfer—I will not say at present for what reasons—I will allude to them presently. They do refuse a transfer and they do not say why. The argument is, and the view taken by the learned judge is, that it is for them to justify their conduct. Now that appears to me to be wrong. It appears to me it is for those who say that they, having the power, have exercised it improperly, to give some evidence to that effect. Here there is absolutely none. Therefore, in common fairness, as a matter of justice between man and man, it strikes me that this decision is based upon an erroneous principle.

Now let us see whether there is anything in the articles which renders that line of reasoning open to observation or excludes it. That was precisely the ground upon which the Court of Appeal in the case of *Ex parte Penney*, differed from the then Master of the Rolls. I am aware that the articles were not quite the same, but the Master of the Rolls had there held that the directors are bound not only to act *bonâ fide* (which of course they are), but are bound to preserve some kind of evidence that they act *bonâ fide*, so that the court may see it. The Court of Appeal said "No, that is not part of their business; show us that they have not acted properly, give us evidence of that kind and we have ample power." Now we must bear in mind that the power of the court invoked in this case rests on the 35th section of the Companies Act, 1862, which enables the court to rectify the register if the name of any person is, without sufficient cause, entered in or omitted from the register, or if default is made, or unneccessary delay takes place. Now who is to prove that? Surely it is for the person invoking the assistance of the court to prove that the name of some person is without sufficient cause entered on or omitted from the register. When all the applicant can say is, the directors have the power to refuse and they have refused, he has not discharged the burden which is imposed upon him.

Mr. Warrington and Mr. Cave have argued that although that may be true under ordinary articles it is not applicable to the present articles, for this reason. These articles are framed upon the theory that the shares shall not be transferred by any shareholder until he has offered them to the other shareholders (that is the short point), and that after he has offered them, and the other shareholders have elected not to buy them, then he has a right to transfer them subject to article 33. [His lordship read clauses (a) and (b) of the articles, and continued:—] The applicant has brought forward evidence to show that he is a responsible person, and nobody says he is not. Then (c):—"Where the directors are of opinion that the proposed transferee is not a desirable person to admit to membership." Now (a) and (b) being excluded, the directors must have acted, if they have acted at all properly, under (c). There is no evidence to show that they have not acted under (c) and no evidence to show that they have acted improperly. Now the contention is, that although they have considered whether they will pass this transfer or not, whether they will approve of the transfer and of the transferee—although they have considered that, and have refused to do it, yet because they have not said or because the minutes do not show that they came to the conclusion that the proposed transferee is not a desirable person—because that does not appear, therefore it is to be assumed that they have improperly exercised this power. I do not assume anything of the kind, nor do I think it is necessary in point of law for the minutes to show or for the directors to show, or for them to state, in the absence of evidence calling upon them to make any statement, that they came to a resolution in those terms. Now it is said that unless they do, the court cannot hold that they have considered the question. Now what is the question? The question for them to consider is whether they will or will not refuse to register the transfer. That is the question. These are only reasons or grounds for it. They have considered that question, and after the evidence given by the applicant I cannot help feeling, inferring, and

believing that they have considered the other question, whether he is or not a desirable person. There is no evidence whatever to show that they have acted in the slightest degree improperly or exceeded their powers.

Now I wish to be cautious in this matter, because I have not the slightest doubt that the court has ample power to control the refusal of directors, or the exercise by them of their power to refuse, provided there is any evidence whatever which justifies the court in coming to the conclusion that they have not done their duty; but in the absence of all such evidence the court has no right to presume—(it is contrary to all ordinary principles of justice)—that they have done wrong; on the contrary, it must be presumed that they have done right. I consequently think that the appeal should be allowed with costs here and below.

Lopes, L.J.—I am of the same opinion, and have nothing to add.

Rigby, L.J.—I have only to add, in consequence of Mr. Warrington's argument that where the power is absolute a different rule applies to where the power is limited, that I do not think that distinction can be maintained. Even although, in terms, the power is absolute, it is a fiduciary power to be exercised for the benefit of the company, and with due regard to the rights of the transferor, so that no power is altogether absolute. But even in the case of a power absolute in terms, the courts have held that the directors are not bound to say, "We throw aside all external considerations and apply ourselves to the exercise of the power in the proper manner," and if they need not do it in that case, I do not see why they should do it when the power itself arises only in certain circumstances.

The fact that they have resolved, must be taken, in the absence of positive evidence sufficient to satisfy the court to the contrary, that they had resolved within their jurisdiction and for right reasons.

Appeal allowed.

Solicitors, *Hepworth & Co.*; *Powell & Rogers.*

From Lancaster Palatine Court of Chancery. (Lindley, Lopes, and Rigby, L.JJ.) July 5, 1895.

MacIver *v.* G. & J. Burns. (*a.*)

Practice — Writ — Domiciled Scotchman carrying on business in England under firm name—Service on manager in England—Motion to set aside—Ord. 48a, *r.* 11.

B., a domiciled Scotchman, residing in Glasgow, carried on business there and also in Liverpool under the firm name of G. & J. B., but the business belonged to B. alone. The plaintiffs, who had formerly carried on another business in partnership with B., issued a writ in the Palatine Court against G. & J. B., and served it upon the manager of the Liverpool office of G. & J. B. The writ claimed relief in respect of the partnership formerly subsisting between the plaintiffs and B.

Held, that such service was not authorized by ord. 48a, *r.* 11, *and must be set aside.*

This was an appeal from an order of the Vice-Chancellor of the County Palatine of Lancaster refusing to make any order on a motion by the defendants, to set aside the service of the writ in the action.

(*a.*) Reported by Arnold Glover, Esq., Barrister-at-Law.

In September, 1856, articles of partnership were entered into between James Burns, George Burns, John Burns, and Charles MacIver for the purpose of carrying on in partnership the business of steamship owners under the name of the Clyde Steam Navigation Co.

Several changes took place in the constitution of the said partnership, and ultimately, in the month of April, 1895, the partners therein were Sir John Burns, Bart., and the plaintiffs, Charles MacIver, Henry MacIver, and William MacIver.

On the 15th of April, 1895, Sir John Burns gave notice to the plaintiffs, under a clause in the partnership articles, of his desire to withdraw from the partnership, and on the 13th of June the plaintiffs gave Sir John Burns notice of their acceptance of his offer.

Sir John Burns was a domiciled Scotchman carrying on business in Glasgow as a shipowner under the style of G. & J. Burns. He had also, for the purposes of his business of G. & J. Burns, an office in Liverpool, of which R. M. Deans was the manager.

On the 20th of June, 1895, the plaintiffs issued a writ in the Liverpool District of the Palatine Court against "G. & J. Burns," whereby they claimed (1) an account as between the plaintiffs and the defendants of the partnership lately subsisting between them, under the name of the Clyde Steam Navigation Co.; (2) damages for breach by the defendants of their agreement or obligation to observe good faith towards the other partners; and (3) that the plaintiffs or any of them might be appointed receivers or receiver of the partnership assets.

This writ was served upon R. M. Deans, the manager of the Liverpool business of G. & J. Burns. It was accompanied by a notice in the following terms: "We hereby give you notice that you are served with the writ in this action as a person having the control or management of the partnership business." A notice of motion for a receiver was served along with the writ.

On the 21st of June the defendants gave notice of motion that the service of the writ in the action and all subsequent proceedings therein might be set aside on the ground that the business carried on under the name of G. & J. Burns belonged to and was carried on solely by Sir John Burns, who was domiciled and resident in Scotland outside the jurisdiction of the court.

On the 25th of June the Vice-Chancellor refused to make any order upon the defendants' motion to set aside service of the writ, his honour being of opinion that the writ was properly served under a rule identical in its terms with ord. 48*a*, r. 11, of the Rules of the Supreme Court, and that the cases of *Russell* v. *Cambefort*, 37 W. R. 701, 23 Q. B. D. 526, and *St. Gobain Channy & Cirey Co.* v. *Hoyermann's Agency*, 41 W. R. 563, [1893] 2 Q. B. 96, relied upon by the defendants, did not apply to a Scotch defendant.

Ord. 48*a*, r. 11, is as follows: "Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name, and so far as the nature of the case will permit all rules relating to proceedings against firms shall apply."

The defendants, by leave, appealed.

Sir R. Webster, Q.C., and *P. Ogden Lawrence*, for the appellants.—Rule 11 of order 48*a* was intended to apply to persons carrying on business under sham names, such as "Waukenphast," and was never intended to authorize the service of a writ on a foreigner or Scotchman. The rule gives no justification or right to serve a Scotchman carrying on business in England. That is a matter for service out of

the jurisdiction, in respect to which there is a whole code of rules. If there were any doubt about the matter on principle, the cases of *Russell* v. *Cambefort* and *St. Gobain Channy and Cirey Co.* v. *Hoyermann's Agency* are conclusive. They apply with even greater force to a Scotchman than to a foreigner. [They were stopped by the Court.]

Cozens Hardy, Q.C., and *T. R. Hughes*, for the respondents.—Rule 11 is expressed in very general terms, and *Russell* v. *Cambefort* gives the only limitation that ought to be set upon it. Scotchmen are subjects of Parliament, and it is not unreasonable to suppose that Parliament may have considered them in authorizing these rules: *Grant* v. *Anderson*, [1892] 1 Q. B. 108, 40 W. R. Dig. 191. The judgments of Lord Esher and A. L. Smith, L.J., in *St. Gobain Channy and Cirey Co.* v. *Hoyermann's Agency* seem to suggest this distinction. If the same principle applies to Scotchmen as to foreigners, that case is against our contention, but the *ratio decedendi* there was allegiance, not local domicile. All Sir John Burns' dealing with us were carried on under the name of G. & J. Burns, and we are suing him in respect of something done by him under that name. *Worcester City and County Banking Co.* v. *Firbank, Pauling, & Co.*, 42 W. R. 402, [1894] 1 Q. B. 784, proves that rule 1 of order 48*a* applies to foreigners not subject to the jurisdiction of English courts except so far as as they are so subject under the order itself.

LINDLEY, L.J.—This is an appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster, refusing to make an order in the terms of the notice of motion, which in substance was to set aside the writ and all subsequent proceedings in this action of *MacIver* v. *G. & J. Burns*. The action was brought by three gentlemen of the name of MacIver against Sir John Burns, sued as G. & J. Burns, and it appears from the indorsement on the writ that the action was a partnership action to take the accounts and wind up the business of what is called the Clyde Steam Navigation Co. The Clyde Steam Navigation Co. was a partnership between the plaintiffs and Sir John Burns, and the dealings and transactions of that partnership relate to the sailings of steamships from the Clyde. Now Sir John Burns being sued simply as a member of that firm, and being a domiciled Scotchman, not residing here, and having nothing whatever to do in this country so far as the cause of the action is concerned, nevertheless does carry on business in Liverpool, apparently under the name of G. & J. Burns, and in consequence of that circumstance he is sued under that firm name, as I will call it. The question is whether that is right.

Now, apart from all rules, let us consider the thing on principle. Here is a partnership action between certain partners. The proper parties to that partnership action are the individual partners. We have ascertained by inquiry that Sir John Burns is not described in the partnership articles as a separate firm carrying on business under the name of G. & J. Burns. Whether it would have made any difference if he had been, I do not pause to inquire. Now, being sued in respect of that partnership business, and being a Scotchman domiciled in Scotland, and not being resident here, if he is to be sued at all in this country, it ought to be under order 11, which relates to the service on and suing of persons not resident in this country. That is the proper order to go under *primâ facie*. But then it is said, on behalf of the plaintiffs, "As he carries on business in Liverpool under the name of G. & J. Burns, we can sue him under rule 11 of order 48*a*." Order 48*a* refers to actions by and against partnerships. The first ten rules of it relate to actions by and against partnerships only. Partnerships can now be sued in the name of the firm, which they could not before, and inasmuch as they had before to be sued in the names of the persons who composed the firm, it was necessary to frame some rules to carry out the procedure, and rules 1 to 10 of order 48*a* are addressed to motions of that kind.

Then comes rule 11, which has really nothing on earth to do with the partnership rules, but which is tacked on to apply to the case of a single individual who carries on business either in the name of a firm or, as it is expressed in the rule, under some name other than his own. Rule 11 is expressed in this way: "Any person carrying on business within the jurisdiction" —there is no reference whatever to persons carrying on business without the jurisdiction—"in a name or style other than his own name may be sued in such name or style as if it were a firm name." Pausing there, that does not give the court any power to sue a person abroad in the firm name. Then the rule runs on: "And, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply." That throws us back upon what I may call the code of rules relating to firms—rules 1 to 10. Unquestionably rules 1 to 10 have, to a certain extent, altered the law as it was laid down in *Russell* v. *Cambefort*. The law is altered to this extent, that if two or more persons, being foreigners, carry on business in this country in partnership, you may sue them under the firm name, and get judgment against the firm, which judgment can be executed against its assets in this country. But when you come to apply that to the case of a single individual, there are no joint assets and the rule will not work. Take the *St. Gobain case*. Just consider the difference. If you have a claim against two or more partners, and you get judgment against the firm, the judgment only affects the joint assets. You cannot make it the foundation of a claim on the individual assets. If you obtain judgment against an individual who carries on business in a firm name, your judgment is against him and him only, and you cannot get any other. Therefore there is really no analogy between the two cases. If you are dealing with a single person, whether a foreigner or a Scotchman, the same rule applies, and you must go under Order 11. You cannot get at him under Order 48*a* at all.

Now consider what rule 11 is for. Rule 11 is to enable the suing of persons in the name in which they carry on business—to facilitate the carrying on of actions against persons who conceal their names. For that purpose you must adapt, as far as you can, the rules relating to actions against firms—partners in firms. When you come to apply it to cases in which the reasoning does not apply, it will not work at all. I put a case in the course of the argument, which strikes me as showing what the real object of that rule is. If a man contracts debts with his baker or butcher in his own name, and carries on business under a name not his own, the baker or butcher cannot sue him under the name not his own. The reasoning of rule 11 does not apply at all to such a case. Why should it? When you come to look at rule 11 you observe the words "may be sued in such name or style as if it were a firm name." That is the key to the whole thing. I do not say the language of the rule states it, but it involves this: that you can only sue a man in his firm name in respect of matters which are connected with the business which he does carry on under that name. Now supposing that Sir John Burns in this case had a partner, and carried on business in Liverpool under the name of G. & J. Burns,

you could not sue him in such an action as this in that firm name, because that would embrace somebody who had nothing whatever to do with the cause of action.

It appears to me that there has been a confusion of thought in this case altogether and a mistake, which is, to my mind, palpable when you look at the reason of the thing; and I must say that if we were to uphold this order we should be sanctioning a course which would give rise to a great deal of disturbance and outcry, and very legitimate outcry too, on the part of Scotchmen and foreigners. The right course here is to sue Sir John Burns in his own name, and to apply for leave to serve him under order 11.

I think the order ought to be reversed.

Lopes, L.J.—I am entirely of the same opinion. I think the learned Vice-Chancellor has misconceived the effect of this rule 11 of order 48*a*. That rule was not intended to apply to a case like the present; it was intended to apply to the case of an individual who carries on business in an assumed name—such, for instance, as the man who carries on business under the name of "Waukenphast," or, again, under the name of "Madame Louise," the real name being an entirely different one; "Madame Louise" and "Waukenphast" being assumed names. The object of the rule was simply to apply to cases of that kind, and in that respect was to remedy a defect which existed before that rule came into operation.

I entirely agree with what has been said by the Lord Justice. I think if we were to support the order that has been made, a greater storm would arise than arose on a previous occasion when Scotchmen considered themselves aggrieved by a case which was decided in this court.

Rigby, L.J.—I am of the same opinion. First of all, let us consider the literal meaning of the words of rule 11: "May be sued in such name or style as if it were a firm name." That is to say, he may be treated as though he were a member of a firm carrying on business in a firm name. It appears to me that those words necessarily limit the operation of rule 11 to cases arising out of that carrying on of a business. This is not a case of the kind at all, and it would appear to me to be altogether wresting the meaning of that clause into quite a different meaning to attribute the meaning to it which has been taken by the Vice-Chancellor.

With regard to the argument that Scotchmen in a case of this kind are to be treated as in a different position from foreigners, I cannot accede to it at all. Of course, Scotchmen are not foreigners; they are fellow-subjects of ours, and they are in the same position as any other fellow-subjects, with the important exception that their system of jurisprudence differs in very important matters from ours—that there are such differences between our system and theirs that even if you find words which control the jurisdiction of, or confer a jurisdiction upon, our courts, you no more assume them to apply to the case of Scotchmen than to the case of foreigners. Parliament, of course, may legislate for Scotchmen as it may legislate for Frenchmen, so far as they are concerned in matters of litigation in our courts; but mere general language will not be construed necessarily to apply either to foreigners or to Scotchmen. That is, I think, the meaning that is to be attributed to the reasoning in the judgments already cited; and, as I have already pointed out, to call a Scotchman an English subject is a perfect absurdity. No one can ever construe words which have express reference to English subjects—as was said in one case by the Master of the Rolls—as having reference to Scotchmen.

Appeal allowed.

Solicitors, *Bircham & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool; *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, Dickinson, & Hill*, Liverpool.

High Court of Justice.

Chan. Div. Stirling, J. } July 27; Aug. 1, 1895.

In re Lamson Store Service Co. (Limited). *In re* National Reversionary Co. (Limited). (*a*.)

Company—Reduction of capital—List of creditors not to be dispensed with—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 13.

Where a company seeks the sanction of the court to a proposed reduction of capital, involving either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of paid-up capital, the court has no jurisdiction to dispense with the settlement of a list of creditors of the company or with the ascertainment of the names of such creditors in manner provided by the 13th section of the Companies Act, 1867.

These were two petitions for reduction of capital.

By the first petition it was sought to pay off capital which was in excess of the wants of the company, partly by writing off unissued capital and partly by the return of capital which had been paid up.

By the second petition it was sought to obtain the sanction of the court to the reduction of the capital by writing off a loss which had happened by reason of a large portion of the funds of the company having been vested in the purchase of its own shares.

What had happened in each of these cases in chambers was this. The creditors of both companies were few in number, and in the first case an affidavit was made that the debts up to the date of the affidavit had been paid or satisfied. In the second case no such affidavit was made. The chief clerk in each case made an order dispensing with the necessity for the settlement of a list of creditors of the company.

By section 13 of the Companies Act, 1867, "Where a company proposes to reduce its capital, every creditor of the company who, at the date fixed by the court, is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the proposed reduction and to be entered in the list of creditors who are entitled so to object. The court shall settle a list of such creditors, and for that purpose shall ascertain as far as possible, without requiring an application from any creditor, the names of such creditors and the nature and amount of their debts or claims, and may publish notices fixing a certain day or days within which creditors of the company who are not entered on the list are to claim to be entered, or to be excluded from the right of objecting to the proposed reduction."

Buckley, Q.C., and *Whinney*, appeared for the first-named company.

Graham Hastings, Q.C., and *Gregson*, appeared for the second-named company.

In each case it was argued for the petitioners that

(*a*.) Reported by Wm. Scott Thompson, Esq., Barrister-at-Law.

there being in fact no creditors of the company the provisions of section 13 of the Companies Act, 1867, did not apply, and that, therefore, the chief clerk's orders were correct.

STIRLING, J.—[His lordship stated the facts as above set forth, and proceeded:—] The question to my mind is this, Whether that was a proper order under the circumstances. The petitions do not fall within the proviso in clause 4 of the Act of 1877, which is to the effect that where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid up capital, the creditors shall not be entitled to object or required to consent to the proposed reduction. Therefore the proceedings must be conducted with due regard to the Act of 1867, s. 13 (reads it). Now the first words are imperative, the court "shall" settle a list of creditors. The order which has been made in chambers directs that the proceedings for settling the list of creditors shall be dispensed with. In my opinion that order is wrong in form and ought not to have been made. The second portion of section 13 is also imperative, but to a certain extent this requirement has been complied with, for evidence has been brought before the court by which to a certain extent the creditors have been ascertained. The third part of section 13 is not imperative, but directory. Rules were made in 1868 which guide the proceedings in chambers. I need not go through them. These also I take not to be imperative, but directory, and the court has a certain discretion as to whether it will require the proceedings there pointed out to be taken or not. The question in this case is whether the order of the chief clerk being, as I think it is, wrong in form, it is not also wrong in substance in that the discretionary power vested in the court has been wrongly exercised. I am of that opinion. I do think that this is a case in which the imperative directions of the Act ought to be followed. I think the matter must go back to chambers with a direction that proper advertisements must be issued. I will give a direction that the matter be proceeded with in the vacation.

Solicitors in the first petition, *Harwood & Stephenson.*

Solicitors in the second petition, *Iliffe, Henley, & Sweet.*

Chan. Div. }
Kekewich, J. } July 31, 1895.

LLOYD *v.* NOWELL. (*a.*)

Vendor and purchaser—Memorandum in writing—Condition of the essence of the contract—Right of vendor to waive condition—Specific performance.

By a memorandum, signed by the plaintiff and the defendant, it was provided that the former should sell to the latter a leasehold house "subject to the preparation by my (the plaintiff's) solicitor of a formal contract." The plaintiff having brought an action for specific performance upon the memorandum,

Held, that this stipulation was a condition precedent to a concluded agreement between the parties; that it could not be waived by the plaintiff, as being for his exclusive advantage; and, therefore, that the action must fail.

The plaintiff, Edwin Lloyd, having agreed to sell to the defendant, Joseph Dove Nowell, and the defendant having agreed to purchase the house No. 365, Camden-road, the agreement was reduced to writing, and was as follows:—

"365, Camden-road,
"Nov. 1, 1894.

"Subject to the preparation by my solicitor and completion of a formal contract, I am willing to sell to you lease of 365, Camden-road, for a term of twenty-eight years at a rent of £110 per annum, you paying me £500 premium for same, and also paying the cost of new lease; £100 paid (and receipt hereby acknowledged) as conditional deposit. The balance to be paid 1st day of January, 1895, and possession given on completion. Plants and conservatory flowers to be included in price named.

"(Signed) E. LLOYD.

"Accepted.
"(Signed) JOSEPH D. NOWELL.
"Witness, GEORGE SQUIRE BONTALL.

The agreement was retained by the plaintiff, and on the 1st of November the defendant paid the said deposit, and the plaintiff handed him a duplicate of the agreement signed by the plaintiff.

The defendant having subsequently refused to complete, the plaintiff, waiving his right to have a formal contract prepared, brought the present action claiming specific performance of the agreement.

The defendant pleaded in his defence that the agreement was not a sufficient memorandum within the Statute of Frauds, and counter-claimed for a return of the deposit, alleging that he had been intoxicated when he gave it.

Warrington, Q.C., and *George Henderson*, for the plaintiff.—The mere fact that the agreement stipulates for a formal contract does not imply that it is not a concluded agreement: *Rossiter* v. *Miller*, 26 W. R. 865, 3 App. Cas. 1124. The stipulation is in favour of the plaintiff only, and he may therefore waive it: *Hawksley* v. *Outram*, [1892] 3 Ch. 359, 41 W. R. Dig. 169.

Renshaw, Q.C., and *A. Beddall*, for the defendant.—The stipulation prevents the agreement from being conclusive. It is not a stipulation in favour of the plaintiff only.

KEKEWICH, J.—It has been stated by Lord Blackburn in *Rossiter* v. *Miller*, that it is a question of construction, whether the parties finally agreed to be bound by terms which they have reduced to writing, though they were subsequently to have a formal agreement drawn up. It seems to me that on the true construction of the agreement before me, it is not a concluded agreement, subject merely to something afterwards being done. The stipulation as to the preparation of a formal contract is of its essence, preventing it from being final.

The question then arises, Whether that stipulation is for the benefit of the plaintiff only, so as to entitle him to waive it. The case of *Hawksley* v. *Outram* has been referred to as showing that it can be waived. That case, however, is distinguishable. There a partner in a business gave a power of attorney authorising the sale of his share of the business. The agreement for sale contained a clause restraining the vendors from trading within a certain distance of the place where the business was carried on. An action for specific performance having been brought by the purchaser, Romer, J., dismissed the action, holding that that clause was *ultra vires* the power of attorney. The Court of Appeal, however, decided that even if it was *ultra vires*, it was for the benefit of the purchaser only, and that he might, therefore, waive it. There could be in that case no doubt for

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

whose benefit the clause was inserted. It was manifestly inserted wholly for the benefit of the purchaser, and not at all for that of the vendor. The purchaser was, therefore, clearly entitled to waive it. But how can I hold that the condition in the present case is only for the benefit of the plaintiff? It was no doubt inserted by his solicitor for his benefit; but it may be for the benefit of the defendant as well. Lord Blackburn, in the case mentioned above, says, "parties do often enter into a negotiation, meaning that when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed, and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that, though it may represent what he said, it does not represent what he meant to say." It is quite within the limits of imagination that the vendor and purchaser here both meant subsequently to have a formal contract drawn up which should contain not what they had said, but what they meant to say. The words "subject to the preparation by my solicitor and completion of a formal contract, I am willing to sell," seem fairly open to that construction.

I am thus of opinion that the stipulation goes to the root of the contract, and is not one which the plaintiff can waive. There will consequently be judgment for the defendant, with costs.

Solicitor for the plaintiff, *Wm. Negus.*

Solicitors for the defendant, *Taylor & Taylor.*

Chan. Div. } July 10, 11, 12, 1895.
Kekewich, J. }

In re GOODENOUGH.
MARLAND *v.* WILLIAMS. (*a*)

Interest, rate of—Tenant for life—Remainderman—Capital income—Apportionment.

The court, in applying the rule laid down in Re Earl of Chesterfield's Trusts (32 *W. R.* 361, 24 *Ch. D.* 643) *and analogous cases, ought now to take interest at* 3 *per cent. instead of* 4 *per cent. as the basis of calculation.*

Under a settlement executed in 1830 the testator, W. Goodenough, was entitled absolutely to a sum of consols, subject to the prior life interests of Dr. and Mrs. Hawkins.

By his will, the testator gave his residuary estate to trustees upon trust for his daughter Mrs. Hawkins for life, with remainder as she should by will or codicil appoint. The will contained a power to retain and vary investments.

The testator died in 1854.

Mrs. Hawkins, who died in 1878, by her will, appointed the fund over which she had power to appoint by the will of W. Goodenough to her husband, Dr. Hawkins, absolutely, and appointed him sole executor.

Dr. Hawkins died in 1894, and the defendant Williams was his sole executor.

The question now raised by the trustees of the will of W. Goodenough was whether the defendant Williams, as legal personal representative of Mrs. Hawkins, was entitled to any and what part of the capital of the consols, the reversion of which, on the death of Dr. Hawkins, formed part of the estate of the testator, and had not been sold as directed by his will.

Crawley, for the trustees of the will.

Badcock, for the defendant Williams.

Marten, Q.C., and *Lemon*; *Renshaw, Q.C.*, and *Methold*; *Bramwell Davis, Q.C.*, and *Potts*, for legatees.

KEKEWICH, J. [after holding that the case was governed by *In re Earl of Chesterfield's Trustees*, 32 W. R. 361, 24 Ch. D. 643, and that the reversionary interest of the testator in the fund ought to have been converted, and that the legal personal representative of Mrs. Hawkins was entitled to an apportioned part of the capital of the fund on that basis], said:—The rule in *Lord Chesterfield's case* for ascertaining the amount apportionable between capital and income, is to ascertain what sum—put out at 4 per cent. per annum on the day of the death of the testator and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax—would have produced the amount actually received. This hypothetical sum is to be treated as capital, and the balance income. In most cases this inures greatly to the benefit of the tenant for life. It is obvious that any alteration in the rate of interest will make an enormous difference. Four per cent. has always hitherto been the rate. What rate of interest ought now to be considered as the court rate to be allowed in analogous cases to the present one or charged against trustees in respect of moneys for which they are liable. I think it is a question which ought to receive the consideration of all the judges of the Chancery Division and be finally settled, but I am not aware of any proceeding by which it can be done. The result of adopting 3 per cent. instead of 4 per cent. will be very greatly in favour of capital as against income. Four per cent. has been for generations regarded as the rate to be allowed by the Court of Chancery unless 5 per cent. was chargeable for special reasons. Five per cent. was generally allowed by juries as the current rate of interest applicable to mercantile contracts or as fit to be allowed on the footing of damages. But it is common knowledge that nowadays trustees cannot get 4 per cent. and have to take even less than 2¾, and that ordinary people willing and able to go outside trust securities and yet determined not to speculate find it impossible to get more than 3 per cent. and are very glad to get as much. It seems to me to be bordering on, if not an, actual absurdity to fix 4 per cent. as the court rate where an ordinary prudent investor cannot obtain that return. In *In re Dracup, Field* v. *Dracup*, 42 W. R. 264, [1894] 1 Ch. 59, the court charged 3 per cent. interest. In my opinion the time has arrived when 4 per cent., except as a penal rate, ought not to be allowed; and I think the amount should be ascertained in this case on the footing that 3 per cent. is the proper rate of interest.

Solicitors, *Frere, Foster, & Co.*; *Hepburn, Son, & Cutcliffe*; *Taylor, Son, & Humbert.*

Q. B. Div. } June 25; July 4;
(Wright and Kennedy, JJ.) } Aug. 7, 1895.

SMALLWOOD (*Respondent*) *v.* SHEPPARDS (*Appellant*). (*a*.)

Frauds, Statute of—Interest in land—Landlord and tenant—Parol agreement for non-continuous letting and hiring of land—Entry on land for purposes of

(*a*.) Reported by F. T. DUKA, Esq., Barrister-at-Law.

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

occupation after agreement — Exclusive possession during occupation—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

Defendant verbally agreed with plaintiff to hire a field for three consecutive bank holidays, and to pay for the use of it the total sum of £45, which sum was to be paid by three equal payments on the days in question. Defendant occupied the field on the first of the three bank holidays only, and paid the instalment on account, but refused subsequently to pay the balance of the £45, and by way of defence to an action by the plaintiff, pleaded that under section 4 of the Statute of Frauds the agreement was void.

Held, that section 4 of the Statute of Frauds was no defence, because upon the evidence it appeared that the parol agreement was for a single letting (although the period for the agreed letting was not continuous) at a single rent; and there had been an entry by the defendant on the land after the agreement for the purposes of occupation, and a payment of rent on account of entry.

Appeal from the decision of his Honour Judge Chalmers sitting at the Birmingham County Court.

The appellant, the defendant in the action, entered into a parol agreement with the respondent to hire from him a piece of waste land for three successive bank holidays for the purpose of putting up a steam "roundabout," and for the use of the land on these three days he agreed to pay £45. The appellant was also to clear away an old shed that stood on the field and was to be allowed £5 for doing so, which deduction from the £45 was to be spread over the three payments in which the rent was to be paid. It was further agreed that if the land was let during this time for building purposes the appellant's right to have the land should cease.

The appellant pulled down the shed and used the field for the first bank holiday only, and paid a sum on account, which, together with his deposit, and the (*pro rata*) allowance made him for pulling down the shed came to £15. He did not, however, use the field for the second or third bank holiday, although the land was still unlet, and, therefore, at his disposal had he wished to occupy it.

On being sued for the balance in the county court, the defendant contended that the agreement, being in respect of a future right to use the land, was void by section 4 of the Statute of Frauds, which requires such contracts to be in writing; also that he understood the arrangement to be that he should pay £15 for each "take," so that the agreement that he should have the land on the three bank holidays, if still unlet for building purposes, amounted in fact to three separate contracts, and consequently that he was not liable to pay for the two days on which he did not occupy.

The learned county court judge decided in favour of the plaintiff, on the ground that there had been an entry under the agreement on the land, and a user of the land by the defendant, coupled with a payment on account, which could only be referable to one entire contract, and that whether the arrangement ought to be regarded as a lease or as an agreement to let land under section 4 of the Statute of Frauds, the provisions of the statute had in fact been complied with. He did not, however, decide the question whether or no the defendant was to have exclusive possession of the field during the period that he was to occupy the land.

From this decision the defendant appealed.

J. F. P. Rawlinson, for the appellant, submitted that the licence to use the land on the three bank holidays was founded on three separate agreements. With regard to the second and third bank holidays there had been no part performance to take the case out of the mischief of the statute. The learned county court judge was wrong, therefore, in holding that section 4 of the Statute of Frauds was not a good defence to the claim.

He cited *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467, and *Lavery* v. *Pursell*, 39 W. R. 163, 39 Ch. D. 508, 36 W. R. Dig. 86.

C. C. Scott, for the respondent.—The learned county court judge has found that the right to use the land on the three bank holidays constituted a single letting at a lump sum for the three dates. There was an entry on the land by the defendant for the purpose of occupation after that agreement was made and a payment in respect of that entry. There was, therefore, a demise of the land for those three specified dates, and section 4 of the Statute of Frauds does not apply. The fact that the rent was to be paid by instalments does not alter the plaintiff's contention that he was to receive £45 for the let. There is no authority to show that because the dates on which the defendant was to occupy were not consecutive, therefore the letting cannot be treated as one contract. The dates on which the land was to be at the disposal of the defendant were clearly agreed upon.

He cited *Wright* v. *Stavert*, 8 W. R. 413, 2 Ellis & Ellis 721, and *Ryley* v. *Hicks*, 1 Strange 651. The case of *Taylor* v. *Caldwell*, 11 W. R. 726, 32 L. J. Q. B. 164, does not apply here.

Rawlinson replied.

Cur. adv. vult.

August 7, 1896.—The judgment of the COURT (WRIGHT and KENNEDY, JJ.) was delivered by

WRIGHT, J.—The learned county court judge not having found whether it was intended that the defendant should have the exclusive possession of the land on the dates that he was to occupy it, it was agreed during the hearing that we should draw any inference of fact from the evidence as stated in the judge's notes, which the judge might have drawn. We draw the inference that the parties intended that the defendant should have exclusive possession of the land for the bank holidays. The judge has found that the contract was a single entire contract for £45, by which we understand him to mean that he finds that it was not an agreement for three lettings at a separate rent or price for each of the three bank holidays, but an agreement for the possession and use of the ground on three occasions at a lump rent or price of £45 for the three, in other words, for one letting.

The defendant entered on the land for the purpose of occupation under the agreement on one of the three days. After entry he made (as the county court judge finds) a payment of money on account which can be referable only to one entire agreement. He might have occupied, had he chosen to do so, on the two later days which the letting covered. In order to maintain an action for "use and occupation" after the close of the period for which it is sought to make the party sued liable, actual occupation is not necessary. The defendant is liable if once there has been an entry by him, provided he might have gone on occupying had he chosen to do so. He has "held" although he has not "enjoyed" (11 Geo. 2, c. 19, s. 14). It appears to us that upon the facts, the defence of the Statute of Frauds fails. There having been an entry for the purpose of occupation under the agreement for a single letting (although the period for the agreed letting was not continuous) at a single or lump rent or price and a payment of rent on account of the entry, the plaintiff's right to

recover the balance after the termination of the letting period is, in our judgment, not affected by the fact that the agreement was a parol agreement. For these reasons the appeal fails and must be dismissed, with costs.

Solicitors for the appellant, *Morse & Simpson* for *W. H. Whitelocke*, Birmingham.

Solicitors for the respondent, *Debenham & Walker* for *J. P. Lambert*, Birmingham.

Q. B. Div.
(Grantham and Wright, JJ.) July 31, 1895.

WOOLWICH LOCAL BOARD *v.* GARDNER. (*a.*)

Pedlar — Certificate—Market — Pedlar using horse—Hawker—Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict. c.* 14), *s.* 13—*Pedlars Acts*, 1871 (34 & 35 *Vict. c.* 96), *ss.* 3, 6; 1881 (44 & 45 *Vict. c.* 45), *s.* 2.

By section 13 *of the Markets and Fairs Clauses Act*, 1847, "*every person other than a licensed hawker*" *selling tollable articles within the limits of a market is liable to a penalty. By section* 6 *of the Pedlars Act*, 1871, *a pedlar's certificate shall, for the purpose of the Markets and Fairs Clauses Act*, 1847, *have the same effect as a hawker's license, and the term* "*licensed hawker*" *in the last-mentioned Act shall be construed to include a pedlar holding such a certificate.*

Held, that a pedlar was exempted from the penalty imposed by section 13 *of the Markets and Fairs Clauses Act only so long as he was trading as a pedlar as defined by section* 3 *of the Pedlars Act*, 1871.

Howard *v.* Lupton, *L. R.* 10 *Q. B.* 598, 23 *W. R. Dig.* 132, *not followed.*

Special case stated by a metropolitan magistrate.

Complaint was made before the magistrate by the appellants under section 13 of the Markets and Fairs Clauses Act, 1847, that the respondents had sold or exposed for sale in a cart drawn by a horse within the limits of a market owned by the appellants, articles —namely, potatoes, in respect of which tolls were authorized to be taken in the market.

The facts alleged in the complaint were proved. Neither of the respondents held a hawker's licence, but each of them held a pedlar's certificate obtained under the Pedlars Act, 1871, which certificate by section 2 of the Pedlars Act, 1881, authorized the person to whom it was granted to act as a pedlar within any part of the United Kingdom.

By section 6 of the Pedlars Act, 1871, a pedlar's certificate under that Act is for the purposes of the Markets and Fairs Clauses Act, 1847, to have the same effect within the district for which it is granted as a hawker's licence, and the term licenced hawker in the last-mentioned Act is to be construed to include a pedlar holding such certificate.

On behalf of the respondents it was contended on the authority *Howard* v. *Lupton*, L. R. 10 Q. B. 598, 23 W. R. Dig. 132, that they were by virtue of section 6 of the Pedlars Act, 1871, licensed hawkers for the purpose of section 13 of the Markets and Fairs Clauses Acts, 1847, and, therefore, exempt from the penalties prescribed by the later section.

On behalf of the appellants it was contended that the effect of section 6 of the Pedlars Act, 1871, was merely that the term "licensed hawker" in section 13 of the Markets and Fairs Clauses Act, 1847, was to be construed to include the persons within the meaning of the term "pedlars" as defined by section 3 of the Pedlars Act, 1871; and that neither of the respondents came within that definition.

The magistrate was of opinion that he was bound by *Howard* v. *Lupton*, and dismissed the summons.

Section 3 of the Pedlars Act, 1871, defines "pedlars" to mean "any hawker, pedlar . . . or other person who without any horse or other beast drawing or bearing burden, travels and trades on foot and goes from town to town into other men's houses, carrying to sell, or exposing for sale, any goods, wares, or merchandise. . . ."

The Markets and Fairs Clauses Act, 1847, s. 13, enacts that "Every person other than a licensed hawker" selling tollable articles within the limits of the special Act authorizing a market is liable to a penalty.

R. C. Glen (*Channell, Q.C.*, with him), for the appellants.—The contention of the respondents is that, for the purposes of the Markets and Fairs Clauses Act, section 6 of the Pedlars Act, 1871, puts a pedlar upon the same footing as a hawker. If this be so, the result will be, that so far as regards as the Markets Act, a hawker's licence will be unnecessary, for a pedlar's certificate will protect both classes. The correct interpretation of section 6 is, that a pedlar is exempted, only so long as he is trading as a pedlar—*i.e.*, without a cart and horse. The magistrate held that he was bound by *Howard* v. *Lupton*. The court were not unanimous in that case, for Lush, J., dissented, and Mellor, J., only assented doubtfully. Moreover, the law has been altered since that decision. A pedlar's certificate was formerly issued for a particular district only, now by section 2 of the Pedlars Act, 1881, it enables the holder to trade as a pedlar throughout the whole country.

Travers Humphreys, for the respondent.—*Howard* v. *Lupton* is right, and ought to be followed. [WRIGHT, J.—This is a criminal case with no appeal, and, therefore, we are not bound to follow *Howard* v. *Lupton*.] Section 6 of the Pedlars Act, 1871, means that for the purposes of the Markets Act a pedlar shall be entitled to trade as a hawker.

GRANTHAM, J.—I am of opinion that we ought not to follow *Howard* v. *Lupton*, which is not a decision binding upon us in this case. Section 3 of the Pedlars Act, 1871, defines what is meant by a pedlar, and then by section 6 a pedlar's certificate is for the purpose of the Markets and Fairs Clauses Act, 1847, to have the same effect as a hawker's licence. That means that a pedlar, having a certificate, is exempted from penalties, only so long as he is acting as a pedlar. In this case the respondents were not acting as pedlars, for they had a horse and cart. The magistrate ought to have convicted, and the case must go back to him with an intimation of our opinion.

WRIGHT, J.—I agree. I do not desire to criticize the decision of the court in *Howard* v. *Lupton* more than this. We have come to the same conclusion as Lush, J., did in that case, and I think that it is clear from the judgment of Mellor, J., that he would have decided in the same way if the Act of 1881 had then been in force.

Appeal allowed; case remitted to magistrate to convict.

Solicitor for the appellants, *Edwin Hughes.*

Solicitors for the respondents, *C. O. Pook.*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Q. B. Div.
(Wills and Wright, JJ.) June 24, 1895.

GREATOREX *v.* SHACKLE. (*a.*)

County court—Interpleader—Auctioneer's commission—Independent claims by different parties in respect of sale of same property—County Court Rules, 1889, *ord.* 27, *r.* 13.

The plaintiffs, a firm of auctioneers, sued the defendant in a county court for commission in respect of the sale of a house. Another firm of auctioneers claimed from the defendant a different sum for commission in respect of the same sale of the same house.

Held, that the two claims were not opposing or competing, and could not be made the subject of an interpleader order.

Appeals from an order of his honour Judge Stonor, the judge of the Marylebone County Court, directing a new trial of this action.

The action was brought in the county court by Messrs. Greatorex & Co., a firm of auctioneers and estate agents, to recover a sum of £35 12s. for commission upon the sale of the defendant's house.

In November, 1893, the defendant placed the house on the plaintiffs' books for sale, and in the following February the plaintiffs introduced a Mrs. Ricketts as a probable purchaser, but after some negotiations the offer made by Mrs. Ricketts was withdrawn.

In March, 1894, the defendant wrote to the plaintiffs withdrawing the house from their books, and at the same time instructed Messrs. Walton & Lee, another firm of auctioneers, to sell the house.

In June, 1894, Messrs. Walton & Lee received an offer from a firm of solicitors to purchase the house on behalf of a client, and in the following November a contract was entered into, the purchaser being Mrs. Ricketts, the person whom the plaintiffs had originally introduced.

The defendant agreed with Messrs. Walton & Lee that their charges should be £25.

After the plaintiffs' action had been commenced the defendant paid £25 into court and obtained, *ex parte* from the registrar, an order for a summons to issue to Messrs. Walton & Lee in the following terms:—"Whereas the defendant has had notice that you claim the subject-matter in this action, and whereas she has paid into court in satisfaction and on deposit the sum of £25, being part of the amount claimed and admitted to be due by the defendant to abide the order of the court in the above action. This is to give you notice that you must appear at a court to be holden on the 7th day of May, 1895, at the hours of ten in the forenoon when the court will adjudicate."

This summons was issued under ord. 27, r. 13, of the County Court Rules, 1889, which provides that, where the defendant in an action for debt &c., "has had notice of any other opposing or conflicting claims to such debt, &c., he may within five days of the service of the summons, apply to the registrar for a summons against . . . the person making such conflicting claim, and the registrar shall thereupon issue an interpleader summons according to the form in the appendix, returnable as soon as conveniently may be, and upon the return day of such summons the judge shall hear the case of the defendant and of the plaintiff in the action, and also of the . . . person making such opposing or conflicting claim, and shall give such judgment therein as shall finally determine the rights and claims of all parties as if the same had been an ordinary action into which a third party had been introduced by counter-claim."

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

At the hearing Messrs. Walton & Lee appeared and objected that the interpleader summons was wrongly issued and that they ought not to be made parties to the action. The county court judge thereupon discharged them from the action with costs to be paid by the defendant. He then proceeded to try the action between the plaintiffs and the defendant, and gave judgment for the plaintiffs for the amount claimed. The defendant afterwards applied for a new trial on the grounds "that the claim of the claimants (Messrs. Walton & Lee) herein ought to have been adjudicated upon as a party to the issue, and that material facts were not brought before the court, and that in any event the claimants were not entitled to any costs as against the defendant, and that the plaintiffs were not entitled to more than £25, and that evidence was excluded which would have enabled the court to come to a different decision, and that if the judgment stood there would be error or mis-carriage of justice."

The county court judge was of opinion that the case fell within the 89th section of the Judicature Act, 1883, and order 57 of the Rules of the Supreme Court and ord. 37 r. 13 of the county court rules, and he ordered a new trial and hearing of the action and interpleader summons, reserving all questions of law and costs.

From this order the plaintiffs and Messrs. Walton & Lee now appealed.

Cagney, for the plaintiffs.—There was no jurisdiction to make an order for interpleader in this case. The claims by the plaintiffs and by Messrs. Walton & Lee are separate and independent. [He was stopped by the court.]

Ernest Pollock, for Messrs. Walton & Lee was not heard.

Moyses, for the defendant.—The interpleader order was right. The claims of the plaintiffs and of Messrs. Walton & Lee are in respect of the same sale and the same house and the defendant is not liable to pay more than one commission in respect thereof. The question is which firm effected the sale, and that question ought to be determined by interpleader: *Barnett* v. *Brown*, 6 Times L. R. 463. The order giving costs to Messrs. Walton & Lee was clearly wrong. The county court judge had power to order a new trial under section 93 of the County Court Act, 1888.

He also referred to *Murtagh* v. *Barry*, 38 W. R. 526, 24 Q. B. D. 632.

WILLS, J.—This case appears to me to be unarguable. It is evident that a series of mistakes have been made in the county court, and the order of the county court judge directing a new trial must be set aside. The facts are shortly these:—The plaintiffs, a firm of auctioneers, brought an action against the defendant for commission in respect of the sale of a house. Messrs. Walton & Lee, another firm of auctioneers, were also claiming commission from the defendant in respect of the sale of the same house. An interpleader order was obtained *ex parte* by the defendant, and notice was given to Messrs. Walton & Lee to appear at the hearing and support their claim. At the hearing Messrs. Walton & Lee objected that the interpleader order was made without jurisdiction, because their claim was entirely distinct from that of the plaintiffs. The county court judge dismissed them from the action, and gave them their costs. That order was right for they had been wrongly brought before the court. It is said that they ought to have taken the less expensive course of moving to set aside the interpleader order, and that they ought not to have been given their costs of

appearing at the trial: that is a point arising on taxation and is immaterial upon this appeal. Upon the trial judgment was given for the plaintiff against the defendant, the judge finding that the plaintiffs were entitled to the commission of £35 12s. which they claimed. The defendant asked for a new trial on several extraordinary grounds, and the application was granted on the ground that the case fell within section 89 of the Judicature Act, 1873, and order 57 of the Rules of the Supreme Court and ord. 27, r. 13, of the County Court Rules, 1889, and that, therefore, the interpleader order was right. But the claims were not in respect of the same subject matter; they were wholly distinct, and the judge had already found for the plaintiffs on their claim. Under these circumstances the judge had no jurisdiction to grant a new trial on the grounds upon which he granted it, and his order must be set aside.

WRIGHT, J.—I am of the same opinion. It may be that the defendant has a real grievance as to the amount of the costs payable to Messrs. Walton & Lee, but that question does not arise here. As to the main question it is clear that the enactments on which the county court judge relied have no application. He seems to have thought that wherever two auctioneers claim commission for the sale of the same house the subject matter of the claims must be the same. That is not so. These are not opposing or competing claims adverse to each other; they are not claims to the same money but entirely separate and independent claims. I think that on the facts which were before the county court judge he had no jurisdiction to grant a new trial.

Appeal allowed.

Solicitor for the plaintiff, *Albert Myers.*

Solicitors for Messrs. Walton & Lee, *Bell, Brodrick, & Gray.*

Solicitor for defendant, *Arthur Cayley.*

C. C. R.
(Lord Russell of Killowen, C.J., Pollock, B., and Grantham, Lawrance, and Wright, JJ.)
July 27, 1895.

REGINA v. FARNBOROUGH. (*a.*)

Criminal law—Larceny—Verdict—Absence of finding as to felonious intent—Conviction.

At the trial of a prisoner on an indictment for larceny no evidence (except as to character) was called for the defence. In reply to a question from the presiding judge, the jury said they were not agreed on their verdict. He then asked them if they believed the evidence for the prosecution, and they replied that they did. The judge directed that this statement by the jury amounted to a verdict of guilty, and it was so recorded.

Held, that the effect of the judge's ruling was to supply a finding that the prisoner had a felonious intent; that he had exceeded his functions in so doing; and that the conviction was bad.

Case stated by the chairman of the Middlesex Quarter Sessions as follows:

At the Midsummer quarter sessions of the peace for the county of Middlesex on the 6th day of July, 1895, the prisoner was charged with stealing milk.

The facts of the charge are immaterial to this case.

It appeared to me that if the jury believed the evidence for the prosecution the prisoner was in law guilty as charged, and I so directed them. No evidence except as to character was called for the defence and the counsel for the defence did not seriously dispute my ruling.

The jury retired to consider their verdict and after they had been absent some time I sent for them and asked if they were agreed, and they replied that they were not. I then asked them did they believe the evidence of the prosecution and the foreman replied that they did.

Counsel for the prisoner objected that no question could be asked except the ordinary ones, "Are you agreed on your verdict," and "Do you find the prisoner guilty or not guilty." I overruled the objection and directed the jury that their verdict amounted to one of guilty and it was so recorded, but I released the prisoner on his own recognizance pending the decision of this case.

It is laid down in 4 Bl. Comm. (ed. 1813), p. 328, "such public or open verdict may be either general guilty or not guilty, or special, setting forth all the circumstances of the case and praying the judgment of the court whether for instance on the facts stated it be murder, manslaughter, or no crime at all. This is when they doubt the matter of law and therefore choose to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances and finding a general verdict if they think proper so to hazard a breach of their oaths." He then goes on to show how (by laws either since repealed or fallen into desuetude) such jurors could be punished.

The question is, Had I the power to put the question and direct such verdict to be recorded, the facts in the judgment of the court clearly constituting in law the offence charged if proved to the satisfaction of the jury?

Arthur Hutton, for the prisoner, read the case. The court called upon

J. P. Grain and *Rowsell,* for the prosecution, who after some argument admitted that the ruling of the chairman could not be supported.

LORD RUSSELL OF KILLOWEN, C.J., after stating the facts said:—If it were not that this case raises a very important question I would have been content simply to say that the conviction could not stand. The verdict of guilty was entered upon the statement made by the foreman of the jury in answer to a question by the chairman that the jury believed the evidence for the prosecution. What did that statement amount to? The foreman had already said that the jury were not agreed, and their believing the witnesses for the prosecution was perfectly consistent with the belief that the facts were not such as to show that the prisoner took the milk *animo furandi* which is an essential ingredient in the offence. They might have thought that he was allowed to take it or that he intended to pay for it. The evidence is not before us, but it is abundantly clear that the jury declined to draw the inference that the prisoner took the milk with the felonious intent. The chairman in directing a verdict of guilty really supplied this essential part of the offence. In so doing he went outside his proper functions, and decided a question of fact which was for the jury only, and the result is that the conviction must be set aside.

POLLOCK, B.—I agree, and I wish to add that this decision must not be taken as interfering with the practice in criminal trials of a jury finding what is called a special verdict. Where a jury find all the facts necessary to constitute an offence, the judge may

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

direct judgment to be entered in accordance with the finding. But that was not the case here.

GRANTHAM, LAWRANCE, and WRIGHT, JJ., concurred.

Conviction quashed.

Solicitor for the prisoner, *Herbert Firth.*

Solicitor for the prosecution, *C. H. Mason.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Kay, and Rigby, L.JJ.) Oct. 29.

MOWBRAY AND ANOTHER *v.* MERRYWEATHER. (*a.*)

Master and servant—Warranty—Damages—Remoteness.

The plaintiffs, who were stevedores, undertook to unload the defendant's ship. The defendant supplied the necessary chains and other plant. One of the chains was unsound and broke, thereby injuring a workman in the plaintiffs' employ. The workman sued the plaintiffs under the Employers' Liability Act, 1880, *and the plaintiffs settled the action for an admittedly reasonable sum. In an action by the plaintiffs to recover that sum from the defendant, it was admitted that the defendant had warranted the chain to be fit for the purpose for which it was to be used, and that there had been a breach of that warranty. It was also admitted that the plaintiffs might, by the exercise of reasonable care, have discovered the defect in the chain.*

Held (*affirming the judgment of* Charles, J., 43 *W. R.* 528), *that the plaintiffs were entitled to recover, as damages for the defendant's breach of warranty, the sum paid by them in settlement of their workman's claim.*

Appeal of the defendant from the judgment of Charles, J., in favour of the plaintiffs at the trial of the action without a jury (see the report, 43 W. R. 528).

The plaintiffs were stevedores at West Hartlepool, and the defendant was owner of the steamship *Wenby.*

The plaintiffs, on the 10th of August, 1894, undertook to discharge a cargo of deals from the ship, and, in accordance with the custom of the port, the defendant promised to provide all necessary and proper derricks, cranes, chains, winches, and other gearing reasonably fit for the purposes of discharging the cargo. He failed to do so, and supplied a chain so defective that, whilst it was being used in discharge of the cargo it broke, and thereby a workman of the plaintiffs was seriously injured. The injured workman thereupon brought an action against the plaintiffs under the Employers' Liability Act, 1880, ss. 1, 2, basing his claim upon the defective condition of the chain, a defective condition which, he alleged, might have been discovered by the plaintiffs by the exercise of reasonable care. The plaintiffs did not contest the action, and paid the workman £125, which sum they sought to recover from the defendant in this action. It was not suggested by the defendant that the settlement was an improper one, and it was admitted upon the trial by the defendant, on the one hand, that there had been a breach by him of the implied warranty, that the derrick, cranes, and chains should be reasonably fit for the purpose for which they were supplied; and by the plaintiffs, on the other hand, that they might by the exercise of reasonable care have discovered the defect in the chain.

Charles, J., gave judgment for the plaintiffs for the amount claimed.

Tindal Atkinson, Q.C., and *H. Gavan Taylor*, for the defendant, in support of the appeal.—The damages claimed by the plaintiffs are too remote, for they are the result, not of the defendant's breach of warranty, but of the plaintiffs' own negligence. There is no direct authority on the point. The opinion of Martin, B., in *Burrows* v. *March Gas and Coke Co.*, 18 W. R. 348, 20 *Ibid.* 493, L. R. 5 Ex. 67, 7 *Ibid.* 96, which the plaintiffs will rely on, was a mere *obiter dictum* and not necessary for the decision of the case before him. The *dictum* of Denman, J., in *Kiddle & Son* v. *Lovett*, 34 W. R. 518, 16 Q. B. D. 605, and the opinions of the judges of the Court of Sessions in *Ovington* v. *M'Vicar*, 2 Court of Sess. Cas., 3rd series, 1066, are in favour of the defendant's contention.

They also referred to *Wrightup* v. *Chamberlain*, 7 Scott 598.

Robson, Q.C., and *Meynell*, for the plaintiffs, were not called on.

Lord ESHER, M.R.—I have no doubt whatever as to what our decision ought to be in this case, although it is the first time that the point to be determined has arisen. It is an action upon a warranty. The plaintiffs say that the defendant warranted that the chain was efficient for the work which it was to do; that was, as the defendant knew, to be used by the plaintiffs' workmen in the plaintiffs' business of stevedores. The defendant admits that he gave such a warranty and that there has been a breach of the warranty. That is sufficient to support an action for, at least, nominal damages. But the plaintiffs say that they have suffered more than nominal damages, because the defendant warranted the chain for use in the plaintiffs' business, knowing that the chain would be used by the plaintiffs' workmen, and that the defendant must, therefore, have known that if an inefficient chain was supplied injury would result to the plaintiffs' workmen.

The plaintiffs also knew that, and the parties, therefore, if they had thought about it, would both have agreed that the almost certain result of a breach of the warranty would be an injury to a workman of the plaintiffs, and an action for damages by him against the plaintiffs. That is what did happen. It is true that the injured workman could not have recovered damages against the plaintiffs unless they had been guilty of negligence, as between the workman and themselves. But the plaintiffs, relying on the defendant's warranty, refrained from examining the chain, and it was that which caused them to be guilty of want of care towards their workmen. Everything which has happened is, therefore, a natural result of the defendant's breach of warranty. The question in this case is whether the damages claimed by the plaintiffs are too remote. The test to be applied is, are the damages the natural consequences of the breach of warranty, or a consequence that might reasonably have been within the contemplation of the parties? If so, the damages are not too remote. If the parties had considered the matter they would have known that the natural consequence of a workman's being injured through using an unsound chain would be an action against his employer. That was the view of Martin, B., in *Burrows* v. *March Gas and Coke Co.*, which I prefer to the opinion of the Scotch judges in *Ovington* v. *M'Vicar*. In my opinion it is clear that in this case the particular damage for which

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

the plaintiffs sue is not too remote, but is a natural consequence of the defendant's breach of warranty. The plaintiffs owed no duty to the defendant, and the defendant cannot rely on the negligence of the plaintiffs, and on the breach of a duty which they owed to a different person—viz., their workman.

KAY, L.J.—This is an action for breach of warranty. Neither the warranty nor the breach are denied. The defendant supplied a chain to the plaintiffs, who are stevedores, to be used by them in their business. The chain was unsound, one of the links having a crack, and in consequence of this defect it broke and injured a workman in the plaintiffs' employ. The plaintiffs seem to have relied on the defendant's warranty and not to have examined the chain before using it. The injured workman would, therefore, have a remedy against two persons, either (under the principle laid down in *Heaven* v. *Pender*, 11 Q. B. D. 503) against the present defendant, who supplied the chain, or against the plaintiffs, for their negligence in failing to discover the defect. The workman brought his action against his employers, the present plaintiffs, and they settled the action by paying £125. It is admitted by the defendant—and it is a very important admission—that the settlement of the action was a proper one, that if the workman had sued the defendant, he would have recovered the same amount. In the present action the plaintiffs seek to recover the sum paid by them to their workman. On behalf of the defendant it is contended that the plaintiffs would not have had to pay anything if they had not themselves been guilty of negligence in failing to discover the defect in the chain. Now, supposing that the accident had happened not to a workman but to one of the plaintiffs, it is clear that he could have recovered damages from the defendant.

It is no defence to say that the plaintiffs refrained from examining the chain to see if it were sound. There was no duty on the plaintiffs, as between them and the defendant, to do so, the defendant having warranted the chain to be fit for the purpose for which it was to be used. In my opinion the case comes within the well-known rule that damages are recoverable when they may fairly be said to be a natural result of the breach of warranty, and a result which it must be assumed was within the contemplation of the parties.

With regard to the cases to which we have been referred, they are all, with two exceptions, distinguishable. In *Wrightup* v. *Chamberlain*, the question was whether the plaintiff had improperly defended an action brought against him by the purchaser of a horse with a warranty, and whether the plaintiff could recover the costs of defending that action from the person who sold him the horse with a similar warranty. If in the present case the plaintiffs had defended the action by their workmen, and so incurred costs, those costs would not be damages naturally resulting from the defendant's breach of warranty, and, therefore, could not be recovered. Then, as to *Kiddle & Son* v. *Levett*, in that case the employer settled with his workman when he was not really liable at all, and, therefore, the amount so paid was clearly not the measure of damages as between him and the person who gave the warranty. That leaves two cases, *Burrows* v. *March Gas & Coke Co.*, and *Ovington* v. *M'Vicar;* in the former case Martin, B., distinctly gives his opinion that damages, such as these, are, under the circumstances, recoverable. On the other hand, in *Ovington* v. *M'Vicar*, the Scotch judges intimate that the opposite view was in their opinion the correct one. I prefer to adopt the opinion of Martin, B.

I think the decision of Charles, J., was right, and that this appeal must be dismissed.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Baker, Lees, & Postlethwaite*, for *Higson & Simpson*, West Hartlepool.

Solicitors for the defendant, *H. A. Crump & Son*, for *Turnbull & Tilly*, West Hartlepool.

From Q. B. Div. (A. L. Smith and Rigby, L.JJ.) Oct. 25.

SADLER *v.* GREAT WESTERN RAILWAY CO. AND MIDLAND RAILWAY CO. (*a.*)

Practice—Parties—Joinder of defendants—Nuisance caused by concurrent acts of defendants—Ord. 16, *r.* 4.

The plaintiff, who occupied premises situate between receiving offices belonging to the defendant companies respectively, brought an action against both companies in the Queen's Bench Division wherein he alleged that each of them frequently caused or permitted access to his premises to be blocked by its vans and carts at a time when access was already blocked by vans and carts on the other side by the other defendant company, and that by their respective combined acts the defendants thus prevented all access to the plaintiff's premises. The plaintiff claimed damages and an injunction.

One of the defendant companies took out a summons that proceedings in the action might be stayed unless the plaintiff struck out the other company as defendants.

Held (Rigby, L.J., *dissenting*), *that the defendant companies were, if at all, separate tortfeasors, and that, upon the authority of* Smurthwaite *v.* Hannay, 43 *W. R.* 113 [1894] *A. C.* 494, *the attempt of the plaintiff to sue them jointly ought not to be allowed.*

Thorpe *v.* Brumfitt, *L. R.* 8 *Ch. App.* 650, *distinguished.*

Appeal from Day, J., in chambers.

The plaintiff, who traded as the Cycle and Sports Association, occupied a shop, No. 268, Strand, which he used for the sale of cyclists' requisites and for storing and repairing cycles.

Upon one side of the plaintiff's shop were premises occupied by the Great Western Railway Co. and used as a receiving office for parcels and goods, and on the other side were premises occupied by the Midland Railway Co. and used for the same purpose.

The plaintiff brought this action against both companies, and in his statement of claim alleged that each of the companies caused a number of vans to assemble for long periods of time on the public highway in front of his premises, and great quantities of parcels, crates, and boxes to be conveyed to and from the vans, and had thereby caused inconvenience and danger to the public, and special inconvenience to the plaintiff.

Paragraph 5 of the statement of claim was as follows: "Each of the defendant companies frequently causes or permits access to the plaintiff's premises to be blocked by its vans and carts in the manner aforesaid at the same time while access to such premises is already blocked by vans and carts on the other side of his premises by the other defendant company in manner aforesaid; and by their respective combined acts the defendants thus prevent all access to the plaintiff's premises by vehicle or cycle, and also cause

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

special inconvenience to the plaintiff and his servants and customers on the footway."

The plaintiff claimed (1) £1,000 damages; (2) the like sum from each of the defendant companies; and (3) an injunction to restrain the defendant companies and each of them.

The Great Western Railway Co. took out a summons to stay proceedings in the action, unless the Midland Railway Co. were struck out as defendants.

Day, J., on the 6th of August, 1895, affirming the decision of the Master, granted the application.

The plaintiff, by leave, appealed.

Ord. 16, r. 3, is as follows: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

Dickens, *Q.C.*, and *Chester Jones*, for the appellant.—We rely on *Thorpe* v. *Brumfitt*, L. R. 8 Ch. App. 650. [A. L. SMITH, L.J.—That case does not cover a claim for damages.] If defendants can be joined for injunction they can be joined for damages: *Thorpe* v. *Brumfitt* was approved by Chitty, J., in *Lambton* v. *Mellish*, 43 W. R. 5, [1894] 3 Ch. 163. If the Midland Railway Co. is struck out, the plaintiff will be debarred from giving evidence as to that company's acts. We do not allege that the defendant companies have combined in the sense of conspiring to commit a nuisance, but that by their concurrent acts a nuisance is caused.

They referred to *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494, and *Booth* v. *Briscoe*, 25 W. R. 838, 2 Q. B. D. 496.

Hon. A. Lyttelton, for the respondent company.—There is no joint right of action, and, therefore, *Smurthwaite* v. *Hannay* applies and shows that the defendant companies cannot be joined. It is not the case that, if the Midland Co. is struck out, the plaintiff will be debarred from giving evidence as to the acts of that company. In *Thorpe* v. *Brumfitt*, James, L.J.. must have looked upon each of the defendants as a separate tortfeasor. The present action, being a claim for damages, must be amended or stayed.

Dickens, *Q.C.*, replied.

A. L. SMITH, L.J.—I am sorry to say that I cannot agree with my brother Rigby in this case. This is an appeal from the decision of Day, J., who affirmed the master, and I understand that the case came before him in this way. The plaintiff brings a common law action for damages, claiming £1,000 and £1,000—a common law action for damages—against two railway companies, the Great-Western Railway Co. and the Midland Railway Co. for committing a nuisance, and he also adds—which is an everyday occurrence now—a claim for an injunction at the end of his statement of claim. The substance of this case is, in my judgment, a common law action for damages to be tried by a jury and a judge. It is conceded that the Great-Western Railway Co. have not acted in combination with the Midland Railway Co. in doing what they have done, and also that the Midland Railway Co. have not acted in combination with the Great-Western Railway Co. in doing what the Midland Railway Co. have done. What is complained of is this. The plaintiff has a shop in the Strand, on one side of which is the Great-Western Railway Co., carrying on a receiving office for parcels and goods, and on the other side there is the Midland Railway Co., also carrying on the business of a receiving office. They are two separate and independent companies, carrying on separate and independent businesses. One has no control over the other, and both act independently in what they do; and it seems to me that each is only responsible for its own acts and is not responsible for the acts of the other company. I agree that in considering whether the Great Western Railway Co. have committed a nuisance or not—assuming the Midland Railway Co. (as is the fact) is now struck out—the doings of the Midland Railway Co. would have to be taken into consideration in considering what the Great Western Railway Co. was doing. I agree with that. And *vice versa*, if the action had been against the Midland Railway Co. the doings of the Great Western Railway Co. would have had to be taken into account. But that is not what the plaintiff is trying to do here. He is trying to sue two independent separate alleged tortfeasors, neither of whom has any control or power over the acts of the other. He is trying to sue them jointly in one action, and he does not know what are the respective acts of one or the other. How can he do that? The procedure was taken out to stay this action upon the facts which I have stated unless one of these companies was struck out. That procedure was taken in the same way as was adopted in a case that went to the House of Lords of *Smurthwaite* v. *Hannay*. These two defendants were joined, as I understand, under ord. 16, r. 4, and the basis of the application to strike out one is that under ord. 16, r. 4, there is no power, under these circumstances, to join the two defendants. My brother Day came to that conclusion, and so did the Master, and so do I.

It seems to me that these two companies, who are, as I say, independent tortfeasors, if they are liable for anything at all, ought not to be joined in one action by the plaintiff, and, as I read *Smurthwaite* v. *Hannay*, the question of the joinder of two plaintiffs equally applies to joinder of two defendants. As I read that decision, it does say, as far as it is applicable to this case, that the defendants cannot be joined in this case, and I agree with what Mr. Lyttelton said, that *Smurthwaite* v. *Hannay* has decided that ord. 16, rr. 1 and 4, has relation to the joinder of parties, and not to the joinder of causes of action.

I think that I differ from my brother Rigby in this case, because he thinks that there is a joint cause of action against the two companies, and no other. I do not think that it is so, and, with submission, in my opinion, these two torts, if they are torts, are independent torts by the different companies, although, as I have already stated, the acts of each company can be taken into account in considering the acts of one company, and deciding whether they amount to a nuisance or not. The acts of both companies should be taken into account, because it may be that the one company ought not to have done what it was doing when the other company was doing what it was doing. But that does not make these two causes of action a joint cause of action, or give any right to join one company with the other in one action. If it is said that I am not following loyally the decision of the court in the case of *Thorpe* v. *Brumfitt*, and the judgment of James, L.J., in this court, I answer that in that case the Lord Justice was not dealing with an action at law, or with the question of damages at all, but he was dealing with an action brought for the purpose of restraining a nuisance; and if the plaintiff's counsel in this action had accepted that position—namely, that he would strike out all question of damages and simply go for the injunction, I will not say what my judgment would have been: but,

inasmuch as he adheres, in this case, to what I say is a common law action for the damages which he claims, with the injunction thrown in, I think that Day, J., properly exercised the jurisdiction he had by making the order which he did make, and I think that it ought to be upheld.

RIGBY, L.J.—I regret to say that I cannot see the case in the same point of view as my brother Lord Justice. The question turns upon the 5th clause of the statement of claim in which it is alleged that "each of the defendant companies frequently causes or permits access to the plaintiff's premises to be blocked by its vans and carts in the manner aforesaid at the same time, while access to such premises is already blocked by vans and carts on the other side of his premises by the other defendant company in manner aforesaid, and by their respective combined acts." I do not rely upon the word "combined" because it was fairly explained as being nothing more than concurrent. It does not mean combination. It is that by the effect of their concurrent acts they "prevent all access to the plaintiff's premises by vehicle or cycle." Well, that is a substantive matter for a complaint if it is made out, and it appears to me, if it is made out, to be a nuisance, not two nuisances, but one, a nuisance to which each of the defendants contributes, and contributes not in such an uncertain degree that the plaintiff does not know which it is, but the plaintiff says that each of them frequently contributes, one by stopping access on his side while access is stopped on the other side by the other, so that altogether any access of a wheeled vehicle to his premises is totally prevented. I conceive that this is a case in which an action can be brought jointly.

It is suggested that it is a common law action. I confess that I do not know what a common law action is at the present day. There is no such thing as a common law action with reference to a question of this kind. A common law action is brought in a common law division in respect to a matter over which the ancient common law courts had jurisdiction, so much so that in Chancery, in the olden days, the question of injunction never could be raised if the right at law was in dispute, or until the right at law had been settled; and in the olden times, if the case of *Thorpe* v. *Brumfitt* had arisen, we should have had to send it back to a common law court to find out whether there was a nuisance at all. To be sure, that has been modified in modern times, but that was the original idea. You rested upon a legal right. James and Mellish, L.JJ., in that case, to my mind, decided that the acts of a plurality of people might, in themselves, when concurrently done, create a nuisance, where the act of each one of those individuals taken alone would be no nuisance at all, but a mere ordinary exercise of his own right. That is recognised by Chitty, J., in the case which has been referred to (*Lambton* v. *Mellish*), though I quite agree that that case had directly nothing to do with the question of parties. Now if the Court of Appeal were right in *Thorpe* v. *Brumfitt*—and I think that we are bound to assume that they were right—it appears to me that their decision was in accordance not only with what is convenient, but with what is the law, as I understand it—namely, that two or three people, though they do not combine in the sense of planning any scheme of action, may, in fact, act in such a manner, taking into consideration the acts of those acting with them, as to make them liable, and not only liable (I will not say now whether they were jointly liable at common law), but liable to be sued in a joint action under the effect of the Judicature Acts, and of rule 4 of order 16. At any rate, I am inclined to think that they would be suable at common law for a nuisance. Suppose there be a carriage road, which I have a right to use, and there are two people who have a similar right to use it. It may be that one of them, if he were on the road, would not stop me, but if two of them actually got into my road, though it might be by reason of a dispute between themselves, and not by reason of a bargain between themselves—if they got in my way and actually stopped me, I conceive that they would be doing an injury to my right of way, and might have been sued, I should have supposed, at common law. But at all events, that being the state of things, there being an action which is an action for an injunction, what right has one defendant to say "I will not be restrained unless my co-defendant is removed from the action, and unless you can get an injunction against him (if you get it at all) in an independent action?" I know of no such right. It appears to me that it is singularly inconvenient that such a doctrine should be laid down, and it appears to me that unless we are absolutely forced by some doctrine, or by some decision, which has not been brought before us, it is not desirable to lay down any such rule.

If it be said that damages being asked for is a reason why the action should be stayed, I again want authority for that. I have never heard of, or I do not remember, any authority, and no authority has been cited before us. The relief sought, or I should say, the main relief sought, is the injunction to do away with the state of things which, if the statement of claim be correct, must be doing perpetual and grave injury to the business of the plaintiff. That I should look upon as the main thing, not as an incident.

It is not an incident that an injunction is granted. An injunction is granted according to the rules which used to govern the Court of Chancery. If, indeed, there be a difficulty about assessing damages against these defendants separately, or if it be an impossibility, well, that is all the worse for the plaintiff. He may fail, I say nothing about that, for it is not necessary to do so—he may fail in establishing his damages, but I do not see how any objection can be taken to his injunction, and the injunction, as I said before, is the main part of the relief that he asks for. As to the case in the House of Lords of *Smurthwaite* v. *Hannay*, as I understand it, I take it to be shortly this, that you cannot bring plaintiffs, and by parity of reasoning you cannot bring defendants, before the court where the causes of action vested in the different plaintiffs, or the causes of action that exist against the different defendants, are separate. I do not look upon this case as one where the liability of the defendants is severable. No doubt, in the action, they allege it, but in clause 5 the plaintiff alleges what may be a much more formidable case, that the concurrent action of the two creates a nuisance.

Therefore, if my judgment had to decide this matter, I should differ from the learned judge, but, of course, as my learned brother does not take the same view, the decision stands.

Solicitors, *Kennedy, Hughes & Kennedy*; *R. R. Nelson.*

From Q. B. Div.
(Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) July 30, 1895.

METROPOLITAN DISTRICT RAILWAY CO. *v.* VESTRY OF FULHAM. (*a*.)

Metropolis—New street—Paving expenses—Apportionment—Owners of land—Discretion of local authority—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.

A vestry or district board, in apportioning the expenses of paving a new street, under section 77 of the Metropolis Management Amendment Act, 1862, *has a discretion, if it thinks fit, to charge particular owners of land in a less proportion than other owners of land.*

Appeal from the decision of a divisional court on a special case stated by a metropolitan police magistrate.

The vestry of the parish of Fulham, having resolved that a certain new street within their district should be paved, estimated the total expenses of such paving at £944 8s. 5d., and apportioned the same between between the owners of houses and land bounding or abutting on the new street in the sums set forth in a list of apportionments.

The Metropolitan District Railway Co. were charged as owners of land bounding or abutting on the new street, the sum apportioned to them being £404 13s. 5d.

The railway company having refused to pay the sum charged on them, the clerk to the vestry laid a complaint before one of the metropolitan police magistrates. At the hearing of the summons the railway company objected that the apportionment was bad in law, on the ground that certain persons named in the list of apportionments were charged, as owners of land, sums representing two-thirds of the estimated expense of the paving opposite to their land, whereas the railway company were charged, as owners of land, a sum representing the full estimated expense of the paving opposite to their land. The said charges of two-thirds of the estimated expense of paving were made pursuant to a resolution of the vestry, that it was just and expedient so to make the said charges.

The magistrate was of opinion that the apportionment was valid and binding, and made an order against the railway company for payment of the sum charged, but stated a special case in order to enable them to appeal to the Queen's Bench Division.

By section 105 of the Metropolis Management Act, 1855, if a vestry or district board shall deem it necessary or expedient that any new street shall be paved, the vestry or board shall well and sufficiently pave the same, "and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement, such amount to be determined by the surveyor for the time being of the vestry or board."

By section 77 of the Metropolis Management Amendment Act, 1862, where any vestry or district board shall have paved or be about to pave any new street under the powers of the above section, "the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do, and any such costs or expenses, including the costs of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board."

The Divisional Court (GRANTHAM and WRIGHT, JJ.), upheld the order of the magistrate, and dismissed the appeal.

The railway company appealed to the Court of Appeal.

Courthope Munroe and *F. O. Robinson*, for the appellants.

Channell, Q.C., and *R. Cunningham Glen*, for the respondents.

The following cases were cited besides those which are referred to in the judgments: *Davis* v. *Greenwich Board of Works*, [1895] 2 Q. B. 219, 43 W. R. Dig. 118, *Whitchurch* v. *Fulham Board of Works*, 14 W. R. 277, L. R. 1 Q. B. 233.

Cur. adv. vult.

July 30, 1895.—KAY, L.J., read the following judgment:—Before the passing of the Metropolis Management Amendment Act, 1862, the local authority entrusted by the Metropolis Management Act, 1855, with the duty of paving a new street and recovering the expenses from the owners of the houses forming such street, had not the power to charge the owners of land abutting on the street nor any express power of apportioning the expenses. The object of section 77 of the first-mentioned Act was to supply these deficiencies in the power of the local authority. The question in this case is whether, when an apportionment has been made in which some owners of land have been charged with a larger proportion of the expenses than others, the magistrate or the High Court in the absence of *mala fides* has any right to interfere. In other words, does the Act impose an obligation upon the local authority to make the apportionment rateably or upon any other principle? At once the question arises, What is meant by rateably or principle? Is the apportionment to be according to length of frontage value of land, or what is to be the basis of it? Length of frontage can hardly be in all cases the basis. One owner might have land only a few yards deep on which no valuable building could be erected. The next might, with the same frontage, have a considerable depth of land which might be available for the erection of large buildings and might be of much greater value. I should expect that the Legislature would leave a large discretion to the local authority to consider all the circumstances of each case, and to make what would be in their opinion a fair apportionment, having regard to all such considerations.

The appellants are owners of land adjoining a new street in the parish of Fulham. They complain that in the apportionment of the expenses of paving that street, other owners of land abutting upon the street have been charged only two-thirds of the estimated expense of paving the footpath and half the carriageway opposite their respective pieces of land, whereas the appellants have been charged with the full costs of the paving opposite their land.

Section 77 of the Act of 1862, provides, first, that the owner of land abutting upon a new street "shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein." It is not said whether the contribution is to be according to length of frontage, value of land, or what is to be the ratio. The next words do create some difficulty: "provided that it shall be lawful for the vestry or district board to

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do," and any such costs and expenses are to be apportioned by the vestry or board. The proviso seems to imply that the vestry could not have charged the owners of land in a less proportion than the owners of houses without that express provision. In other words, that the statute means that owners of houses and land must *primâ facie* be charged rateably, but, as between land and houses, land may be charged in a less proportion than houses. Therefore, it is argued, that as between owners of houses and between owners of land the charge must be rateable, and though the one set of owners may be charged in a less proportion than the other set, the charge upon each set must be rateable *inter se*. But the difficulty still remains, what does rateable mean? The word is not used in the Act, but if implied it must be intended that the local authority is not to divide the charge according to length of frontage only. No express principle of division is laid down. It seems to me that is intentionally avoided for the very purpose of giving the local authority a large discretion.

In *Stroud* v. *Wandsworth Board of Works*, 42 W. R. 355, [1894] 2 Q. B. 1, the Court of Appeal had to consider the third section of the Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), which empowered the local authority from time to time to execute any necessary works of repair upon a carriage-road, and upon a consideration of the scheme and object of these Acts, the court came to the conclusion that, although it was not expressed in distinct words, the necessary implication was that the question whether the repair was necessary or not was left to the discretion of the local authority, and that the magistrate or court could not interfere.

In *Stotesbury* v. *Vestry of St. Giles*, 59 L. T. N. S. 473, 37 W. R. Dig. 121, the same question that arises in the case before us came before a divisional court. The difficulty upon the words of section 77 of the Act of 1862, to which I have referred, does not seem to have impressed the Divisional Court, though it is noticed in the judgment of one of the learned judges. They held that a *bonâ fide* apportionment among different owners of land could not be interfered with by the magistrate. In my opinion a large discretion as to apportionment is intentionally by the statute vested in the local authority, and so long as it is exercised *bonâ fide*, as in this case, the magistrate or court has no jurisdiction to interfere.

A. L. SMITH, L.J.—The question in this case depends upon what is the true meaning of section 77 of the Metropolis Management Amendment Act, 1862, and is whether, when a local authority has paved or is about to pave a new street within the metropolis, that authority has a discretion as to how it will apportion the expenses of so doing between the owners of land abutting thereon, or whether it is bound to apportion the expenses equally between each owner of land, either as regards frontage or rateable value, or on some other defined principle, wholly irrespective of the varying amenities the different plots of land may possess, and the different advantages they may derive from the paving of a new street.

I agree that an apportionment made by a local authority is unimpeachable upon appeal in a court of law (*Nisbet* v. *Greenwich Board of Works*, 24 W. R. 223, L. R. 10, Q. B. 465), unless that authority has exceeded its jurisdiction in doing what it has done: *Reg.* v. *Marsham*, 40 W. R. 84, [1892] 1 Q. B. 371. Unless, therefore, section 77 enacts that the local authority shall have no discretion as to how it shall apportion the expenses of paving a new street between the abutting landowners, then the apportionment in this case must stand, for the local authority has acted within its jurisdiction in apportioning, as it has done, the expenses of paving between different landowners.

In the year 1855 it was enacted by the Metropolis Management Act, 1855, that the owners of houses forming a new street should, on demand, pay to the local authority the estimated expenses of paving such street. This section in no way directed in what manner the expenses were to be borne by the different houseowners, nor did it provide for any apportionment being made by the local authority between them. So matters rested until the year 1862, when the Act of 1855 was amended by the Metropolis Management Amendment Act of that year. By section 77 of this Act, owners of lands abutting upon a new street were placed under contribution towards these paving expenses as owners of houses had theretofore been, and the section enacts that where "any vestry or district board, under the powers of the Act of 1855, had paved, or were about to pave, any new street, the owners of land abutting upon such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same, as well as the owners of the houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such expenses shall be apportioned by the vestry or district board, who were empowered to recover the same from the owners, or, at their discretion, to accept payment of the amount apportioned in respect of each house or premises by instalments." It is clear that this apportionment of the expenses is to be made between the owners of houses and of lands abutting upon the new street, and it will be noticed that the section in no way enacts how this apportionment is to be made, whether according to frontage or to rateable value, or to any defined principle. This is left to the discretion of the local authority.

It is not suggested in this case that the local authority, in the apportionment which they have made, have charged the owners of land more than the owners of houses, but what the authority have done, and what is complained of by the appellants, who are landowners, is that they have not apportioned the expenses equally between each landowner. To test the point taken, suppose the case in which there is no landowner and nothing but houseowners in the new street. Is there anything in this section, which was passed to bring landowners under contribution and to give the right of apportionment to the local authority, to compel that authority to apportion the same amount between one landowner in a street who has, say, a house with a twenty-foot frontage and a depth of eighteen feet, and the next houseowner, who has a house with a like frontage and treble or quadruple its depth? It certainly was not so enacted by the Act of 1855, and I cannot find it in the Act of 1862, and, indeed, the case of *London School Board* v. *St. Mary, Islington*, 24 W. R. 137, 1 Q. B. D. 65, would tend to show that there is no such restriction. It is true that the point now taken was not argued, though it stood out clearly upon the case. If the local authority have a discretion as to how to apportion the expenses of paving between the different houseowners in a new street, it seems to me that they have a like discretion as regards the different landowners therein.

It was said that the words in section 77, which make it lawful for the local authority to charge owners of land a less proportion than owners of

houses, show that this is the only inequality tolerated by the section, and it is upon this that the appellants rest their case. If this be the meaning of the Legislature, in my judgment it would not have been left in this ambiguous manner, but there would be found some provision that the local authority were to apportion the expenses, either upon frontage, as in section 150 of the Public Health Act, 1875, or upon rateable value, or upon some other principle of equality. But instead of this we find that the apportionment is left wholly to the vestry to decide, without fetter or restriction, except these words have the effect contended for.

In my judgment that is not the true interpretation of these words, which were inserted not for the purpose of showing how an apportionment upon owners of houses was to be made—for they have no relation thereto—but to make it clear that landowners, when brought under contribution, might be charged less than owners of houses as regards paving expenses, if the local authority thought fit, and the discretion which is otherwise given to the local authority by the rest of the section is not taken away by these words. For these reasons, as well as those given in the judgments of my Brothers Wills and Grantham in the case of *Stotesbury* v. *Vestry of St. Giles*, in the year 1888, to review which the present appeal is brought, I am of opinion that it fails, that the local authority have acted within the jurisdiction given them, and that this appeal must, therefore, be dismissed with costs.

Lord ESHER, M.R.—I am entirely of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Baxter & Co.*

Solicitors for the respondents, *T. Blanco White.*

From the Mayor's Court. (Lord Esher, M.R., and Kay and Lopes, L.JJ.) Oct. 29.

CHAMBERLAIN *v.* VOGAN. (*a.*)

Corporation of London—Revenue—Duty on grain—Mixture of grain and other articles—The Metage on Grain (Port of London) Act, 1872 (35 & 36 *Vict. c.* c.), *s.* 4.

The Metage on Grain (Port of London) Act, 1872, *s.* 4, *imposes a duty of three-sixteenth of a penny per cwt. in respect of "grain brought into the Port of London for sale."*

Held, that the duty was imposed upon grain which was brought into the Port of London for sale as grain, and was not leviable in respect of grain which was brought in for the purpose of being mixed with other articles and sold for horse food.

Appeal of the plaintiff from the Mayor's Court.

The action was brought by the plaintiff, who was the Chamberlain of the City of London, to recover duty under section 4 of the Metage on Grain (Port of London) Act, 1872.

That section provides that the Corporation of London "may demand and receive, in respect of all grain brought into the port of London for sale, a duty at the rate of three-sixteenths of a penny per cwt., to be called the City of London Grain Duty, and such duty shall, subject to the provisions of this Act, be held by the corporation for the preservation of open spaces in the neighbourhood of London, not within the metropolis as defined by the Metropolis Management Act, 1855."

The jury found a special verdict that the defendants were the owners and consignees of a quantity of grain—namely, maize and oats which had been brought into the port of London; that a portion of the maize was sold to the purchasers in the same state as it arrived, and that the defendants admitted their liability to pay duty in respect of that; that the residue of the maize and the oats were taken to the defendants' mills, and a portion of the maize was ground into meal, and then sold in that condition; the remainder was crushed and cracked between rollers, and then sifted so as to separate the crushed and cracked maize from the meal, which was sold, while the crushed and cracked maize was mixed with beans, peas, and oats which had been similarly treated and sold for horse food. The oats brought in by the defendants were treated in a similar manner and were also sold for horse food. The jury further found that the maize and oats were brought into the port of London for the purpose of being dealt with as described and then sold.

On these findings, the Common Serjeant entered judgment for the defendants.

The plaintiff appealed.

Sir E. Clarke, Q.C., and *Danckwerts*, for the plaintiff.—In spite of the treatment of the maize and oats, as described in the special verdict, they still remained "grain" within the meaning of the section, and were, therefore, liable to duty. The statute provides that the duty shall be paid on grain brought into the port of London "for sale," but it does not say that the grain must be sold separately. In *Attorney-General* v. *Green*, 4 Price 224, it was held that a vendor of blacking containing vinegar and other ingredients was liable to the excise duty of vinegar. Suppose, a cargo of maize and oats brought into London for sale; separately they would both be liable to the duty, but according to the defendants' contention, if they were mixed and the mixture sold, no duty at all would be payable. That is a most unreasonable conclusion.

They also cited *Scott* v. *Taylor*, 48 J. P. 424, and *Pharmaceutical Society* v. *Armson*, 42 W. R. 662, [1894] 2 Q. B. 720.

Joseph Walton, Q.C., and *Albert Gray*, for the defendants.—There are three purposes for which grain may be brought into London; it may be for sale, or for manufacture, or for consumption. The duty is imposed only in the case of sale. In this case the defendants have not sold grain, but a mixture for horse food. A person who had contracted to buy maize would not accept this mixture in fulfilment of his contract.

Lord ESHER, M.R.—I have come to the conclusion that this Act of Parliament being an Act dealing with commercial matters, its phraseology must, therefore, be construed according to its ordinary commercial meaning. When in a commercial transaction grain is said to be brought into a place for sale, that would mean for sale as grain. In this case the grain was not brought in for sale as grain, but as something else, and the defendants are, therefore, not liable to pay duty in respect of it. The appeal must be dismissed.

KAY, L.J.—I am of the same opinion, having no doubt about the meaning of the Act. If grain is brought in for the purpose of being manufactured into something else, which, if delivered, would not be a fulfilment of a contract to sell grain, then it cannot be said that the grain was brought in for sale. In this case the sale was not a sale of grain, but of a

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

different article of commerce, although it is true grain formed part of it. Sale is not the only antithesis to consumption. There is also the manufacturing of a distinct article out of the grain and a sale of that article. That is this case, and in my opinion it is outside the provisions of the Act.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *H. H. Crawford.*

Solicitors for the defendants, *Wansey, Son, & Bowen.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 11, 12, 1895.

EBBETTS *v.* CONQUEST. (*a.*)

Landlord and tenant—Underlease—Covenant to keep in repair—Measure of damages.

In an action for damages on a breach of covenant to keep demised property in repair, the proper measure of damages is the difference in value between the reversion with the covenant performed and the value of that reversion with the covenant unperformed.

In the case of an underlease, if the underlease discloses the fact that it is an underlease, the liability over of the underlessor to his superior landlord is a material circumstance to be taken into account in ascertaining the amount of damages to be paid by the underlessee to the underlessor for breach of covenant to keep in repair.

Appeal from a decision of an official referee as to the amount of damages payable by the defendants for the breach of a covenant in an underlease to keep the premises in repair.

The original lease of the premises, known as the Grecian Theatre in the City-road, was granted by the trustees of St. Botolph, Bishopsgate, in 1840, to Thomas Rouse for a term of sixty-one years from Michaelmas-day, 1837.

In March, 1851, Rouse granted an underlease of his whole term, less the last ten days thereof, to Benjamin Oliver. The plaintiffs now represented Rouse, and the defendant Conquest now represented Oliver, whilst William Booth was a co-defendant, being an assignee of the underlease.

The underlease contained a covenant to "keep" the premises in repair, and showed, on the face of it, that it was an underlease and not a lease by a freeholder. The action was brought for breach of that covenant.

Romer, J., at the trial of the action, held that there had been a breach of the covenant, and referred it to the official referee to assess the amount of the damages. He assessed the damages at £1,305 treating the proper measure of damages as the sum which it would cost to put the premises in a proper state of repair, with an allowance for the unexpired term of the underlease. It was admitted that on this principle the sum of £1,305 was the right amount.

The defendant Booth appealed.

Haldane, Q.C., Sargant, and *H. Courthope-Munroe,* for the appellant.—The plaintiffs say the damages should be the amount it would cost to fulfil the the covenant. We say the damages should be based on the depreciation in the selling value. These premises would be of no value even if they were put in repair, the only value attaching to them is as a building site. The official referee, acting on the first principle, has assessed the damages at £1,305. We say the amount should be £200, for if they were put into repair they would be worth £200 more for pulling down than if not put into repair. The covenant to keep in repair is not one of which the courts grant specific performance. Only damages are recoverable, and those damages, as the cases show, are arrived at on the principle of making good the loss which the plaintiff has suffered. *Vivian* v. *Champion,* 2 Lord Raym. 1125, is against us, but ever since that case there is a consistent line of authorities, showing that in the case of covenants to "keep in repair" the right principle is the one contended for by us, though in some of the cases there are, no doubt, *dicta* to the effect that the rule is different in the case of covenants "to yield up in repair." These cases are as follows: *Smith* v. *Peat,* 9 Exch. 161, 2 W. R. Dig. 164; *Hadley* v. *Baxendale,* 2 W. R. 302, 9 Ex 341, 2 Smith, L.C., 9th ed., 594; *Turner* v. *Lamb,* 14 M. & W. 412; *Davis* v. *Underwood,* 6 W. R. 105,2 H. & N. 570; *Mills* v. *East London Union,* 21 W. R. 142, L. R. 8 C. P. 79; *Joyner* v. *Weeks,* 39 W. R. 583, [1891] 2 Q. B. 31. [LOPES, L.J., referred to *Inderwick* v. *Leech,* 1 Times L. R. 95, 484, referred to in *Joyner* v. *Weeks.*] *Henderson* v. *Thom,* 41 W. R. 509, [1893] 2 Q. B. 164; *Whitham* v. *Kershaw,* 34 W. R. 340; 16 Q. B. D. 613; *Wigsell* v. *School for Indigent Blind,* 30 W. R. 474, 8 Q. B. D. 357. From the cases it is now established that the *dictum* of Lord Holt in *Vivian* v. *Champion* is not sound.

They also referred to *Coward* v. *Gregory,* 15 W. R. 170, L. R. 2 C. P. 153.

R. F. Norton (*Jelf, Q.C.,* with him), for the respondents.—The argument of the appellant comes to this, that if a freeholder lets a chapel, the lessee's surveyor may come and say "This property would let better as a public-house. Therefore we will only pay damages on the footing of the house being pulled down." That cannot be the law, and the case of a leaseholder letting a house is an *a fortiori* case. There is no difference between the covenant to keep in repair and to yield up in repair, except that in an action on the former discount is allowed.

He referred to *Clow* v. *Brogden,* 2 Man. & G. 39, 54.

Haldane, Q.C., replied, and referred to Mayne on Damages (5th ed.), p. 99, Key and Elphinstone's, and Prideaux's, Precedents in Conveyancing.

LINDLEY, L.J.—I think that the official referee was right in the view which he took. This is an action brought by the plaintiffs, who may be treated as standing in the place of Mr. Rouse, against Mr. Conquest, who may be treated as standing in the place of Mr. Oliver, to whom I will refer presently, and against Mr. William Booth, who is an assignee, as I understand it, of Mr. Oliver. Now the action is brought in respect of a breach of covenant to repair. This is contained in an indenture of underlease of the 24th of March, 1851, made between Mr. Rouse, who was himself a tenant under the Bishop of London, and Mr. Oliver. Mr. Oliver is dead, and as I have said Mr. Conquest represents him, and he has assigned to Mr. Booth. Now the underlease itself shows plainly enough what the position of the parties was; that is to say the underlessee knew perfectly well that his lessor was himself a lessee; and knew perfectly well that he was taking an underlease. Whether or not he looked at the lease under which his immediate lessor held I do not know. But it is important to observe that the parties knew perfectly well their relative positions, because when we look at the under-

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

lease we see constant references to the superior landlord there. For example, there is liberty reserved to the agents of the superior landlord to come in and do repairs, and there is a covenant not to do anything which will annoy the immediate lessor's landlord or the tenants of the superior landlord.

Now the covenants which are contained in the underlease, and with which alone we have to deal, are covenants to repair. I understand those covenants to mean to put into repair the premises demised —which now practically consist of this Grecian Theatre—to repair them and to keep them in repair, and to deliver them up at the end of the term in good repair.

Now there is not in this underlease any covenant to indemnify the immediate lessor against his liability to his superior landlord in respect of repairs. The consequence of that is, that under these covenants the immediate lessor cannot get, by a long way, so much in the shape of damages as he might if he were suing upon a covenant for indemnity. Now this property demised by the underlease is out of repair. The plaintiffs are reversioners. Their reversion consists only of about ten days, but they are liable over, on the expiration of their lease, to deliver up this property to their landlord, who is the Bishop of London, in proper repair. That is conceded, and the circumstance is all important in investigating what is the proper amount of damages to which they are entitled for breach of the covenant on which they sue. The underlease itself has not yet run out. When this action was commenced there were about four or four and a-half years to run, and there are now about three and a-half years. But the action is not brought for a breach of the covenant to leave in repair, because the time for suing on that has not arrived. The action is brought for a breach of the covenant to keep in repair.

Now what is the rule as to ascertaining the damages for a breach of that sort? The breach is not in controversy. It appears to me that this is an ordinary action for a breach of contract, and that the general principle applicable to it is that laid down in *Hadley* v. *Baxendale*. I will refer to that case, because it appears to me to cover the present case. As appears from the report, Alderson, B., in delivering the considered judgment of the court, said: "We think the proper rule in such a case as the present is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered, either arising naturally, that is according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." I take that to be the rule, and I apply it to this case, and it is because of the importance of the underlessee knowing the position of his lessor that I refer to this underlease. If this underlease had not disclosed the fact that it was an underlease, possibly the observations which I have made would require some modification. What, then, are the damages which the plaintiffs have sustained by reason of the breach by the lessee of his covenant? It appears to me that, applying *Hadley* v. *Baxendale*, the damages which they have sustained are to be measured by their liability over to their lessor, which was one of the circumstances, special if you like, but known to and reasonably within the contemplation of the defendants, and far short of a covenant of indemnity. Surely the damages sustained by the plaintiffs, for which the defendants are liable upon the principle of *Hadley* v. *Baxendale*, must be reckoned thus: Ascertain what is the difference in value between the reversion with the covenant performed as it ought to be and the value of that reversion with the covenant unperformed, which it ought not to be? That represents the damages which, it appears to me, the defendants ought to pay the plaintiffs. The learned official referee has taken that view, and he has assessed the damages upon that principle. He says that it will cost over £1,500 to put the property in repair, and he discounts that sum, and makes the damages £1,305.

Now Mr. Haldane says that that is wrong in principle, because that is really giving the plaintiffs an indemnity when there is no covenant for it. My answer to that is that it may be in this particular case an indemnity, but if the plaintiffs were suing upon a covenant of indemnity, they might get a great deal more. Mr. Haldane says that you must treat this as an ordinary case of landlord and tenant where the landlord is the reversioner. He says you must look at the value of the reversion apart from these special circumstances to which he alluded, and, apart from that which is all-important in this case—namely, the liability over. If you were dealing with a reversion in fee, I do not suppose that this sum of £1,305 would be the measure of damages. I think that that is very likely; but you cannot leave out the cardinal point in this case, on which the whole case turns—namely, this liability over. It seems to me, therefore, that the learned referee is right, and, at all events, it would not be prudent to say he was wrong. I have not gone into these calculations, but there is nothing wrong in the principle he has adopted. Therefore, I think that the appeal ought to be dismissed, with costs.

LOPES, L.J.—I am of the same opinion. The general rule with regard to damages in actions of this kind may be stated thus: Where the term has come to an end and the action is on the covenant to leave in repair, the measure of damages is the sum it will take to put the premises into the state of repair in which the tenant ought to leave them according to his covenant; and the measure of damages for the breach of a covenant to keep in repair during the currency of the term is the loss which is occasioned to the lessor's reversion—a loss which will be greater or less according as the term of the tenant at the time of the breach has a greater or less time to run. Those I think, are the general rules which are deducible from the cases. But there are special circumstances in this case which prevent this particular case from coming exactly within either of these rules. The special circumstances which I allude, to are that there is a liability over. In this case the underlessee knew that he was taking from a lessee, and I cannot doubt that he knew of the covenants in his lessor's lease, and amongst those covenants is a covenant to yield up in repair on the termination of the lease. To my mind that is the most important matter in this case when we have to deal with the question of damages. We have, therefore, under these circumstances, to consider what is the loss to the lessor's reversion; in other words, what is its marketable value. Supposing he offers it for sale, I presume the purchaser

would say: "If I buy, I buy subject to a liability to yield up the premises in repair. I can only, therefore, give you such a sum as the premises are worth, after deducting from that sum the cost of repairs." In my view the plaintiffs are entitled to say: "We are liable to our lessor to give up these premises in repair. If you had observed your covenant and kept the premises in repair the reversion would be worth so much. You have not kept it in repair, and it is worth so much less, that so much less being what it will cost to put it in repair. Therefore the loss to the reversion is the cost of putting those premises in repair." Now if I had to deal with this case with a jury, I should have left the question to them in the way I have already stated. I should say what you have to consider is, What is the loss inured to the plaintiffs' reversion. In order to arrive at that you must in your own minds determine what is the value of this reversion with this covenant observed, and what is the value of this reversion with the covenant not observed, and the difference between those two sums will be the loss which the plaintiffs have sustainted in respect of their reversion. I did not at first very clearly understand how the official referee had dealt with the matter. But it seems to me that that is the way in which he has dealt with it. He has taken all those matters into consideration, and he said that practically the loss that has accrued to the reversion is the difference between the value of the reversion with the covenant performed and the value with the covenant unperformed. That amounts to £1,500, which discounted, as it ought to be, will amount to the sum of £1,305. Whether that is a proper figure or not I am not prepared to say, because we have not the figures before us. But most distinctly I cannot say that the official referee is applying a wrong principle. Nor can I say that is not a right and proper figure for him to have assessed.

I think, therefore, that the appeal fails.

RIGBY, L.J.—I am of the same opinion. This is a question of principle and principle only. No attempt has been made, and I presume no attempt could be really made, to affect the figures unless we can affect the principle upon which they are arrived at. The authorities referred to by Mr. Haldane clearly show that as a general rule there is a difference in the assessment of damages in the case of a breach of a covenant to yield up in repair, brought after the determination of the term, and the case of a breach of a covenant to keep in repair, brought during the continuance of the term. In the first case, by the authorities it is laid down upon grounds of convenience, and, indeed, it is no doubt an arbitrary rule, that whether or not the lessor in fact loses, he shall be paid the amount which would be necessary to place the premises in good repair. It may happen that even a payment of that amount would not induce him to repair. It may be far more to his interest to let the buildings be pulled down. But these considerations are not taken into account, principally because they depend upon the arrangements which the lessor has made with other persons, with which the lessee has nothing at all to do and as to which in general, he will have no information, and as to which at the time he enters into the bargain, he can have none.

Then there is, as to the covenant to keep in repair, another rule which is this. On a covenant to keep in repair the general rule is that you are to take the effect upon the value of the reversion treating it as though it were carried into the market for sale under such circumstances that the purchaser might do whatever he liked with the property, turn it to the best advantage, which I will assume in this case would be by pulling down the buildings altogether and treating the property so purchased as a mere building site. The very fact that the rule is stated in those terms appears to me to prevent the possibility of applying it to a case of this kind. This reversioner for ten days cannot take his reversion into the market and sell it to a purchaser, who shall be able to deal with it as he pleases as building ground. His interest is such that he cannot touch the buildings, except for the purpose of repairing them. He cannot pull them down, and cannot convert the property into a building site. Therefore, the supposed standard which is a perfectly good standard of reason and sound sense, as well as of authority, when applicable to the case of a freeholder who can deal with his reversion as he likes, and give similar rights to the purchaser, ought certainly not *primâ facie* to apply to a case of the present kind. Mr. Haldane was not able to point out any authority in which that principle had been so applied. And I think, from the very terms of the rule, and in the absence of authority, it ought to follow, upon common sense grounds, from the very statement of the rule itself, that it cannot apply. My conclusion is that that rule does not apply to the present case. What rule then ought to apply? We must consider what the position of the parties is. Mr. Oliver, through whom Mr. Booth claims, and by whose bargain he is bound, knew well that this property was not the freehold of Mr. Rouse, who demised to him. He had clear notice, upon the face of his own underlease, that it was an underlease, and that there was a subsisting lease from the superior landlord, the Bishop of London, represented at the present time by the plaintiffs. Knowing that, What is the clear rule of law? Oliver must be taken to have known all the terms of that superior lease, in the same way as if they had been cited at length in his own underlease. It would appear that the original lessee was under liability himself to keep in repair, and a further liability, at the end of the term, under the covenant, to yield up in repair.

Now, applying the rule of *Hadley* v. *Baxendale*, what must be taken to have been in the contemplation of the parties? The fact which was known to the underlessee, that his immediate lessor was under liability to keep in repair, and to yield up in repair, becomes one of the circumstances of the case to be looked at in the assessment of damages. The measure of damages is the injury to the plaintiffs. I do not say to the plaintiffs' reversion necessarily, but the loss to the plaintiffs arising directly out of the breach—a loss which must be known to be the necessary consequence of the breach under the circumstances of the plaintiffs' covenant with the superior landlord. The learned official referee appears to me to have taken the right view.

I will only observe that, if the supposed general rule of the diminution of the reversion were to apply to a case of this kind, the result would seem to follow that, in a case of ten days' reversion or three days' reversion, nothing but nominal damages could be recovered, during the term, upon the covenant to keep in repair.

I am of opinion that there has been no miscarriage, and that the sum of £1,305, so far as I can say without the figures being before us, represents fairly the damage which the plaintiffs have sustained. Under these circumstances the appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellants, *Ranger, Burton, & Frost.*

Solicitors for the respondents, *Clarke & Calkin.*

App. Bankruptcy.
(Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) Aug. 2, 1895.

In re CAREY.

Ex parte JEFFRIES *v.* CAREY CYCLE CO. (LIMITED). (*a.*)

Bankruptcy — Conveyance with intent to defeat and delay creditors — Conversion of bankrupt's business into a limited company—Respective rights of creditors of the bankrupt and of the limited company.

The bankrupt, when insolvent, had converted his business into a "one-man" company, limited.

Held, that the trustee in bankruptcy was entitled to a declaration that the conveyance of the bankrupt's business to the company was void against him, and that he was entitled to take the assets of the company; but that he must pay the new creditors of the company in full, in priority to the creditors of the bankrupt.

This was an appeal from the judgment of Vaughan Williams, J., dated the 20th of May (43 W. R. 605), declaring that a transfer of the business of Carey, a bankrupt, to the Carey Cycle Co., was void as against the trustee in bankruptcy, but that the assets of the company formed part of the general estate of the bankrupt, and that they were subject in the first place to the creditors of the company being paid in full out of them. The bankrupt had used the company as his agent, and must, therefore, indemnify it, and the trustee could only take its assets subject to this obligation to indemnify.

Crisp, for the appellant, the liquidator.—The order appealed from is wrong so far as it orders the liquidator to hand over the assets of the company to the trustee in bankruptcy.

Herbert Reed, Q.C., and *Carrington*, for the trustees, were not called upon.

Lord ESHER, M.R.—This appeal must be dismissed. All we have to decide is whether the point taken on behalf of the appellant is a good one or a bad one. I think it is an utterly bad one.

KAY and A. L. SMITH, concurred.

Appeal dismissed.

Solicitors, *Arthur Pyke; Bassett & Co.*

High Court of Justice.

Chan. Div.
Chitty, J. Aug. 9, 10, 1895.

In re LORD COLERIDGE'S SETTLEMENT. (*b.*)

Settlement—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22 (2), 53—*Capital money—Investment—Tenant for life, direction by—Trustees.*

The tenant for life under a settlement has power conferred on him by the Settled Land Act, 1882, *of directing the mode of investment of capital money arising under the Act and selecting the particular investment, subject only to the limitations expressed in the Act itself, and cannot be controlled by the trustees or the court in the exercise of this statutory power so long as he really and honestly exercises his discretion.*

Summons.

This was an application by the trustees of the settlement executed by the late Lord Coleridge in 1887 for the purpose of obtaining the decision of the court on the question whether they would be justified in investing certain capital money which had arisen from a sale of a leasehold house, part of the settled property, according to the direction of the present Lord Coleridge, the tenant for life in possession. The sale was effected by him under his statutory power.

The settlement expressly referred to the Settled Land Act, 1882, and declared that capital money arising under that Act might be invested in the names of the trustees, or under their control, in any investment in which trustees were by law authorized, or in other various investments specifically mentioned.

The several investments which the tenant for life directed were all within the scope of the settlement power; but they were not such as the trustees would themselves select. The prices of the stock were considerably above par, and the net annual proceeds of the investments as a whole were not much more than £3 per cent.

The trustees, amongst other objections to the investments, pointed out that, in the event of certain redeemable stock being paid off at par, the capital of the trust fund would be diminished.

Romer, for the trustees.

Macnaghten, for the tenant for life.

CHITTY, J.—The question turns upon sections 21, 22, and 53 of the Settled Land Act, 1882. Section 21 enacts that capital money under the Act shall be invested or otherwise applied wholly in one or partly in one and partly in another or others of the modes after-mentioned, and these modes are specified in the ten following sub-sections. This division into ten sub-sections is merely for the sake of clearness and convenience. Sub-section 1 runs thus:—"In investment on Government securities" (by section 2 this term includes stocks, funds, and shares), "or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money, or on" other securities mentioned in the sub-section. Section 22 enacts that the investment or other application of capital money by the trustees "shall be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees."

It was argued by counsel for the trustees that the only direction which the tenant for life could give to the trustees was to invest or apply the money according to some one or other of the ten sub-sections in section 21, each sub-section being regarded as a whole; and that, in regard to the various modes of investment or application specified in each sub-section, the choice of the particular investment or application lay with the trustees. There was nothing in the Act to justify this construction; it would cut down the power of the tenant for life in a manner not contemplated by the Legislature, and render it almost nugatory. The argument was abandoned, and rightly, by counsel on my pointing out some of the results which ensue from its adoption.

The power thus conferred on a tenant for life of directing the mode of investment, and of selecting the particular investment, is, no doubt, extensive. The enactment is in accordance with the general policy of the Act; in cases falling within its provisions the Act transfers, in regard to investment, a function ordinarily exercised by trustees, from the trustees to the tenant for life. The only limitations imposed on him are those to be found in the Act

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

(*b.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

itself—notably in the 21st and 53rd sections. By the 53rd section a tenant for life, in exercising any power under the Act, is bound to have regard to the interests of all parties entitled under the settlement, and, in relation to the exercise thereof by him, is deemed to be in the position and to have the duties and liabilities of a trustee for those parties. Supposing that this case had not fallen within the Act, and that the trustees had, in the exercise of their ordinary discretion, selected these securities in good faith, their discretion could not have been questioned: they would have been acting within the scope of the authority conferred on them by the settlement. Similarly the tenant for life, in the exercise of his statutory power, cannot be controlled by the trustees or by the court, so long as he really and honestly exercises his discretion. This the present tenant for life has done; he has considered the question of the propriety of the investments, and has consulted a broker of good standing in the City of London, who has advised him on the subject. He has offered to produce an affidavit verifying the paper on which the broker's advice is given. This should be done. I hold, then, that the trustees will be safe in complying with the direction given, and that they are bound to comply with it.

Solicitors, *C. & S. Harrison & Co.; Spencer Whitehead*, for *Blackmore, Shield, & Mackarness*, Alresford.

Chan. Div. }
North, J. } Aug. 2, 1895.

Crompton and Evans Union Bank *v.* Burton. (*a*.)

Practice—Payment into court—Order for payment into court on motion—Admission by defendant of receipt of money—Improper payments by defendant.

Upon an interlocutory motion, money will not be ordered to be paid into court by a constructive trustee unless it is actually in his hands. It is not sufficient that it has been in his hands and that he is responsible for it.

Neville *v.* Matthewman, 42 *W. R.* 675, [1894] 3 *Ch.* 345, *and* Nutter *v.* Holland, 43 *W. R.* 18, [1894] 3 *Ch.* 408, *followed.*

Motion by the plaintiffs for an order directing George Burton and William James Burton, two of the defendants, within four days to pay into court to the credit of the action, a sum of £2,835 19s., being the balance of the purchase-moneys of certain real estate, after deducting therefrom £2,500 due on a first mortgage.

The plaintiffs were second mortgagees of the property which had been sold, the amount of their mortgage being £3,000. Henry Green, the mortgagor, died on the 3rd of July, 1893. The executors and trustees of his will were also made defendants to the action. Acting under the advice of the defendant, George Burton, who was their solicitor, the trustees of the will put the mortgaged property up for sale. Eighteen lots were sold, realizing in all £5,335 19s. It turned out, however, on investigating the title, that the trustees had only a future power of sale under the will, and, therefore, could not make a title, whereupon the defendant, George Burton, procured a transfer of the first mortgage to his son, William James Burton, who carried out the contract by selling, as mortgagee, under the power of sale. George Burton acted as solicitor for his son in the completion of the contracts, and the purchase-money was paid to him; the son did not receive any of the money, and was in fact a mere nominee throughout. In answer to the motion, the defendant, George Burton, had filed an affidavit admitting the facts, and the receipt of the whole sum, but exhibiting an account purporting to show how he had disposed of the whole of the money with the exception of £1,035. He claimed to be entitled to deduct, besides the money due under the first mortgage, certain payments, amounting to a considerable sum, made to the testator's executors in respect of costs incurred by them in carrying on a colliery, which formed part of their testator's estate, and also to retain the costs of the transfer and sale, and the amount of a promissory note still outstanding, given by him as collateral security for money borrowed by the executors from their bankers.

Swinfen Eady, Q.C., and *E. S. Ford*, for the plaintiffs.—The only deduction the defendants were entitled to make from the proceeds of sale was the amount due to the first mortgagees; they ought not to be allowed their claim in respect of the other items in the account, such payments were breaches of trust, and the defendants must be treated as if they still had the moneys in their hands.

Vernon Smith, Q.C., and *A. W. Rowden*, for the defendants Burton.—The defendant, George Burton, was acting for the executors and not for the first mortgagees. Even if he has wrongfully parted with the money, the order cannot be made against him: *Nutter* v. *Holland*, 43 W. R. 18, [1894] 3 Ch. 408, and *Neville* v. *Matthewman*, 42 W. R. 675, [1894] 3 Ch. 345. Orders on motion are only made for the security of the fund, not by way of penalty or by way of prejudging liability.

E. S. Ford, in reply.—*Neville* v. *Matthewman* differs from this case, inasmuch as there the executor never got the money. *Nutter* v. *Holland* was a case under ord. 55, r. 3 (*d*), where the actual words are "money in the hands of the executors or trustees."

North, J., after stating the facts, disallowed the claim on the promissory note, and also the costs of the sale, on the ground, as to the latter, that there was no evidence that they had been paid, and continued:—Then I come to deal with the item relating to the payments made by the defendant to the executors. In his affidavit the defendant says that he paid the sums to Hardwicke (one of the executors) to enable him to carry on the colliery, and it was understood that he (the defendant) should be paid out of the proceeds of sale of the property, and the plaintiffs would be paid somehow else. This arrangement was a gross breach of duty on the part of the trustees and the solicitor, and I should accordingly have thought it was a matter of course that these moneys should be paid into court, but I feel embarrassed by the cases of *Neville* v. *Matthewman* and *Nutter* v. *Holland*. I do not think those cases can go quite as far as the defendants contend—namely, that if a man wrongly paid away money yesterday, he cannot be ordered to pay it into court to-day; but, having regard to the practice of the court as modified by those cases, and to the fact that these moneys have been paid to the executors, and are not now in the hands of the defendants, I cannot order the moneys so parted with to be paid into court. I, therefore, order the defendants Burton to pay into court the balance of the proceeds of sale of the mortgaged property after deducting the sum paid to the first mortgagees and the payments made to the executors.

Solicitors for the plaintiffs, *Johnson, Weatherall, & Sturt*, for *W. G. Ekin*, Nottingham.

Solicitors for the defendants, *Peacock & Goddard*.

(*a*.) Reported by R. Sillem, Esq., Barrister-at-Law.

Chan. Div.
North, J.

June 26, 1895.

In re JEFFERY.
ARNOLD *v.* BURT. (*a.*)

Infant—Maintenance—Income — Contingent interest — Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

Where property is settled on trust for such members of a class as shall attain twenty-one, the accumulated income will be divisible into as many shares as there are members in existence, one of such shares being payable to each adult, and one of such shares being applicable under the Conveyancing Act, 1881, *s.* 43, *for the maintenance of each infant.*

The fact that the class is capable of increase will make no difference.

Adjourned summons.

William Jeffery, who died in February, 1887, gave the residue his estate, both real and personal, to his trustees upon trust to sell and convert the same, and out of the income to pay certain life annuities and subject thereto to hold the same "in trust for all and every the present and future born children of my son Clayton William Jeffery and all and every the present and future born children (except William Charles Burt, who I declare shall take no benefit or interest whatsoever under this my will), of my said daughter Matilda Jane Burt, and all and every the present and future born children, including Frank Harry Burt of my daughter Pauline Mary Burt, who, whether in my lifetime or after my decease, being a son or sons, shall have attained or shall attain the age of twenty-one years, or being a daughter or daughters shall have attained or shall attain that age or shall have married or shall marry, and if more than one, in equal shares as tenants in common."

In *In re Jeffery, Burt* v. *Arnold*, 39 W. R. 234, [1891] 1 Ch. 671, North, J., held that the surplus income belonged to the grandchildren who had attained twenty-one at the time such income accrued and that section 43 of the Conveyancing Act, 1881, did not apply. He did not, however, make any order as to future income.

Application was now made by the trustees in consequence of the decision in *In re Holford*, 42 W. R. 563, [1894] 3 Ch. 30.

Carter Price, for the plaintiffs.

Coltman, for the adult grandchildren, said that the case was distinguishable from *In re Holford*, because there the class was not capable of increase.

Seddon, for great grandchildren.

Wright Taylor, for grandchildren under age.

North, J., said that in *In re Jeffery, Burt* v. *Arnold*, and afterwards in *In re Adams*, 41 W. R. 329, [1893] 1 Ch. 329, he took a certain view of the law; but in *In re Holford* the judges in the Court of Appeal had expressly said that *In re Jeffery* was wrongly decided. He there decided how the income then accrued due was to be applied, and that was past and done with; but he was now asked to make a declaration as to income that had not then accrued due. He did not think that the question was *res judicata* by his former decision, and the Court of Appeal having said that he was wrong in his former decision he would not then follow it, but hold that the income was not to be divided only among those who had attained twenty-one. He would accordingly make a declaration that the trustees had power under section 43 of the Conveyancing Act, 1881, to apply the shares of those under twenty-one for the maintenance and education of the respective infants.

Solicitors, *Whitehouse & Etherington*, for *Tylee & Mortimer*, Romsey; *J. J. Harlow*, for *Goates & Blatch*, Southampton.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div.
Stirling, J.

July 3, 4; Oct. 31.

In re MASON'S ORPHANAGE AND THE LONDON AND NORTH-WESTERN RAILWAY CO. (*a.*)

Charity — "Scheme legally established" — Deed of foundation — Powers of sale — Consent of Charity Commissioners to the exercise of—Charitable Trusts Act, 1855 (18 & 19 *Vict. c.* 124), *s.* 29—*Vendor and Purchaser Act*, 1874.

The deed of foundation of a charity is not a "scheme legally established" within the meaning of section 29 of the Charitable Trusts Act, 1855:

Consequently, the trustees of a charity who contracted to sell land in exercise of powers of sale contained in their deed of foundation could not force their title upon the purchasers without first obtaining the sanction of the Charity Commissioners to the sale.

The trustees of a charity based their title to certain hereditaments, the subject of this summons, under a deed of foundation dated the 29th of July, 1868, the terms whereof it is immaterial to here set out.

The said deed was duly enrolled and perfected in accordance with the provisions of 9 Geo. 2 c. 36 and the amending Acts thereunto.

The said deed contained, *inter alia*, certain powers of sale and exchange, in exercise of which the trustees contracted with the London and North-Western Railway Co. to sell to the company the hereditaments aforesaid.

The railway company objected to the title on the ground that under section 29 of the Charitable Trusts Act of 1855 the trustees were precluded from exercising the said powers of sale without the consent of the Charity Commissioners, and they demanded that such consent should be obtained.

In the alternative they proposed to pay the purchase-money into court under section 69 of the Lands Clauses Act of 1845. The trustees declined to comply with either alternative, and the company then took out this summons to have it determined by the court whether the trustees could exercise the powers aforesaid without the consent of the Charity Commissioners.

Underhill, for the summons.—The sole question is whether the deed of foundation is a "scheme legally established" within the meaning of section 29 of the Charitable Trusts Act of 1855, which provides that it shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of an Act of Parliament, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the board, any sale, mortgage, or charge of the charity estate. I say the deed of foundation is not such a scheme. The phrase "scheme" occurs frequently both in this Act and also in that of 1853, of which it is an amending Act, whereas neither Act refers to a "deed of foundation." The policy of these Acts was to secure the proper administration of charitable funds through the

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

supervision of some responsible public authority. If the trustees in the exercise of these powers of sale are only to be controlled by the terms of the deed of foundation the object of the Acts will clearly be evaded. The purchasers are entitled to ask that the trustees obtain the consent of the Charity Commissioners before the purchasers can be called upon to accept the title.

Hastings, *Q.C.*, and *Ingle Joyce*, for the trustees of the charity.—The trustees of this charity have power to sell without consulting the Charity Commissioners, on the ground that the deed of foundation is a "scheme legally established" within the meaning of section 29 of the Act of 1855. The deed was duly enrolled and properly attested, and that makes it a "scheme legally established." Plaintiff's argument practically is that the word "scheme" has acquired a technical meaning, but the court ought not to give a technical meaning to a word without very careful consideration and upon very weighty grounds: *Massy* v. *Rowen*, L. R. 4 H. L. App., at p. 300, 18 W. R. H. L. Dig. 20. Then clearly in section 54 of the Act of 1853 the word "scheme" means a "plan"—*i.e.*, a deed of foundation, and that indicates that the word has the same meaning in section 29: *In re Campden Charities*, 30 W. R. 496, 18 Ch. D. 310. The legislature never intended, by section 29 of the Act of 1855, to take away from trustees their powers of sale, and the word "legally" only means "in a legal way."

Underhill, replied.

Stirling, J. (after stating the facts as above set out) delivered a reserved judgment as follows:—What is usually meant by a scheme in connection with a charity is not the instrument of foundation, but a document sanctioned by some properly constituted authority containing directions for the administration of the charity. Previously to the passing of the Charity Act of 1853 such schemes were made by the Court of Chancery only, and they were mainly made in three classes of cases—*i.e.*, (1) Where the directions in the instrument of foundation were ambiguous, imperfect, or otherwise insufficient; (2) where the directions had become under altered circumstances unsuitable to carry out the intention of the founder; and (3) where a scheme sanctioned by the court had in like manner become unsuitable for that purpose. In the Act of 1853, however, other authorities than the Court of Chancery were authorized to make schemes. Now the word scheme occurs in several sections of the Act of 1853 and in section 39 of the Act of 1855, and in all these places it is used to designate such an instrument as I have described. *Primâ facie*, then, it might be expected that the word would also bear the same meaning in section 29 of the latter Act. [His lordship here dealt with the language of the various sections of the Acts, and continued:—] Now I think that the use of the words "legally established" in connection with the word "scheme" seems to point to the intervention of some duly constituted authority, and as a matter of verbal construction I come to the conclusion that the words "scheme legally established" do not include the instrument by which the charity was founded.

It would, however, I think, be unsatisfactory to dispose of the case without considering what object the Legislature intended to attain by the enactment of section 29. Now this section prohibits three classes of transactions—*i.e.*, (1) sales; (2) mortgages or charges; and (3) certain kinds of leases of charity estates; and it is desirable to see how the law stood with respect to such transactions prior to the passing of the Act of 1853. A sale, lease, or mortgage under an express power was good: see the judgment of Lord Cranworth in *Attorney-General* v. *Hardy*, 1 Sim. N. S. 338. Even where no express power of sale existed a sale might be made provided it were in accordance with a provident administration of the estate for the benefit of the charity, but the purchaser took subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances, *Attorney-General* v. *Warren*, 2 Swans. 291; and *In re Clergy Orphan Corporation*, 43 W. R. 150, [1894] 3 Ch. 145, the court, although it had power to sanction the alienation of charity lands, exercised that power with great caution: *Attorney-General* v. *The Mayor of Newark*, 1 Hare 395. [His lordship here considered, at length, the principles which had been applied by the court in the cases of leases of various kinds made in respect of charity lands, and continued:—]

The statement of the law, which I have just made appears to disclose two blots, at least, in charity administration.

In the first place it was obviously difficult in many cases for a trustee, not acting under the direction of the court, to satisfy himself that the transaction in which he was engaging might not afterwards be held to be a breach of trust, and in the second place many transactions held by the courts to be within the powers of trustees, were, to say the least of it, of very doubtful expediency in the interest of the public.

By sections 21 and 24 of the Act of 1853 the Legislature authorized the Charity Commissioners to sanction leases, mortgages, sales, and exchanges of charity lands, and thus enabled the trustees to obtain protection in a cheap mode, and without putting either the charity estate or themselves to the expense of Chancery proceedings. In this way the first of the two blots was removed, and I think the second was intended to be wiped out by section 29 of the Act of 1855.

The view of the Legislature was that alienations of charity estates, by way of sale or mortgage, or by leases in reversion, or for lives or long term, or in consideration of fines, gave rise to abuses, which the law as it stood prior to 1855 did not adequately prevent, and that such transactions ought not to take place, except by the direct authority of Parliament, or with the sanction of the court or the Chancery Commissioners, both being authorities familiar with charity administration, and likely to be vigilant in guarding against its abuses. But founders of charities and their legal advisers were not necessarily cognizant of what had been done in past times, and might unwittingly introduce into the instruments of foundation, clauses which the experience of the courts or the Charity Commissioners would lead them to regard as highly objectionable. I do not suggest that the present vendors have done, or intended to do, anything which could possibly be treated as an abuse of their powers; but if their contention is well founded, it follows that the founder of a charity might, by introducing appropriate clauses into the foundation deed, effectually authorize his trustee to grant leases in reversion, or for lives, or long terms, or in consideration of fines, without the consent of the Charity Commissioners.

Now I do not think that that was intended by the Legislature. Section 29 of the Act of 1855 prohibits (*inter alia*) sales except under certain circumstances. It is for those who claim that their case falls within either of the excepted cases to make this out, and, upon a fair construction of the enactment, I think the present vendors have failed to do so.

The objection, therefore, raised by the purchasers

is, in my opinion, well founded, and there will be declaration accordingly.

Solicitors, *C. H. Mason; Burton, Yeates, & Hart*, for *Johnson, Barclay, Johnson, & Rogers*, of Birmingham.

Chan. Div.
Vaughan Williams, J. } May 16; July 17, 1895.

In re STANDARD GOLD MINING CO. (*a.*)

Company—Winding up—Practice—Right to inspection of depositions taken under section 115 *of the Companies Act*, 1862—*Companies* (*Winding-up*) *Rules, April*, 1892, *rr.* 11, 32.

When a company is being wound up by the court, and an examination has been taken under section 115 *of the Companies Act*, 1862, *every creditor and contributory whose claim or proof has been admitted is entitled under rule* 32 *of the Companies* (*Winding-up*) *Rules, April*, 1892, *as of right to inspect the file of proceedings and take copies of any documents therein.*

Motion.

This was a motion by a contributory in the winding up of the company which was being wound up by the court to discharge an order made by his lordship in chambers refusing liberty to inspect and take copies of depositions taken under section 115 of the Companies Act, 1862. The motion also asked in the alternative for a declaration that the depositions were upon and formed part of the file of proceedings of the company under rules 11 and 12 of the Companies (Winding-up) Rules, April, 1892. The depositions in question were not filed on the ordinary file open to the inspection of contributories, but on a supplemental file kept for the purpose.

Bramwell Davis, Q.C., and *Theobald*, for the application, said that the applicant had first, an absolute right to inspect; or if not, the court in its discretion would allow inspection. They referred to General Order, November, 1862, r. 58; Companies (Winding-up) Rules, 1890, r. 180; Companies (Winding-up) Rules, April, 1892, rr. 11, 32; *Re London* v. *Lancashire Paper Mills Co.*, 57 L. J. Ch. 766, 36 W. R. Dig. 25; *Re Beall*, [1894] 2 Q. B. 135; *Re Greys Brewery Co.*, 32 W. R. 381, 25 Ch. D. 400, 408.

Gore Browne, for the liquidators, referred to the Bankruptcy Rules, 1870, rules 9 and 12, and Bankruptcy Act, 1883, s. 27; *Ex parte Pratt*, 31 W. R. 187, 21 Ch. D. 439; Vaughan Williams on Bankruptcy, ed. 4, p. 80; *Re Norwich Equitable Fire Insurance Co.*, 32 W. R. 964, 27 Ch. D. 515; *Re American Exchange in Europe*, 58 L. J. Ch. 706, 38 W. R. Dig. 11; *Re Gold Co.*, 27 W. R. 757, 12 Ch. D. 77.

Bramwell Davis, Q.C., replied.

VAUGHAN WILLIAMS, J.—The question I have to decide is whether in a winding up a creditor or contributory is entitled under the rules to inspection of everything on the file, including depositions taken under section 115 of the Companies Act, 1862. The rules are rules 11 and 32 of the Companies (Winding-up) Rules, April, 1892. For the purposes of the present case I shall treat the depositions as if they were on the ordinary file directed to be kept by rule 11.

In *Ex parte Pratt*, which was a case in bankruptcy, the court seems to have considered that a creditor had not an absolute right to a copy of his depositions, but that it was a matter of discretion whether he should be allowed to have a copy. The right in bankruptcy was also discussed in *Re Beall*, where Lord Davey said: "The depositions were taken by the court at the instance of the official receiver, and were taken down by a shorthand-writer, who was sworn, who thereby became the agent of the court. They were, in fact, taken by the court itself for the purpose of the proceedings in the bankruptcy. Why they should not be placed on the file, like any other proceedings in bankruptcy, I am at a loss to understand, and, they being on the file, I can see no ground whatever for taking them off. They are placed there for the inspection of the debtor and of any other person who is entitled to inspect them under rule 12." Lord Davey says that it is a matter of right and I have some difficulty in reconciling what he says with what was said by the late Sir George Jessel in *Ex parte Pratt*.

I do not understand, from the statement of facts in *North Australian Territory Co.* v. *Goldsborough Short & Co.*, 41 W. R. 501, [1893] 2 Ch. 381, which was a case in the winding up of a company, that the defendants, who were asking for leave to inspect the depositions, were creditors or contributories in the winding up; and it seems to me, therefore, that that case has no application to the present. I wish to say, however, that the rule applied by Lord Esher seems to be the same as that which used to be applied in bankruptcy, where inspection was invariably refused, even on the application of a creditor, until notice had been given of an intention to use the deposition in some judicial proceeding. Where the practice is inconsistent, I must give effect to the words of the rule. I cannot say that the applicant has not the right to see these depositions. It is very inconvenient that the practice should be in this state, as the court should have a discretion in the matter. If I had a discretion I should allow the applicant to see his own deposition, but not those of the other deponents.

Solicitors, *Linklaters; Loughborough, Gedge, & Nisbet.*

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Q. B. Div.
(Cave and Wright, JJ.) } Oct. 26.

TANNER *v.* OLDMAN. (*a.*)

Metropolis — Building — Buildings to be carried out under a contract—London Building Act, 1894 (57 *& 58 Vict. c.* 213), *s.* 212.

The provision in section 212 *of the London Building Act*, 1894, *which exempts from compliance with its requirements buildings to be carried out under any contract entered into before the Act, includes buildings to be carried out under a building agreement made for the development of an estate.*

Case stated by the metropolitan police magistrate sitting at Greenwich, under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

Section 212 of the London Building Act, 1894, provides as follows:—"Notwithstanding anything contained in this Act, a building, structure, or work which has been commenced before and is in progress at the commencement of this Act, or which is to be carried out under any contract entered into before the passing of this Act, may be completed, subject to and in accordance with the provisions of the Acts

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

relating thereto as in force immediately previous to the passing of this Act."

The appellant, a district surveyor under the Act for the district of Hatcham, served on the respondent a notice of objection to certain buildings which he proposed to erect in Musgrove-road, in the parish of St. Paul's, Deptford, on the ground that the plans did not conform to the requirements of the Act.

Under a building agreement between the Haberdashers' Co. and the respondent, dated the 3rd of January, 1894, the respondent had agreed to build forty-three dwelling-houses on four several plots of land, of which those to which objection was taken formed a part. They were to be built at a cost of not less than £380 each, at various times between the years 1894 and 1899. They were to be erected and completed in accordance with plans and specifications approved of by the company's surveyor, and it was further provided that the works should be executed in accordance with the regulations of the Metropolitan Building Act then in force, and any other Act for the time being affecting the premises.

The proposed houses would have satisfied the requirements of the Metropolitan Building Acts in force previously to 1894, but did not satisfy the provisions of the present Act. There was no evidence that the company's surveyor had seen or approved of the plans and specifications.

The respondent appealed to the police magistrate, sitting as a court of summary jurisdiction, who disallowed the objection and stated this case.

Cripps, Q.C., and *Daldy*, for the appellant.—The sole question is whether the word "contract" in the section includes an ordinary building agreement entered into for the development of an estate. It only includes a contract for the carrying out of a specific building or buildings. If building agreements were intended, the working of the Act would be postponed for an indefinite period, for such contracts often extend over a long period of time. The builder who enters into them takes the risk of the legislative requirements being altered. The buildings in this case could not be said to be "carried out" under the building agreement. The contract under which they would be carried out would be the specifications prepared and approved before their erection.

Jelf, Q.C., and *Grain*, for the respondent.—The owner is just as much interested as the builder in the continuance of the conditions on which he made his contract; for if a fixed sum had been named to be expended on each house, and the Legislature subsequently required, as in the present Act, increased thickness of walls, the builder, in order to recoup himself, would reduce the size and lower the character of the houses, a circumstance which might have a material effect on their selling and letting value and on the value of adjacent property. The Legislature must be taken to have declared, by means of section 212, that it will not interfere with arrangements made on the faith of the old law.

Cripps, Q.C., in reply.—It is admitted that if the respondent in this case were to make a sub-contract with another builder for the execution of the work the buildings would then be subject to the provisions of the Act. It follows that they are equally subject to those provisions if he executes the work himself.

CAVE, J., after reading section 212, said: The question in this case is whether the buildings were to be carried out under a contract entered into before the passing of the Act. There can only be one answer to that question—that they were. Several houses were to be erected at various times under a building contract. It was by that contract alone that the builder had power to enter on the land, and build the houses. Without that contract he would have been a trespasser. We are asked to narrow the meaning of the word "contract" in the section, and to say that it is limited to a builder's specifications. If the Legislature had desired that construction it could have substituted the word "specification" for "contract." A specification may be a contract, but all contracts are not specifications. The appeal must be dismissed.

WRIGHT, J.—I am of the same opinion. I cannot help thinking that when an Act like this is passed, which is capable of being opposed by private persons, a section of this kind occurring in it ought to be treated as a sort of compromise. At any rate, there is no reason for narrowing the ordinary meaning of the word contract.

Appeal dismissed.

Solicitor for the appellant, *Blaxland.*

Solicitors for the respondent, *Watson, Son, & Room.*

C. C. R.
(Lord Russell of Killowen, C.J., Pollock, B., and Grantham, Lawrance, and Wright, JJ.) July 27, 1895.

REGINA v. WAUDBY. (*a.*)

Criminal law—Wounding—Aiding and abetting—Indictment for felonious wounding—Conviction for misdemeanour only—Prevention of Offences Act, 1851 (14 & 15 *Vict. c.* 19), *s.* 5—*Accessories and Abettors Act*, 1861 (24 & 25 *Vict. c.* 94), *s.* 8.

Where a prisoner is indicted for felonious wounding, and is convicted only of the misdemeanour of unlawful wounding, a person who is indicted with him for aiding and abetting the felony may be convicted of aiding and abetting the misdemeanour.

Case stated by Lawrance, J., as follows:—

John Waudby and William Waudby were tried before me on the 17th of May last, at the assizes held at Leeds, upon an indictment charging John Waudby with feloniously, &c., shooting, with intent to do grievous bodily harm to one William Featherstone, and William Waudby was charged with aiding and abetting John Waudby to commit the said felony.

In the second count of the indictment the charge against John Waudby was for feloniously wounding, with intent to do grievous bodily harm, and against William Waudby for being present, aiding, and abetting, &c., the said John Waudby to commit the said felony.

The jury found John Waudby guilty of unlawfully wounding, and William Waudby guilty of aiding and abetting, and it was objected on behalf of the prisoner, William Waudby, that, as he was only aiding and abetting a misdemeanour, he was entitled to be acquitted on the said indictment.

I overruled the objection, and released the said William Waudby on recognizances to come up for judgment when called upon.

The question for the consideration of the court is whether I was right in so holding.

No counsel appeared for the prisoner or for the prosecution.

LORD RUSSELL OF KILLOWEN, C.J., after reading the case, said:—We are of opinion that the learned

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

judge was clearly right. It is provided by section 5 of 14 & 15 Vict. c. 19, that "if, upon the trial of any indictment for felonious wounding, the jury are satisfied that the defendant is guilty of the wounding, but are not satisfied that he is guilty of the felony, they may acquit him of the felony, and find him guilty of unlawful wounding, and he is to be liable to the same punishment as if he had been convicted of the misdemeanour of wounding."

Then section 8 of 24 & 25 Vict. c. 94, provides that, "whosoever shall aid, abet, counsel, or procure the commission of any misdemeanour, shall be liable to be tried, indicted, and punished as a principal offender." I think that these two enactments must be read together, and that William Waudby was properly convicted of the commission of the misdemeanour, in which fn fact he was a principal offender.

POLLOCK, B., and GRANTHAM, LAWRANCE, and WRIGHT, JJ., concurred.

Conviction affirmed.

Privy Council.

(*From the Supreme Court of New South Wales.*)

July 3, 1895.

MORRIS v. THE OFFICIAL ASSIGNEE OF THE ESTATE OF E. W. COOKE. (a)

Bill of sale—Fraudulent assignment—Intent to defeat and delay creditors—13 Eliz. c. 5.

The appellant made an advance of £600 in good faith to a man apparently solvent, but who afterwards became bankrupt, taking as security an assignment of the stock-in-trade, book debts, and other property of his debtor. It was arranged that the bill of sale was not to be registered, but there was no evidence that the assignment was made with intent to defeat or delay creditors. Possession was only taken by the appellant just before the bankruptcy, but in time to prevent the instrument being avoided under the Bills of Sale Act.

Held, that the title of the appellant was complete, and did not depend upon his taking possession, though, if he had not done so, the provisions of the Bills of Sale Act might, in certain events, have deprived him of his security.

In re Ash, 20 *W. R.* 849, *L. R.* 7 *Ch. App.* 636, *distinguished.*

This was an appeal from the Supreme Court of New South Wales. The facts sufficiently appear in the judgment of their lordships.

Warmington, Q.C., and *F. Thompson*, for the appellant.

Reed, Q.C., and *Carrington*, for the respondents.

The judgment of their lordships (Lord HERSCHELL, L.C., and Lords HOBHOUSE, MORRIS, DAVEY, and Sir RICHARD COUCH) was delivered by the Lord Chancellor.

This is an appeal from an order of the Supreme Court of New South Wales reversing an order of Owen, J., sitting as judge in bankruptcy, who refused to declare a bill of sale given by the bankrupt to the appellant on the 11th of July, 1892, void as against the official assignee of the bankrupt.

The assignment included all the stock in trade, book debts, and other property of the bankrupt. It appears that he was indebted in a sum of £500 to a Mr. Warner, who required payment. The bankrupt accordingly sought, through the agency of a Mr. Tomkins, to obtain a loan for the purpose of enabling him to discharge this debt, and of providing him with further funds. Tomkins applied to the appellant to make the advance. He promised to lend £600, upon obtaining as security a bill of sale. While the negotiations were proceeding, the appellant was under the impression that the proposed borrower was a brother of the bankrupt. Upon his discovering that this was not the case, he at first refused to make the loan, but ultimately agreed to do so, and a bill of sale was executed and the money advanced on the 11th of July, 1892.

Owen, J., who heard the case, states in his judgment (as their lordships think with perfect correctness) that there was no evidence that the bankrupt was at that time in any financial difficulties. The case then stands thus:—The appellant made the advance of £600 in good faith, as the judge found, to a man who, as far as appears, was solvent, taking as security the assignment in question, of which he is *primâ facie* entitled to the benefit. It is asserted, however, that the assignment was made with intent to defeat or delay creditors within the meaning either of the Act 13 Eliz. c. 5, or of the Bankruptcy Act then in force, and is, therefore, void as against the respondent. The bill of sale was not registered, and possession was not taken by the appellant until immediately before the bankruptcy, but it was taken in time to prevent the instrument being avoided under the provisions of the Bills of Sale Act.

It was incumbent, therefore, on the respondent to prove the intent, which he alleges, to defeat or delay the creditors of the bankrupt. For this purpose he relies on what passed with reference to the registration of the bill of sale at the time the transaction was entered into. There is some conflict of evidence as to this. The appellant asserts that it was he who insisted that the bill of sale should not be registered, on the ground that as he was a medical man and not a money-lender he did not wish his name to appear, in connection with a loan, upon the trade register. His evidence is confirmed in this respect by Tomkins. In a prior deposition in bankruptcy the appellant said:—"It was aranged that the bill of sale was not to be registered. I agreed to this." There appears to be no inconsistency between this statement and his evidence at the hearing. The bankrupt in his evidence did not contradict the appellant's statement that the idea of non-registration emanated from the appellant, though on his examination in bankruptcy he had said that he thought he asked the appellant not to register the bill of sale as it would injure his credit. The appellant denied this, and the learned judge in whose presence the witnesses were examined believed this denial, and said that no one who heard the bankrupt give his evidence could doubt that he was an unreliable witness.

Their lordships, therefore, can have no hesitation in accepting the appellant's account of what had happened. They entertain no doubt that the sole reason why the appellant did not register the bill of sale was that which he gave, and that there was no agreement that he should refrain from registering it at the instance, and for the benefit, of the bankrupt.

The respondent, however, further relies upon an alleged agreement by the bankrupt to inform the appellant if "things were not looking so bright," so that he could either register the bill of sale or take possession under it. The learned judge says:—"The respondent" (the present appellant) "at first denied this, then he said he did not remember, and finally

(a.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

he volunteered the statement that he would not undertake to say that the words were not used. I must, therefore, take it that those words may have been used, but even so, it does not show an intent on the respondent's part to defeat or delay his creditors."

In view of the fact that the learned judge treated the appellant as a witness of truth, and characterized the bankrupt as an unreliable witness, it may well be doubted whether, if it were material, any finding adverse to the appellant could properly be based upon this evidence of the bankrupt, even though the appellant would not undertake absolutely to contradict it. But their lordships entirely agree with learned judge of first instance that even if the bankrupt volunteered, as he alleges he did, to give the appellant information if his circumstances should become precarious, it does not assist the respondent's case.

The question is, with what intent the assignment was made, and not why the appellant refrained from registering or postponed taking possession. Their lordships see no evidence that the assignment was made with intent to defeat or delay creditors. They think the transaction was a perfectly honest and straightforward one. The intent of the bankrupt who made the bill of sale was to obtain an advance of £600, which he could not get except upon the terms of his giving that security. The intent of the appellant who made the advance was to obtain security for his loan. Their lordships do not believe that there was on the part of either of them any other intent.

It was suggested for the respondent that as the appellant knew that Warner, who was unsecured, was to be repaid out of the advance of £600, it was really a device for transferring Warner's debt to the appellant, and so giving a security for it which could not safely have been given to Warner in respect of an antecedent debt due to him. There appears to their lordships to be no pretence for this suggestion. If the assignment was not vitiated by any such intent as is alleged, it is immaterial to inquire why the appellant refrained from registering or postponed taking possession. He was under no legal obligation to do either. No doubt unless he registered or took possession he incurred the risk of losing his security. So long as he did neither, his security would have been avoided by an execution or a bankruptcy. But he was entitled to run this risk if he pleased. Subject to this risk the law in England as well as in New South Wales allows a title to be acquired by an assignment without delivery of possession.

This is, in their lordships' opinion, the answer to the reasons which appear to have mainly influenced the Supreme Court. It is quite true that credit may probably have been given to the bankrupt after the date of the bill of sale which he would not have obtained if that transaction had been made public either by registration or a change of possession. But when the Legislature determined to interfere with secret bills of sale they did not render all assignments void unless accompanied by delivery or followed by registration. The operation of the Bills of Sale Act was much more limited.

The learned chief justice in the Supreme Court relied much on the case of *In re Ash*, 7 L. R. Ch. Ap. 636. In that case a bill of sale was given in respect of an antecedent debt, and at a time when the grantor was in a condition of insolvency. It was, therefore, *primâ facie* bad. It was sought to validate it upon the ground that the advance had been made on a promise that a bill of sale should be given, and that the sum advanced was, therefore, to be treated as a present advance on the security of that instrument. The court whilst admitting that as a general rule this would be so, thought that the rule did not protect transactions where the giving of a bill of sale was purposely postponed until the trader was in a state of insolvency in order to prevent the destruction of his credit, which would result from registering a bill a sale.

The chief justice said in his judgment in the present case that "there was a close analogy between the case of postponing the giving of a bill of sale and postponement in entering into possession." Their lordships cannot agree with this view. In the case relied on, the bill of sale was given by an insolvent person without any present advance, and of itself could not avail the grantee. He invoked the aid of a prior promise made at the time of the advance but, for the reasons given, the court held that he could not derive any benefit from this promise.

In the case under appeal the bill of sale was granted, in respect of a present advance, by a person not shown to be insolvent. The title of the grantee was then complete, and did not depend upon his taking possession, though, owing to his not doing so, the provisions of the Bills of Sale Act might in certain events have deprived him of his security. Beyond this his title was unaffected by it.

Their lordships will humbly advise Her Majesty that the judgment appealed from should be reversed and the order of the judge in bankruptcy restored, and that the respondent should pay the costs in the Supreme Court and the costs of this appeal.

Solicitors for appellant, *Field, Roscoe, & Co.*

Solicitor for respondent, *Lumley & Lumley.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — Aug. 9, 1895.

LINFOOT *v.* POCKET. (*a*.)

Bill of sale—Condition or defeasance—Book of "rules and regulations"—Payment of principal and interest by instalments—Form—Validity—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10 (3)—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *Schedule.*

The plaintiff, having borrowed £100 *from the defendant, executed a bill of sale which provided for the repayment of the sum by instalments. Upon paying the first instalment, about a month after the execution of the bill of sale, the plaintiff received from the defendant a book in which to enter receipts for instalments, and which contained upon the cover a "notice" and certain "rules and regulations which are strictly adhered to." The "notice" and the "rules and regulations" prejudicially affected the position of the plaintiff as borrower, and the defendant subsequently attempted to enforce the rules against him.*

Held (*reversing the decision of* Kekewich, J.), *that the "notice" and the "rules and regulations" were not in any way a part of the bargain, and could not be considered as a "condition or defeasance" so as to avoid the bill of sale under section* 10 (3) *of the Bills of Sale Act*, 1878.

The bill of sale provided for the repayment of the £100 *and interest as follows:—"The sum of* £6 *on the 5th of December*, 1894, *on account of interest and princi-*

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

pal, and a like sum of £6 on account, as aforesaid, on the 5th day of each and every succeeding month thereafter."

Held, that, upon the true construction of the bill of sale, instalments of £6 were to be paid until the last instalment, when, if less than £6 was found to be due, such less sum only was to be paid; that, though the calculation involved might be a little more difficult than in the case of the form in the Schedule to the Bills of Sale Act, 1882, *the bill of sale was not thereby rendered void; and that there was nothing in the form in the Schedule which forbids a loan upon the terms that the principal and interest shall both be paid by equal instalments.*

In re Bargen, [1894] 1 *Q. B.* 444, *approved.*

Appeal from Kekewich, J.

On the 5th of November, 1894, the plaintiff was induced by an advertisement offering to lend money at five per cent. and issued by the defendant under the name of Wilberforce, to borrow £100 upon a bill of sale of his furniture.

The bill of sale contained an assignment of chattels by way of mortgage to secure payment of £100 and interest thereon at 1s. in the pound per month, and the plaintiff thereby agreed to pay "the sum of £6 on the 5th of December, 1894, on account of interest and principal, and a like sum of £6 on account as aforesaid, on the 5th day of each and every succeeding month thereafter."

On the plaintiff paying the first instalment on the 6th of December, he received from the defendant a small book in which to enter receipts for instalments and which, upon the cover, contained a "notice" and also certain "rules and regulations which are strictly adhered to."

The notice was in the following terms:—"It has come to the knowledge of Mr. Wilberforce that certain unprincipled persons have written to clients (the more especially where there is a bill of sale existing) offering and professing to assist them in evading the repayment of their loans (their sole object being to extort large sums of money by way of fees, &c.) Borrowers are hereby informed that they render themselves liable to be convicted of felony should they either remove their goods, chattels, or effects, or assign them by way of security to anyone, or should they obtain a loan on the same elsewhere without the consent of Mr. Wilberforce, and furthermore should any county court or other judgment be registered, or any executions be entered against them, or whenever Mr. Wilberforce considers he is likely to lose the security of the goods, chattels, or effects, the bill of sale will be immediately enforced without notice. Should you, therefore, receive any communication from persons offering their assistance, Mr. Wilberforce will feel obliged by your forwarding the same to him without delay."

The "rules and regulations" contained a number of provisions adversely affecting the position of the borrower, which the defendant subsequently attempted to enforce against the plaintiff. In a letter addressed to the plaintiff on the 21st of December, 1894, the defendant stated that he treated the instalment-book as part of the contract.

The plaintiff brought this action to have the bill of sale declared void, two grounds of objection being taken before Kekewich, J.—viz., 1 That the plaintiff was induced by fraud to execute the bill of sale, and (2) that the instalment-book constituted a "condition or defeasance" which avoided the bill of sale by virtue of section 10 (3) of the Bills of Sale Act, 1878. That section provides that "if the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under the Act therewith and as part thereof, otherwise the registration shall be void."

Kekewich, J., decided in the defendant's favour on the first point, but on the second objection he decided in the plaintiff's favour, and set aside the bill of sale.

The defendant appealed. By a cross notice of appeal the plaintiff raised the further objection that the bill of sale was not in the form prescribed by the schedule to the Bills of Sale Act, 1882.

Reed, Q.C., and *A. Powell*, for the appellant.—The book of rules and regulations is merely a convenient way of informing the borrower of dates for the payment of instalments. It is no part of the contract.

They referred to *Counsell* v. *London & Westminster Loan Co.*, 36 W. R. 53, 19 Q. B. D. 512.

Bramwell Davis, Q.C., and *Manby*, for the respondent.—The book of rules and regulations ought to be treated as a condition. The defendant intended to enforce them, and he cannot be heard to say they were not a part of the contract. The policy of the Bills of Sales Acts will be violated if such a course is sanctioned. Moreover, the bill of sale is void by section 9 of the Bills of Sale Act, 1882, inasmuch as it is not in accordance with the schedule to that Act. It is not permissible to have an instalment made up partly of principal and partly of interest. The case of *In re Bargen*, [1894] 1 Q. B. 444, is wrongly decided. In the present case it is impossible for the borrower to tell how long it will take him to pay off the debt. The defendant's conduct constitutes an indirect violation, an evasion of the Act: *Jefferies* v. *Alexander*, 8 H. L. Cas. 594, 9 W. R. Dig. 10.

They referred to *Davis* v. *Burton*, 32 W. R. 423, 11 Q. B. D. 537; *Goldstrom* v. *Tallerman*, 35 W. R. 68, 18 Q. B. D. 1; *Edwards* v. *Marston*, 39 W. R. 165, [1891] 1 Q. B. 225, and *Moorhouse* v. *Wolfe*, 46 L. T. N. S. 374, 30 W. R. Dig. 51.

Reed, Q.C., in reply.—The statutory form contemplates the payment of principal and interest together. The bargain is only to pay while something remains due, therefore the last instalment need not be exactly £6.

He referred to *Hazlewood* v. *Consolidated Credit Co.*, 39 W. R. 54, 25 Q. B. D. 555; *Simmons* v. *Woodward*, 40 W. R. 641, [1892] A. C. 100; *Lumley* v. *Simmons*, 35 W. R. 423, 34 Ch. D. 698; *Weardale Coal & Iron Co.* v. *Hodson*, 42 W. R. 424, [1894] 1 Q. B. 598; *In re Wood, Ex parte Wolfe*, [1894] 1 Q. B. 605.

Bramwell Davis, Q.C., replied upon the question of form.

LINDLEY, L.J.—This is an appeal from a decision of Kekewich, J., declaring that a bill of sale is void, and in contravention of the Bills of Sale Act, and that the same ought to be delivered up by the defendant to the plaintiff to be cancelled. Then there is an offer to redeem on payment of £100, and interest at the rate of 5 per cent.

Now the question arises in this way. On the 5th of November, 1894, the plaintiff was induced, by an advertisement issued by the defendant, a person named Pocket, who trades as Wilfrid Wilberforce, described as of 11, Stroud Green-road, Finsbury Park, to go and borrow money of him, and he has good reason to repent it ever since. The plaintiff borrowed £100, and signed this document. [His

lordship read the material part of the bill of sale, and after referring to the fact that five per cent. in a money-lender's mouth meant five per cent. per month, continued:—] Now the plaintiff in this action impeaches this document, mainly on the ground of fraud, and upon the ground that it is subject to a condition or defeasance which is not expressed in it; and there was also a point raised that it is not in accordance with the Bills of Sale Act, 1882.

As far as the plaintiff's case rested upon the ground of fraud, Kekewich, J., decided against him; that is to say, the learned judge decided against him so far as he sought relief on the ground that he had been taken in and cheated when he signed the bill of sale. There is no reason whatever for quarrelling with that decision, because the man was not cheated into signing the bill of sale. Although he was fool enough to be attracted by this advertisement, he, being a man of some intelligence and quite capable of reading what he signed, went and signed this document, wanting, of course, the money. That part of the case, therefore, fails.

The next point, and the one which has been the most urged before us, is that this document was accompanied by some condition or defeasance which was not expressed in it, and which, by reason of its not being expressed, rendered the bill void under the Bills of Sale Act, 1878, s. 10, clause 3, which runs thus—[His lordship read the clause, and continued:—] Was there any condition or defeasance which ought to have been embodied in this Bill of Sale? It appears to me, when one understands the facts, that obviously there was not. The bill of sale was executed, and there was no bargain, no condition, no defeasance, nothing which was part of that bargain. The bargain was complete, the money was paid, and the bill of sale was executed.

What happened afterwards was this. The plaintiff paid the first instalment of £6, and then he received a little book containing certain things called "rules and regulations which are to be strictly adhered to." Those "rules and regulations" are oppressive in the extreme. [His lordship referred to the notice, which he described as preposterous and atrocious, and to the rules and regulations, and continued:—] Now, if those "rules and regulations" were part of the bargain, no doubt they would fall within section 10, clause 3, of the Act of 1878. But they were not part of the bargain; and although Mr. Wilberforce said he understood them to be so, or rather said that they were actually so, we cannot, I am afraid, fairly or properly retort upon him: "We will take you at your word and hold that to be part of the bargain which never was so." He tried to bully or frighten his borrower, and he succeeded in doing so, I dare say, but we cannot on that account hold that these regulations which were first seen by the borrower a month and more after the contract was complete were in any way part of the bargain. He knew nothing about them, and I cannot accede to the suggestion that we ought to hold them as conditions of the bargain merely because one side said he thought they were part of the conditions when the other side had never heard of them. We could not so hold in a case where the parties concerned were two honest people, and we certainly cannot so hold in a case like this in favour of one man, who certainly deserves censure.

Then comes a totally different point. It has been argued before us, and I thought at first there was something in it, that this bill of sale was void as not being in accordance with the form in the schedule to the Act of 1882; and the objection is that by mixing up, as this bill of sale does, the principal and interest together and making the whole debt payable by equal instalments of £6 monthly, the first being payable on the 5th of December, 1894, the borrower cannot find out when he has paid off his security—that he cannot find out when the last instalment of principal is due or when the last instalment of interest is payable.

Now unquestionably this is a serious matter to borrowers, because such a piece of paper as this in the hands of unscrupulous men like Wilberforce would possibly be used for the purpose of gross oppression. I feel that very strongly, but it does not follow that it constitutes a ground on which we can hold this bill of sale to be void. The first thing we have to do is to construe it; and we must construe a bill of sale as we would construe any other instrument, that is with the view of understanding it in reference to the transaction to which it relates. After all, the transaction comes to this: it is one for lending money—it is a loan transaction; and although the principal sum and interest is to be repaid by instalments of £6 each, if, when you come to the last instalment, there is not so much as £6 due, you must pay what is due. I think that is the obvious construction to be put upon it. But it has been urged that that does not get over the difficulty, because you cannot find out when the loan is at an end—when the principal has been paid off; and at first I thought that was a serious matter. But when we look closely at the form, I do not think we can go so far as to say this bill of sale is void as not being in accordance with the form. The form given in the schedule runs thus: [His lordship read the form, and continued:—] There is no time specified there, but as the whole loan must be repaid I agree that, if you construe this form of document as it was construed by Fry, L.J., in the case of *Goldstrom* v. *Tallerman* and read it as a contract to pay the principal and interest by equal instalments, "interest then due," in parentheses, you can ascertain by a not very difficult calculation how much principal or interest you have paid off, and how much you ought still to pay. But still calculations have to be made—you cannot get at it without some calculation—and I cannot say that a bill of sale is void because that calculation is made a little more troublesome. I think that is a sound principle to go on, and I observe that Lord Halsbury in the case of *Simmonds* v. *Woodward* says this, addressing himself to another objection, which I do not deal with now: "It appears to be this, that whereas an example is given of the form in the schedule, in which you are to state when the instalments are to be due, and the Legislature has there suggested a form in which the instalments are to be equal, therefore, unless the sum lent, together with interest"—now this is the important part—"(because it appears to me that the interest is an essential part of the instalments, according to the provisions both of the Act itself and of the forms suggested in the Act, to give effect to the bill of sale) is capable of accurate sub-division, you cannot do it—that you cannot possibly make a bill of sale which shall have an unequal division of the sum lent." If I understand that, it means this: That the then Lord Chancellor did not quite adopt the construction put upon this bill of sale by Fry, L.J.; but whether that is so or not, in the face of that and of the other decisions which have been referred to, and which I will refer to presently, I do not think we can say that because a bill of sale requires a little more calculation than the form in the schedule, it must necessarily be void under the clause in the Act which says that bills of sale shall be void if they are not in accordance with that form. If you look at the form it is impossible to say that it forbids the loan upon the terms that the

principal and interest shall both be paid by equal instalments. It is not possible to say that, though the interpretation is not so clear as at first sight appears; but what we have been asked to say is that a bargain such as this, which is common enough in the case of building societies, is necessarily bad if made in the form of a bill of sale. We are not prepared to go that length.

Now, with regard to the authorities which have been cited, I do not think it is necessary to look at them, or at all events to refer to them at any length. The cases of *Goldstrom* v. *Tallerman* and *Edwards* v. *Marston* are not very difficult to deal with, because you can find out what the payments are without much difficulty as regards principal and interest. Then as regards the case before Vaughan Williams, J., *Bargen's case*, where the terms were a little different, you have not got what you have here, that the instalments, the £6 per month, are to be on account of interest and principal, still it is quite obvious from the reasoning of that learned judge that he was of opinion, and I think he was right, that you cannot say that a bill of sale which is otherwise unobjectionable, is void because you have to make a calculation a little more difficult than that which you must make even if you adopt the form which is given in the schedule.

For these reasons I am of opinion that this appeal must be allowed.

LOPES, L.J.—I am of the same opinion. I am bound to say I have felt, if it could be done legally, that I should like to declare this bill of sale void, but after much consideration I fear that is not possible.

Several points were taken before the learned judge in the court below. It was contended that this bill of sale was obtained by fraud. The learned judge heard evidence upon that matter and considered it and came to the conclusion that that point was not established, and I think he was right in so holding, because it is impossible to say, having regard to the circumstances, that the borrower was deceived by the bill of sale. He was an intelligent person, able to read and write and able to understand what he saw. He read the bill of sale, and had an opportunity of forming his own opinion with regard to its effect, and he signed it. It is impossible, therefore, to say that he had been induced by fraud to sign and become a party to that bill of sale. I should so hold, and I think the learned judge was right. That disposes of that point.

Then another point was taken and it was this. It was said that the bill of sale was subject to a certain condition or defeasance such as is contemplated by the Act of 1878, section 10, sub-section 3, which has been already referred to and read by my brother Lindley. Well, I think that means a condition or defeasance which is part of the bargain, but here, as far as I can discover, it is impossible to say that there was any condition or defeasance which was part of the bargain. It was said there was a book sent containing rules and regulations, and that they formed part of the bargain, and that in point of fact by subsequent letters the borrower himself admitted they were part of the bargain. Now, I cannot come to that conclusion. That those rules and regulations, dealt with as they were by Mr. Pocket, were very much in the nature of a scandalous attempt on his part to affect the borrower and terrify him, I have not the slightest doubt. When did that book first come to the knowledge of the borrower? Never until a month after the bill of sale had been executed. It was then that that book was first introduced to his notice; he had never heard of it, and knew nothing of it at the time of the bargain; and in my opinion he never assented in any way which would have been binding upon him to any one of the terms which are contained in that book. It was an attempt, in my opinion, of a most disgraceful kind, to intimidate the borrower, but to say that it amounts to such a condition or defeasance as is contemplated by section 10 of the Act of 1878 is impossible, and, therefore, that point fails.

But then there is another point raised, which is more difficult to deal with. It is said the bill of sale is bad in not complying with the statutory form. It was put in this way: that with regard to that portion of the bill of sale which provides for repayment of the loan, it mixes up principal and interest in a way which makes it difficult to understand (the amount being payable by equal instalments) what portion is attributable to principal, and what to interest, difficult to say when the debt or loan would be paid off, difficult to know on what terms the borrower might redeem. It was said that all this is so ambiguous, so uncertain, and so embarrassing and confusing that it amounts to a deviation from the statutory form, and, therefore, renders the bill of sale bad. Upon that point the form adopted was relied upon in this way—namely, that it was impossible, except by extending the period of payment to a very remote time, to come to the conclusion that it was to be paid off by equal instalments—the instalments provided for being these equal amounts—of £6. At first I was rather struck with that difficulty, but on consideration I do not think much of that point, because at the end, assuming the balance did not amount to £6, it could be paid off according to the cases which have been brought to our notice. The question is whether this point is a good one. Is there such a deviation from the statutory form as would render this bill of sale bad? In my opinion there is not. If you look at the statutory form it is impossible to say that even where there is a literal observance of that form some calculation will not be involved—that is to say, a calculation of what is principal and what is interest, and other matters; and the only difference I can see between the statutory form and the present form is this, that in the present case it would be a rather more complicated calculation to make, than that which would have to be made if the statutory form were observed. I do not think that is enough to render a bill of sale bad. I adopt the opinion expressed by Vaughan Williams, J., in *In re Bargen*, which was referred to, and which is as follows:—"The statutory form contemplates that the principal sum, together with the interest then due, may be paid by equal instalments covering principal and interest."

I feel, therefore, that it is impossible to set this bill of sale aside; and I again say I am very sorry to have to come to that conclusion.

RIGBY, L.J.—I am of the same opinion. With regard to the point of fraud I do not think there was any fraud in the procuring of the contract. I think there was fraud attempted in reference to the rules and regulations, which Wilberforce knew as well as anybody else were not part of the contract. In that attempt, and in the unprincipled way he put them forward as part of the contract I think there was fraud, though I do not see that it succeeded, because the borrower, upon taking advice, was able to see that this was an attempt to impose upon him and he was not really imposed upon.

With reference to the point of condition, of course that cannot be a condition in any way which was not made known to the other side; and, therefore, the putting forward of those rules and regulations, how-

ever improper it might have been or otherwise, would not make them part of the contract.

With reference to the other point, I confess that for some time I was rather disposed, if possible, to find an objection; I should not have been sorry, that is to say, if any objection ultimately satisfactory to me could have been made to this form. But we are bound, of course, to administer the law and to construe the document, and not, because we disapprove of the conduct of one of the parties, to strain the construction too heavily against him; and I think there is nothing contained in the form given in the schedule to the statute which would prevent an instrument in the form we have in this case taking effect as a bill of sale.

I cannot quite follow Mr. Bramwell Davie's argument upon the case of *Goldstrom* v. *Tallerman*. There the suggestion was very much that the form given for an instrument of this kind was the only form which could be permissible under the statute. Fry, L.J., says:—"It is suggested that the form here requires the computation of the whole interest upon the principal at once, the addition of this sum to the principal and the division of such total sum into a stipulated number of instalments." That is not exactly the present case, because he assumes there a stipulated number of instalments. But it is very like the present case, like it, I think, in all respects except that one circumstance that the instalments were to work themselves out and there was no number of instalments stipulated for. Then he says that construction is excluded. That is the construction he puts upon it. He does not say at all, as I understand, that it is improper to include principal and interest in one instrument, in one instalment, but that you are not obliged to do it, and he got at that by saying, "We think the words 'together with interest then due' are parenthetical." I dare say they are, but whether parenthetical or not I see no decision here that it would not be legal, that it would be a substantial departure from the form in the schedule to take principal and interest into account at once and to make the loan repayable in that manner, which is practically the way in which building societies loans are very generally made repayable.

Now, if that be so, I do not think there is much left, except this, which weighed upon me a good deal at first, that it would require not an easy calculation but a somewhat difficult one, a calculation which in fact a vast number of people entering into these small transactions would not be able to make. There again it is pointed out that it is not quite a simple thing to calculate interest upon the statutory form, and agreeing that it is rather a simpler case if you pay instalments of principal until the whole of the principal is got rid of, and then pay the interest, still it is not quite a simple thing to calculate even that, that is to say, there are a vast number of people who could not do it to save their lives, but would have to get assistance even if fairly intelligent people; and I certainly cannot adopt as a principle that because in this case the arithmetic would be somewhat more difficult, there is, therefore, a substantial departure from the form given in the schedule. If we were to hold on a very literal construction that you are bound to have a state of things in which the whole principal and interest could be paid by equal instalments, these being instalments of £6, I am still of opinion that if that were a problem proposed to a mathematician he would answer in the way I did, that in order to do that, you would be obliged to calculate interest on the principal first of all, treating it as a loan for a term, and in doing that it would take a very long time, indeed, I gave it I think during the argument as 100 months.

I am satisfied that is not the way to construe the contract, but that it really comes to this, that you are to pay the instalment of £6, until there comes a last instalment which will not equal £6, and that when you get to that you must pay that last instalment, though it is not £6. It seems to me that that is the business-like way of dealing with the contract, and I am unable to find that there is anything in it on which we can say that this bill of sale is void.

LINDLEY, L.J.—The appeal will be allowed with costs, and judgment will be entered for the defendant, but without costs.

Appeal allowed.

Solicitors, *J. W. Greig; R. Aylward.*

High Court of Justice.

Chan. Div. / North, J. — Oct. 28.

In re GOODALL.
GOODALL *v.* GOODALL. (*a*.)

Inland Revenue—Probate duty—Partnership—Option to purchase partnership premises within period after testator's death—Will—Extension of period—Option exercised in extended period—Conversion—Customs and Inland Revenue Act, 1881, *s.* 27.

The proceeds of sale of real estate, sold after a testator's death, in order to be liable to probate duty must have been sold pursuant to a contract subsisting at the death.

A testator, in partnership with his sons, agreed in the partnership deed that the sons should have the option to purchase the partnership premises, consisting of freeholds and leaseholds, within a certain period after his death. By his will he extended the period. The sons exercised the option after the original period fixed by the articles had expired, but within the extended period.

Held, probate duty not payable on the proceeds of sale of the freeholds.

Originating summons asking (*inter alia*) whether probate duty was payable under the following circumstances.

Prior to 1889 the testator, Josiah Montague Goodall, carried on business at the "Camden Works," such works were his private property, and were partly freehold and partly leasehold.

On the 17th of October, 1889, the testator took into partnership his two sons, and the deed of partnership, article 4, after reciting that the testator had demised to the two sons the Camden Works by deed of even date for the term of twenty-one years at the annual rental of £2,000, and subject to the covenants and conditions therein contained, continued: "The said two sons are hereby declared trustees of the said lease for the firm, and it is hereby agreed that if the firm shall be desirous of purchasing the reversion in fee simple of the said Josiah Montague Goodall in such part of the said premises as is of freehold tenure, and the unexpired residue of the term of years granted in such part of the said premises as is of leasehold tenure, subject to the rent and lessor's covenants reserved by and contained in the last mentioned premises by the lease under which the said J. M. Goodall holds the same, at the price of £27,000, and shall, within six months from the

(*a*.) Reported by R. SILLEM, Esq., Barrister-at-Law.

death of the said J. M. Goodall, give to the trustees of his will, or one of them, a notice in writing to that effect; then and in such case the persons then constituting the firm shall be deemed the purchasers of the freehold and leasehold reversion to the premises aforesaid, at the price of £27,000, subject to the following conditions." [It is unnecessary to state the conditions as they were not followed in the purchase when it took place.]

By a subsequent agreement endorsed on the partnership deed, and dated 26th of August, 1892, it was agreed that the purchase money, if the option were exercised, should be £30,866, and the option given to the firm was ratified and confirmed.

By his will dated the 9th of August, 1893, the testator devised and bequeathed all his real and personal estate to his trustees upon trust to convert, "subject as respects the premises where the business of Goodall & Sons is now carried on to the option of purchase hereinafter mentioned," and he directed the trustees if the option to purchase given by the articles of partnership were not exercised, to sell the said premises under the trust for sale of his residuary real and personal estate: and his will continued: "And whereas, under the articles of partnership entered in between me and my two sons dated the 17th day of October, 1889, as modified by a deed endorsed thereon dated the 26th day of August, 1892, the persons constituting the firm of Charles Goodall & Son have the option for a period of six calendar months after my death of purchasing the business premises of the said firm at the price of £30,866, Now I hereby declare that such period of six calendar months shall be extended to three years."

The testator died on the 15th of October, 1893.

The sons did not exercise the option within six months of the death, but gave a verbal notice within the period of three years that they would purchase on certain terms not contained in the articles or in the will, and the property was conveyed to them by two deeds, one deed dealing with the freehold and the other with the leaseholds. In the former were included certain other freeholds which the testator, by his will, gave the sons the option of also purchasing. They were duly valued pursuant to the directions contained in the will at the sum of £3,900. The total purchase moneys in these deeds amounted to £34,766, from which being deducted the £3,900, left the sum of £30,866 the agreed purchase money for the Camden Works. These conveyances did not refer to the option given by the articles, but purported to be made by the trustees pursuant to the trust for sale contained in the will.

The Crown claimed probate duty on the proceeds of sale of the freeholds produced by the exercise of the options, and consented that the question should be raised in the originating summons which had been taken out to have decided sundry questions arising on the will.

Upjohn, for the executors.—The will created another option—viz., an option to purchase the same property on the same terms, except that the option is exerciseable at any time within three years from the death instead of only within six months. And since the sons exercised the option given them by the will, that is to say, after the expiration of the time limited by the articles, the doctrine of *Lawes* v. *Bennett*, 1 Cox 167, has no application, as the conversion did not take place by virtue of any contract entered into by the testator in his lifetime, but took place solely by virtue of the directions contained in the will. It is similar to a devise of real estate upon trust for sale, in which case probate duty is not payable upon the proceeds of sale. Probate duty is only payable on property vesting in executors *virtute officii*: *Attorney-General* v. *Brunning*, 8 W. R. 362, 8 H. L. Cas. 243; *Attorney-General* v. *Hubbuck*, 32 W. R. 170, 12 Q. B. D. 275.

Vernon Smith, Q.C., and *Vaughan Hawkins*, for the Crown.—The property was purchased under the original option given by the articles, but extended to three years. The testator in his will refers to the to the articles of partnership, and says: "I hereby declare that such period of six calendar months shall be extended to three years." The mere extension of the time within which the option is to be exercised does not affect the contract by which the deceased had bound himself under the partnership articles to sell at a given price. The other essentials of the contract were to remain the same as before. The term of three years is substituted for the period of six months, but that is all. The deceased remained bound to sell for £30,866. If the option had been exercised within six months probate duty would have been payable. The term of three years instead of six months became of the essence of the contract: *Barclay* v. *Messenger*, 22 W. R. 522.

NORTH, J., after stating the facts and referring to the material parts of the partnership deed and will, continued:—In my opinion, in the present case probate duty is not payable on the proceeds of sale of the real estate. The option was not exercised within six months after the testator's death. Nothing at all was done until after the time had expired, and then a verbal notice of an intention to exercise the option was given. Whether or not a verbal notice was sufficient is not worth considering, because a conveyance has been executed, and it may be that that would supply any deficency in the notice in the first instance. It was not, however, until six months had expired that notice was given, even verbally, that the surviving partners would exercise the option. Some time afterwards the property was taken over by the sons. I should say this—that when they did give notice they only gave notice that they would purchase on certain terms, which were not contained either in the partnership article or in the will—viz., that the purchase-money should be left on mortgage for some time, and that appears to have been done. Now there are three points that might be suggested. First, that the purchase was made under the option contained in the partnership articles; secondly, that the purchase was made under the option contained in the will; and, thirdly, that the purchase was made as on the face of the conveyance it is expressed to be made, by agreement between the trustees with power to sell and the persons purchasing. The question as to probate duty being payable depends upon whether or not the option given under the partnership articles was exercised. In my opinion it clearly was not exercised. It was an option to be exercised by notice in writing given within six months after the testator's death. It was a contract existing between the parties at the time of the testator's death, and his estate was subject to that contract. If that contract had been carried out by the sons exercising the option, the conversion effected by the acceptance of the option takes effect from the time at which the contract was made; that is a period antecedent to the death of the testator. If, in the events which have happened, there turns out to have been a contract subsisting at the death of the testator for the sale of the property, which has been carried out, the purchase-money arising from that sale is subject to probate duty. But unless there was some such contract existing at the date of the testator's death there was no conversion at that time, and if there was no contract in existence at the testator's death resulting in a

conversion, a trust for conversion or an option to purchase contained in the will itself would not make probate duty incident to the proceeds of what was, in that view, real estate at the time of the testator's death.

Now, as to what the effect of the contract contained in the articles was I have expressed my opinion. I think it is clear that there was a contract pending at the testator's death. If it had been carried out and the parties had exercised their rights under it, there would have been a conversion, but when the six months expired after the testator's death, without the notice being given, it was impossible for the sons then to say that they had any rights whatever in this property under a contract contained in the articles. Any right which they had when they actually agreed to purchase, could only have been under the will, and the extension in the will of the period, during which the option might be exercised, was, no doubt, a beneficial disposition in favour of the members of the firm. If the value of the property had increased beyond the price fixed to be paid for it, the increased value would have been a benefit given to the members of the firm, which they could have taken if they liked. But that would have been a legacy under the will, and could not affect the question as to what property there was at the testator's death, upon which probate duty was actually payable. I have abstained from expressing any opinion whatever upon whether the sons did take under the option contained in the will, or by virtue of an independent contract with the trustees, because I have not before me the persons interested in that question, nevertheless, as regards the crown, the result is the same. Probate duty is not payable, because, no matter who took the property under the dispositions contained in the will, it was real estate at the time of the testator's death.

Solicitors, *Morley, Shirreff & Co.*; *Solicitor to Inland Revenue.*

Chan. Div. North, J. June 22, 25, 1895.

PEGGE *v.* NEATH AND DISTRICT TRAMWAYS CO. (*a.*)

Tramway company—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 56—*Enforcing penalties against tramways company—Distress—Summary Jurisdiction Act*, 1879, *s.* 43—*Debentures—Receiver and manager.*

There is nothing against public policy in allowing penalties imposed for the protection and the safety of the public to be enforced by distress and sale of the goods and chattels of a tramway company.

Summons for leave to distrain.

The Neath District Tramways Co. was formed in 1873 by a provisional order made under the Tramways Act of 1870, and confirmed in the usual way by Act of Parliament.

Clause 8 of the provisional order provided that "the promoters shall at all times maintain and keep in good condition and repair the rails of which any of the tramways should for the time being consist, and if the promoters at any time fail to comply with this provision or with any of the requirements of the Tramways Act, 1870, they shall be subject to a penalty not exceeding £5 for every day on which such act of omission continues, and such penalty may be recovered as by clause 56 of the said Act, is provided."

Section 28 of the Tramway Act, 1870, provides that "the promoters shall, at their own expense, at all times maintain and keep in good condition and repair with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as his between the rails of the tramways, &c."

Section 56 of the same Act provides that " . . . all penalties . . . may be recovered and enforced as follows:—In England before the justices of the peace, in manner directed by the Act 11 & 12 Vict. c. 43, and any Act amending the same."

On the 8th of February, 1895, the Neath Petty Sessional Divisional Court at the instance of the Glamorgan County Council as the road authority imposed on the company penalties to the amount of £435 for not keeping in good condition and repair the rails of their tramways, and the payment of the penalties was to be enforced by distress and sale as provided by the Tramways Act, 1870.

In 1875 the company had issued debentures by which they charged "the undertaking, lands, houses, stables, plant, property, and effects, both present and future, of the company."

The debenture-holders commenced an action in September, 1894, to realize their security, and on the 3rd of October the vacation judge made an order appointing a receiver and manager of the undertaking and business of the company.

This order was not appealed from, and in January, 1895, the usual judgment in a debenture-holders' action was pronounced.

This was an application for the leave of the court that, notwithstanding that the receiver was in possession, the county council might enforce the penalties by distress. By consent the summons was treated as if it had asked for a declaration of the rights of the council under the distress—viz., whether the council were entitled to proceed to sale.

Vernon Smith, Q.C., and *J. G. Wood*, for the county council, argued that *Marshall* v. *South Staffordshire Tramways Co.*, 43 W. R. 469, [1895] 2 Ch. 368, showed that the court would not now appoint a receiver and manager, and that, as the county council were not parties to the application appointing the receiver and manager, they could not be prejudiced by it, and that an application to the court was only necessary because its officer was in possession. *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. App. 201, has no application here, and does not prevent these penalties being recovered as provided. The penalties exist in order that the public may be protected by the tramway being kept in good repair.

Ashton Cross, for the debenture-holders and the company.—There are, no doubt, cases where a distress could issue and a sale take place without interfering with the undertaking, but that is not so in this case, for there is no surplus stock or anything of that kind which could be sold. Any sale must make it impossible for the company to carry on business, and so the public will be inconvenienced. These debentures were only a floating security till the appointment of a receiver, but on that happening the debenture-holders became entitled to the undertaking: *Legg* v. *Mathieson*, 2 Giff. 71, 8 W. R. Ch. Dig. 67.

NORTH, J., after stating the facts and that there could be no distress levied without the leave of the court, because of the appointment of the receiver and manager, continued:—The result, therefore, is that the application now is made by the county council

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

for leave, notwithstanding the appointment of a receiver, to exercise their rights of distraining. The debenture-holders object, and it is necessary to see what their position really is. Now in *Gardner* v. *London, Chatham, and Dover Railway Co.* Lord Cairns said—[the learned judge read from p. 211 of the report (L. R. 2 Ch. App.), and continued:]—Let me remark that what was charged there was the undertaking; but in my opinion the words in the present debentures really mean the same thing. The operative words begin by charging "the undertaking." Then certain details which are included in it are mentioned, but that, in my opinion, does not alter the effect of its being a general charge on the undertaking. *Gardner's case*, as is well known, related to a railway company, and the courts have to some extent regarded a tramway company as in a different position. There is a power contained in the Tramways Act to sell a tramway with the consent of the Board of Trade, while there is no such power in the case of a railway. The order appointing a receiver and manager made by the vacation judge in this case merely followed other orders made by other judges to a similar effect in similar cases. There has been no appeal from that order, but the question whether there is jurisdiction to make such an order has in the meantime been decided with respect to a tramway company by the Court of Appeal in *Marshall* v. *South Staffordshire Tramways Co.* There it was decided that the rule laid down as to a railway company in *Gardner's case* applies to a tramway company, overruling certain decisions to the contrary effect. The principle of *Gardner's case* applies to all tramways governed by the Tramways Act, 1870, whether the promoters are local authorities, or private individuals, or companies formed under the Companies Acts, 1862, or companies created by special Act of Parliament.

It is clear, therefore, that according to that decision, in the case of such a tramway company as the present, a receiver and manager such as was appointed in this case ought not to have been appointed, a special receiver of tolls might have been appointed, but that is a different matter altogether. The order made in this action by the vacation judge has not been the subject of appeal, and therefore it is binding upon the parties to it; but the county council are not parties to the action, not represented in it, and they are not bound by that decision. It is open to them to say that, notwithstanding that the receiver and manager has been appointed in very large terms, they are not affected by it. Of course they are affected to the limited extent that, there being an officer of the court in possession, they cannot touch the property which he holds without the leave of the court. But they get over that difficulty by coming here for leave to distrain. It is a case, therefore, in which the debenture-holders have not, in my opinion, as against the county council any right by reason of there having been a receiver and manager appointed in this action. It follows, therefore, that I must give the county council leave to exercise their power of distress, notwithstanding the appointment of the receiver.

But, then, counsel on both sides asked me to decide what the rights would be under the power to distrain, and Mr. Cross pointed out that, if in point of fact, there is a power to distrain and sell what is distrained, the very difficulty will arise that the public convenience arising from the existence of a tramway will be impaired and interfered with. He says that if part of the rolling stock is seized and sold the use of the tramway for public purposes will, in Lindley, L.J.'s, words, be defeated, or at all events seriously affected; and, so far as the public are concerned, they will be equally affected by a sale, whether the sale is made by the debenture-holders or by anybody else. But to that observation I think two remarks apply. In the first place the cases I have referred to are cases dealing with the power of debenture-holders. The Glamorgan County Council do not stand in the position of debenture-holders or anything like it. Their powers, are express statutory powers, given to them by the Tramways Act, 1870, and the provisional order relating to their own tramway, confirmed by Parliament in 1873. It is not a question, therefore, of the company handing over its property to its creditors. It is a case of a body whom the Legislature recognizes as having a right to distrain, and in my opinion I cannot interfere with that right. There is this further to be said; the argument that the property comprised in the undertaking of the tramway must not, in the interests of the public, be interfered with, really has not any application. The provisional order provides that the promoters shall, at all times, maintain and keep in good condition and repair the rails of which any of the tramways shall for the time being consist. This power of distress is expressly conferred for the purpose of compelling the promoters, as far as they can be compelled, to maintain and keep in good condition and repair the lines of the tramway. If that is neglected, the public convenience will be sacrificed, because if the rails are not safe they cannot possibly be used by the public. This power, which is given here, is really a power not doing something that will interfere with public convenience, but a power given to secure public convenience in the best way.

It is a case, therefore, in which the exercise of the power will not defeat any such purpose of giving rights to the public as Lord Cairns referred to in *Gardner's case*.

In my opinion, therefore, the Glamorgan County Council must have leave to distrain, and, in my opinion, they are entitled to exercise the power of distress without any interference by and notwithstanding the claim of the debenture-holders of the company. I have not said anything as to how they can sell. I think their rights in that respect are regulated by the statute.

The statute of 1879, it is suggested, repealed the earlier statute. The Act is altered, no doubt, and varied to a considerable extent, but I do not find that it is repealed. The 43rd section of the Act of 1879 says "the following regulations shall be enacted with respect to warrants of distress issued by a court of summary jurisdiction." Then it proceeds to lay down how they are to be executed, and, of course the county council must proceed in accordance with the Act of Parliament.

Solicitors, *Helder, Roberts, Son, & Walden*, for *Morgan & David*, Neath; *Charles Everitt*, for *Curtis*, Neath.

Chan. Div. }
Stirling, J. } July 23; Nov. 5.

CARTER v. CARTER. (*a*.)

Married woman—Deed of settlement by—Acknowledgment—Copyholds—No surrender made—Declaration of trust—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *s.* 77.

A., a married woman, with the concurrence of her husband, by a deed duly acknowledged made a declara-

(*a*.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

tion of trust in respect of certain copyhold hereditaments. No surrender was ever made by A.

On the death of A., her customary heir, B., was duly admitted tenant on the court rolls in her stead.

Held, that the declaration of trust was a disposition within the meaning of section 77 of the Fines and Recoveries Act, and, consequently, that B. was bound by the trusts thereof.

This was an action for the execution of the trusts of a post-nuptial settlement.

The settlement was dated the 2nd of January, 1878, and was made between James Carter and Susannah Carter, his wife, of the one part and the defendants, John and Edward Sayers (his trustees), of the other part, whereby after reciting, *inter alia*, that Susannah Carter was admitted tenant on the court roll of the Manor of West Tarring in the county of Sussex in respect of certain copyhold hereditaments, the said James Carter covenanted with the trustees to concur with the said Susannah Carter in surrendering to the lord of the manor the said copyholds to the use of the trustees, their heirs and assigns, to the intent that the trustees should, when admitted, hold the same upon the trusts thereinafter declared concerning them. And it was also agreed that in the meantime and until the said premises should be surrendered, the said Susannah Carter and her heirs should stand seised of the said premises upon the aforesaid trusts. The deed reserved to the said Susannah Carter, an absolute power of appointment, and until and in default of such appointment, the trustees were to hold the said premises upon trust to pay the annual income thereof to the said Susannah Carter during her life for her separate use, and after her death to pay the same to the said James Carter if he survived her, and after the decease of the survivor to sell the said premises and to divide the proceeds thereof amongst the children of the marriage in equal shares.

The said deed of settlement was acknowledged by Susannah Carter and a memorandum thereof duly enrolled in the Court of Common Pleas on January 4, 1878. Susannah Carter died on November 20, 1884, without having exercised the power of appointment aforesaid. The copyhold hereditaments settled by the indenture of settlement were never surrendered to the trustees, the said Susannah Carter continuing tenant upon the court rolls up to the date of her death. James Carter, her husband, died on the 24th of October, 1892. There were several daughters but only one son born of the said marriage and he predeceased his mother, leaving issue a son, the defendant, Alfred James Carter, who was, according to the custom of the said manor, her customary heir, and he was duly admitted as tenant in respect of the above-mentioned copyhold hereditaments on the 8th of May, 1894. There was no custom in the manor which required the lord thereof to take notice of trusts, nor was there a custom which entitled the husband of a female copyholder to any estate by the curtesy.

The question for the court was whether the defendant, A. J. Carter, as the customary heir of Susannah Carter, was beneficially entitled to the said copyhold hereditaments, or whether he was only a trustee thereof for the beneficiaries under the said deed of settlement.

Robertson Macdonald, for the beneficiaries other than the infant customary heir.—The heir is bound by the trusts. Copyholds can be bound by a declaration of trust by a *feme sole*; of that there is no doubt: *Steele* v. *Waller*, 28 Beav. 466, 9 W. R. Ch. Dig. 17. As to the proviso in section 77 of the Fines and Recoveries Act, "Provided always that this Act shall not extend to lands held by copy of court roll, of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law in any case in which any of the objects to be effected by this clause could, before the passing of the Act, have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel," that proviso has no application, because the wife cannot, by surrender into the hands of the lord of the manor either before or after the Act, declare herself a trustee of the copyholds. The lord of the manor is not bound to take any notice of trusts. With respect to the construction of section 77, it has been laid down that it enables a married woman to pass her separate real estate by deed or will as a *feme sole*: *Crofts* v. *Middleton*, 4 W. R. 439, 8 De G. M. & G., at p. 212; *Pride* v. *Bubb*, 20 W. R. 220, L. R. 7 Ch. App. 64.

W. D. Rawlins, for the infant defendant.—The infant heir is not bound by this trust, on the ground that no surrender was ever made by Mrs. Carter. The Fines and Recoveries Act has no application to the property, because of the proviso at the end of section 77. The wife ought to have surrendered to the use of the trustees, and then a deed should have been executed declaring the trusts, whether the declaration appeared on the court rolls or not. Before the Act a married woman could dispose by surrender with the concurrence of her husband. The object of the Act, therefore, was not to provide for dispositions by a married woman, but rather to enable her to dispose of the equitable estate. This is a voluntary settlement, and therefore the infant beneficiaries are volunteers, and must not be assisted by the court; and, moreover, a declaration of trust is not a disposition for the purpose of barring an estate tail, and hence it is not a disposition for any other purpose: *Green* v. *Paterson*, 34 W. R. 724, 32 Ch. D. 95. A declaration of trust is inoperative without a surrender, and the heir is consequently absolutely entitled.

Swann, for the trustee.

Macdonald replied.

Cur. adv. vult.

STIRLING, J. [after stating the facts above set out, continued:—] The deed of settlement was purely voluntary. An effectual disposition of property may be made without consideration in two ways—*i.e.*, either by doing such acts as amount at law to a conveyance or assurance of the property, or the legal owner of the property may, by one or other of the valid modes, constitute himself a trustee thereof, and may, without an actual transfer of the legal title, deprive himself of the beneficial interest: *Richards* v. *Delbridge*, 22 W. R. 584, L. R. 18 Eq. 11.

Now I think the draftsman of this deed knew the law, and intended to avail himself of the second mode of disposition I have just mentioned, and the question is, Has he effectively done so? Mrs. Carter never divested herself of the legal ownership of the property, but she did by the deed of 1878 declare herself a trustee for it, and if she had been at that date a *feme sole*, I think these trusts would have been binding on her heir. She was, however, under coverture, and the question which I have to decide reduces itself to this, whether a married woman, tenant on the rolls of copyholds, can, by deed acknowledged under the Fines and Recoveries Act, effectually declare herself a trustee of those copyholds. The answer depends on section 77 of the Act. It is thereby enacted that a married woman may dispose of land of any tenure (excepting in the case where she is tenant in tail, which is elsewhere provided for), provided that the disposition be by deed,

concurred in by her husband and acknowledged by the wife in the manner therein stated. (There is a proviso to the section, which I will consider later.) With all these requirements the deed of 1878 complies. The first question which arises on the enactment is whether a declaration of trust is a disposition. The words "dispose" and "disposition" in the Fines and Recoveries Act are not technical words, but ordinary English words of wide meaning. Where not limited by the context, those words are sufficient to extend to all acts by which a new interest (legal or equitable) in the property is effectually created. A declaration of trust on the part of a *feme sole*, whereby she effectually parts with the entire equitable interest in property of which she remains legal owner, certainly appears to me to be a disposition in equity of that property. This appears to have been the opinion of Lord Hatherley, L.C., in *Pride* v. *Bubb*.

It was said, however, that the contrary was decided in *Green* v. *Paterson*, which is a decision binding upon me. That case, as far as it is material to the present, related to copyholds of which a married woman was tenant in tail, and tenancies in tail are expressly excluded from the operation of section 77 of the Fines and Recoveries Act, and depend on the prior sections 15 and 40. It is quite true that section 15, by which a tenant in tail was empowered to dispose of the lands entailed, uses the word "dispose," which is used again in section 77; but section 40 limits the mode of disposition by enacting that every disposition of lands under the Act by a tenant in tail thereof should be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute, and no disposition by a tenant in tail vesting only by contract should be of any force at law or in equity under the Act. The effect of that is that the mode of disposition to bar an estate tail is limited to such an instrument *inter vivos* as would be effectual to pass a legal estate in fee simple. A mere declaration of trust, of course, could not pass a legal estate, and consequently I entirely agree, if I may be allowed to say so, in the decision of the Court of Appeal in *Green* v. *Paterson*, that a mere declaration of trust would not bar an estate tail. The language of Fry, L.J., might, no doubt, admit of a wider meaning, and that is what is relied upon. He says: "In the first place, the statute requires that the instrument to bar the estate tail shall be a disposition, and I find in this case nothing like a disposition. It is a mere declaration of trust by the lady." Those words, taken literally, would seem to indicate an opinion that a mere declaration of trust was not a sufficient disposition within the Fines and Recoveries Act, but I think that they ought to be read as applying only to the point then actually calling for decision, and not as intended to affect the construction of section 77, which was not then under consideration by the court, and all the more so as I do not observe that *Pride* v. *Bubb* was cited to the court in the argument. In section 77 I find nothing which requires the disposition to be made by such an assurance as is required by section 40.

It is next contended on behalf of the heir that the transaction falls within the concluding proviso of section 77, which is this: "Provided always that this Act shall not extend to lands held by copy of court roll of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law in any case in which any of the objects to be effected by this clause could, before the passing of the Act, have been effected by her in concurrence with her husband by surrender into the hands of the lord of the manor of which the lands may be parcel." In my opinion, the object intended to be effected by the deed of 1878 was that Mrs. Carter should declare herself a trustee of the legal estate in the copyholds then vested in her, or, in other words, to effect a disposition of the equitable interest without disturbing the legal title. I fail to see how this object could be effected by a surrender of that estate into the hands of the lord of the manor, for the effect of such a surrender would be to alter the legal title, and, therefore, the present case does not seem to me to come within the proviso.

In my opinion, therefore, the heir is bound by the trusts, and judgment must be given in favour of the plaintiffs. I declare that the heir is bound by the trusts of the deed, and that he is a trustee of the legal estate vested in him for the purposes of the deed, and I direct a proper assurance to be executed, with liberty to apply in chambers for a vesting order.

Solicitors, *H. Sowton*, for *J. C. Buckwell*, Brighton; *Henshall Fereday; H. E. Griffith*, for *G. P. Holmes*, Worthing.

Chan. Div. }
Stirling, J. } Oct. 30

In re DARLING.

FARQUHAR v. DARLING. (*a*.)

Charity—Will—Gift to "service of God."

A gift by will for the "service of God" is a good charitable bequest.

Adjourned summons.

Elizabeth Caroline Darling made her will, dated the 13th of May, 1871, in the following terms:—"I, Elizabeth Caroline Darling, desire that at my death all of which I may die possessed with the exception of the few legacies and gifts I may hereafter make, shall go to the poor and the service of God." The testatrix then, after directing a sale of her effects and appointing executors of her will, specified certain charitable, &c., institutions intended to be benefited by her bequest.

By a codicil to her will, dated the 13th of May, 1891, the testatrix directed an annuity to be purchased for the benefit of her coachman and bequeathed a legacy to her cousin.

The testatrix died on the 10th of February, 1895, and her will and codicil were proved on the 9th of March, 1895.

This was a summons by the executors asking what were the several charitable institutions meant and intended by the testatrix in the bequests given by her will to several charitable institutions *nominatim*, and for an order that the executors might be at liberty to distribute the ultimate residue of the testatrix's personal estate in certain proportions among certain named charitable institutions. The question arose whether the bequest to the poor and the service of God was a good charitable gift.

Phipson Beale, Q.C., and *Dundas Gardiner*, in support of the summons.

Graham Hastings, Q.C., and *Onslow*, for the next of kin.—This is not a good charitable gift: *Budget* v. *Hulford*, W. N., [1873] 175; *Townsend* v. *Carus*, 3 Hare, 257.

Ingle Joyce, for the Attorney-General.—This is a

(*a*.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

good charitable purpose: Tudor's Charitable Trusts, p. 10; *Powerscourt* v. *Powerscourt*, 1 Moll. 616; *In re Sutton, Stone* v. *Attorney-General*, 28 Ch. D. 464, 33 W. R. Dig. 243. In the latter part of the will there is a good gift to charities even if you strike out the earlier part. The fact that legacies are given is sufficient to pass the whole residue.

Dibdin, for one of the charities named in the will.

STIRLING, J.—In this case the testatrix commences her will as follows:—[His lordship read the clause set out above, and continued:—] The question is whether that is or is not a good charitable gift. When it is said that it is not good, the meaning is that it includes under it objects which are not recognized by the laws of charity. There can be no question that a gift for the benefit of the poor is good, but it is said that one for the "service of God" is not. It is said that the "service of God" includes much that is not religious, and in a sense that is true. There is an ancient document where the congregation is desired to pray for the welfare of those who serve God in Church and State. A distinction is drawn, therefore, between Church and State, but equally the persons prayed for are to serve God. Hence in a certain sense acts which are not religious are said to be in the service of God. But I have to construe this according to the plain and ordinary meaning of words used by English testators, so that when the service of God is referred to, it must be taken to mean service in a religious sense, similar to such services as are referred to in the document I have mentioned when service in the Church is spoken of. Therefore, I come to the conclusion, even if the point were unaffected by authority, that a gift to the poor or for a religious purpose is good. But the point is not without authority. The same or a similar question came before Manners, L.C., in Ireland in a case of *Powerscourt* v. *Powerscourt*. There there was a devise to lay out, at their discretion, £2,000 per annum until the testator's son came of age, "in the service of My Lord and Master, and, I trust, Redeemer." This was held a good charitable devise. The judgment of the Lord Chancellor is this: After referring to certain Statutes of Elizabeth, he says: "These cases prove that pious uses are a branch of charity, and as such are recognized and and carried into effect in this court. . . . I am of opinion that a bequest to pious uses sufficiently designate a specific object, and that this cannot be distinguished from a bequest to pious uses." It has not been disputed before me that a bequest for religions purposes is a good charitable bequest, and, on the authority of the case to which I have referred, I hold that the whole estate is well given to charity.

Solicitors, *H. W. Lyall; Bell, Steward, May & Snow; Solicitors to the Treasury; Bridges & Co.*

Chan. Div.
Kekewich, J. } Aug. 7, 1895.

WILLIAMS v. QUEBRADA RAILWAY, &c., CO. (LIMITED). (*a.*)

Practice — Discovery — Privileged communications — Production — Fraud—Inspection by judge—R. S. C., ord. 31, *r.* 19a, *sub-rule* 2.

Communications between a solicitor and his client as to the subject-matter of an alleged fraud are not privileged from production in an action where fraud is charged.

Summons.

This was a debenture-holder's action for enforcing their securities.

By the statement of claim it was alleged that the company entered into an agreement shortly before the commencement of the action with its agents, Messrs. Matheson & Co., the sole consignees for the sale of the company's ores, by which, without disclosing the existing charges, the company purported to charge all its property with a large sum alleged to be due from it to their agents, Matheson & Co.; that the company was at the time insolvent and its stoppage imminent, and that the charge was only given to defeat and delay the holders of the debentures.

Matheson & Co. were defendants with the company, and it was asked that the agreement might be set aside.

The company shortly after went into liquidation, and the liquidators filed an affidavit of documents in this action claiming privilege for portion of the minute and agenda books as containing copies of or extracts from counsels' opinions and solicitors advice on matters on which the company required and obtained advice.

The plaintiff now applied for production.

A. R. Kirby, for plaintiff.—The statement of claim charges the defendant company with fraud, and so privilege cannot be claimed: *R.* v. *Cox*, 33 W. R. 396, 14 Q. B. D. 153.

Rowden, for defendant company.—All communications between a party and his solicitor are privileged: *Minet* v. *Morgan*, 21 W. R. 467, L. R. 8 Ch. App. 361. *R.* v. *Cox* and *R.* v. *Orton* cited in *R.* v. *Cox* were both criminal cases: *Follett* v. *Jefferyes*, 1 Sim. N. S. 3; *In re Postlethwaite, Postlethwaite* v. *Rickmer*, 35 W. R. 563, 35 Ch. D. 722.] His lordship suggested that he should see the documents, to which both parties consented.]

KEKEWICH, J., said.—It is essential to the proper administration of justice that the privilege of protection from production to an opponent of those communications which pass between a litigant or an expectant one and his solicitor should be upheld. It is said that this case, being one of fraud, is taken out of the ordinary rule, and that no protection can be claimed on the ground of privilege. What are the facts? The plaintiff and others are holders of debentures and debenture stock of the defendant company—a first charge—which, it is said, is obstructed by another charge given by the defendant company in favour of their agents with the intention of defeating and delaying their security. It is also said the company was insolvent and the charge was given to prevent for a time the inevitable stoppage. It is difficult to say that that is not a charge of fraud. The liquidators make an affidavit of documents claiming protection for the copies or extracts from the opinions of counsel and advice of the sompany's solicitors with reference to this charge contained in the minute books. Are they entitled to it? In *R.* v. *Cox* it was held that where there is a charge of fraud the protection of confidential communications between a client and his solicitor on the ground of privilege is not allowed. But it is said that was a criminal case, and that in civil cases something more is necessary; but *R.* v. *Cox* is based on general principles and does not draw any distinction between crime and civil fraud, and is applicable to both civil and criminal cases.

Ord. 31, r. 19*a*, sub-rule 2, provides that: "Where on an application for an order for inspection privilege is claimed for any document it shall be lawful for the

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege." My difficulty here was whether I could insist on seeing the documents in question, because the rule says for the purpose of deciding as to the validity of the claim of privilege, and I had already made up my mind that the claim of privilege was invalid. I wished to see them because I wished to stop if I could the production of useless documents. Counsel assented to my seeing them, and I have come to the conclusion that the plaintiff's counsel must have the opportunity of seeing them. They are certainly relevant, but whether they support the plaintiff's charge of fraud I do not say.

Order for production. Defendants to pay costs in any event.

Solicitors, *Ashurst, Morris, Crisp, & Co.; Henry Kimber & Co.*

Chan. Div. }
Romer, J. } Oct. 29.

ROOKE *v.* DAWSON. (*a.*)

Scholarship — Education — Award — Passing best examination — Number of marks — Discretion of examiner.

When a scholarship under a trust is to be awarded to such candidate as shall have passed the best examination in subjects to be determined by an examiner, such scholarship may be refused to the candidate who has obtained the highest number of marks if, in the opinion of the examiner, he has not passed a satisfactory examination.

This was an action brought by the plaintiff as an infant, suing by his father as next friend, for a declaration against the trustees of an indenture dated the 31st of October, 1854, establishing a scholarship known as "the Bousfield Scholarship," at Mill Hill Nonconformist Grammar School, Hendon, Middlesex, for a declaration that he, the plaintiff, was entitled to be put in possession of a scholarship which the defendants refused to award to him.

The facts of the case were as follows.

Under the indenture above mentioned it was declared that the trustees of the scholarship in question should stand possessed of the sum of £1,000, and of the investments for the time being representing the same, as a scholarship at the Protestant Dissenters' school at Hendon aforesaid to be held at one of the two colleges therein named, one of which was University College, London, and tenable for three years. It was provided in the deed that after the avoidance of the scholarship by the founder's grandsons, who were therein named as scholars without examination (which avoidance had long since occurred), and every subsequent avoidance thereof, except such avoidances as were mentioned in rule 8 of the said indenture, that the scholarship should be awarded to the pupil leaving school and going to such colleges as aforesaid who should pass the best examination in subjects to be determined upon from time to time by the examiners, and who should have been at Mill Hill School for the time and age therein prescribed.

Condition 8 provided that in the event of the avoidance of the scholarship by any means within three years from the date of the last avoidance of the scholarship, if no half-yearly payment should have been made, the next highest boy at the examination who was duly qualified should succeed, otherwise it should remain vacant until the next June and should then be offered at a public examination as aforesaid.

At an examination held in September, 1893, at which four boys competed, the plaintiff obtained the third place. The successful candidate, however, did not comply with the conditions, and the scholarship in consequence was not awarded to him. The second candidate subsequently by deed poll disclaimed all interest in the scholarship. The trustees, however, did not award the scholarship, but in June, 1894, held a second examination at which the candidates were the plaintiff and another boy, H. M. Spicer.

In this examination the plaintiff obtained 570 and Spicer 496 marks. The examiner, however, reported that neither candidate, in his opinion, deserved the scholarship, and that the plaintiff did not show sufficient knowledge of the subjects in which he was examined to justify an award to him. If awarded at all he suggested that the scholarship should be divided between the two boys, either equally or proportionately to the number of marks obtained by them.

The plaintiff subsequently entered at University College, London.

Hopkinson, Q.C., and *Wurtzbury*, for the plaintiff. —The plaintiff is entitled to the scholarship, as he has fulfilled all the conditions required by the trust deed. He obtained the highest number of marks in the examination, and he has entered at University College, London. It is not a question as to what sort of an examination he passed. [ROMER, J.—Suppose only one boy presented himself, would he be at once entitled to the scholarship, without passing a satisfactory examination?) We do not go so far as that; but under the circumstances we say that the plaintiff is entitled.

Birrell, Q.C., and *Micklem*, for the defendants.— The words of the indenture are "pass the best examination." The plaintiff did not pass a satisfactory examination at all in some subjects. This is a case in which the examiner has a discretion.

Hopkinson, Q.C., replied.

In the course of the argument *In re Nettle's Charity*, 20 W. R. 965, L. R. 14 Eq. 434, was referred to.

ROMER, J.—I am of opinion that the plaintiff's action fails, and on this ground, that on the words of the deed no boy is entitled to the scholarship who does not pass a satisfactory examination in the subjects to be determined on from time to time by the examiner. If no boy passes such examination, it is clear that the examiner is entitled to say that no boy has passed a satisfactory and proper examination for so valuable a scholarship. The examiner has decided that no boy deserved the scholarship, and that the plaintiff is not entitled to it. The trustees have taken a proper course in refusing to award it, and the plaintiff's action fails, and must be dismissed, with costs.

Solicitors, *Rooke & Sons, Pennington & Sons.*

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Grantham and Vaughan Williams, JJ.)

Nov. 11.

DRAX *v.* FFOOKS. (*a.*)

Election law — Registration — Parochial register — Ownership qualification—Right of women to be electors—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *ss.* 2 (1), 3 (2), 43, 44 (1), 44 (6) (b).

Notwithstanding section 3 (2) *and section* 43 *of the Local Government Act*, 1894, *a woman, whether married or unmarried, is not entitled to be a parochial elector or to be on the register of parochial electors in respect of the ownership of property.*

Case stated by the revising barrister for the northern division of the county of Dorset.

The appellant, who was a married woman, claimed to be placed on the parochial electors' list of Milborne St. Andrew in respect of the ownership of property in that parish. The appellant was owner in her own right of the freehold farm in respect of which she claimed, her husband not being interested in it, nor on the register in respect of it. She was living more than three miles from the parish of Milborne St. Andrew. The property was of sufficient value to sustain the claim.

The revising barrister disallowed the claim and expunged the name of the appellant, holding that a woman, whether married or not, was not by law entitled to claim a parochial vote in respect of the "ownership" of property, that being a qualification which would confer a parliamentary vote; and that, by virtue of section 43 of the Local Government Act, 1894, a married woman could only claim to be placed on the parochial electors' list in respect of an occupation qualification such as would entitle her, if unmarried, to be on Division 3 of the occupiers' list of voters for the parish.

He referred to *Chorlton* v. *Kessler*, L. R. 4 C. P. 397, 17 W. R. C. L. Dig. 49; and *Chorlton* v. *Lings*, 17 W. R. 284, L. R. 4 C. P. 374.

Section 2 (1) of the Local Government Act, 1894, provides that "the parish meeting for a rural parish shall consist of the following persons, in this Act referred to as parochial electors, and no others—namely, the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish"; and section 44 (1) further provides that "the local government register of electors and the parliamentary register of electors, so far as they relate to a parish, shall, together, form the register of the parochial electors of the parish."

Section 3 (1) of the same Act provides that "the parish council for a rural parish shall be elected from among the parochial electors of that parish or persons who have during the whole of the twelve months preceding the election resided in the parish, or within three miles thereof"; and sub-section (2) of section 3 declares that "no person shall be disqualified by sex or marriage from being elected or being a member of a parish council."

Section 23 (2) provides that "a person shall not be qualified to be elected or to be a councillor unless he is a parochial elector of some parish within the district, or has, during the whole of the twelve months preceding the election, resided in the district, and no person shall be disqualified by sex or marriage for being elected or being a councillor"; and section 20 (2) contains similar provisions with regard to guardians.

Section 43 is as follows:—"For the purposes of this Act a woman shall not be disqualified by marriage for being on any local government register of electors, or for being an elector of any local authority, provided that a husband and wife shall not both be qualified in respect of the same property."

Alexander Macmorran, for the appellant.—In order to give effect to section 3 (2) the appellant's name ought to be placed on the parochial register, for by section 3 (1), in order to become a parish councillor, she must either be on that register or live within three miles of the parish. She does not live within three miles of the parish, so she must have a right to be on the parochial register. To hold otherwise would be to disqualify her on account of her sex. The same reasoning applies when you consider the effect of sections 20 (2) and 23 (2). Section 43 expressly enacts that a woman is not to be disqualified by marriage for being on the register. Section 44 (9) gives her the right to have her name placed on the parochial list, notwithstanding it does not appear on the local government or parliamentary registers. The revising barrister was wrong in expunging the appellant's name. He ought to have placed a mark against it signifying that she was entitled to vote only as a parochial elector in accordance with section 44 (6) (*b*), which enacts that "where the revising barrister in any list of voters for a parish would, in pursuance of section four of the Registration Act, 1885, erase the name of any person otherwise than by reason of that name appearing more than once in the lists for the same parish, the revising barrister shall, instead of erasing the name, place against the name . . . . if he is entitled to vote only as a parochial elector, a mark signifying that he is entitled to be registered as a parochial elector, and the name so marked shall not be printed in the parliamentary register of electors, but shall be printed . . . in a separate list of parochial electors."

No counsel appeared on behalf of the respondent.

Lord RUSSELL OF KILLOWEN, C.J.—It is to be regretted that we have not had the assistance of counsel on both sides. In my judgment the revising barrister was right. The question is whether a married woman can, in respect of the ownership of property, be properly placed on the register as a parochial elector, she not residing within three miles of the parish in respect of which she claims. The question turns on the construction of various sections of the Local Government Act, 1894, and I will state my reading of those sections. The effect of section 2 (1) is that the parochial electors are to be made up of two classes—(1) the persons on the local government register or burgesses, and (2) those on the parliamentary register. By section 44 (1) the local government register and parliamentary register are to constitute the parochial register. To get on the local government register occupation and payment of rates are necessary. These qualifications the appellant has not got. Then, can she be on the parliamentary register? No. She is ineligible for the parliamentary register on account of her sex. Whether or not she can be retained on the list of voters with a mark against her name, she cannot, at all events, be placed there for any effective purpose in connection with the parliamentary register. Section 3 (2) contains a general provision that no person is to be excluded from becoming a councillor by reason of sex or marriage; and by section 43 for the purposes of the Act no person is to be disqualified by marriage. The observation to be

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

made with regard to both these sections is, that they do not profess to give a qualification. Therefore it seems to me that, for the purpose of this question, the effect of them is that if she has the necessary qualification for being on the local government register or the parliamentary register, then the fact of her being a married woman shall not take that qualification away.

Counsel referred also to section 44 (6) (*b*). That section was provided for a class of cases in which, under an antecedent state of the law, certain names appearing on the list of voters would have been erased by the revising barrister. The names, instead of being erased, are now to be differently dealt with. But the section does not apply to married women at all, because, under the antecedent state of the law referred to, their names could not appear on the register at all.

GRANTHAM, J.—I am of the same opinion. The sections of the Act of 1894 are somewhat conflicting, and I had some doubt on this question until I recognized the distinction between section 3 (2) and section 43. The former says that neither sex nor marriage shall disqualify, while the latter is confined to removing the disqualification of marriage. But, as neither married nor unmarried women can get on the parliamentary register, the sections do not touch women with an ownership qualification only.

VAUGHAN WILLIAMS, J.—The appellant is not disqualified because of her sex, but because she has not got the statutory qualification. She has neither the local government qualification nor the parliamentary qualification. It may be that it is because of her sex that she has not the parliamentary franchise; still, she is without it, and it is the absence of that franchise, and not her sex, that is the disqualification.

Appeal dismissed; leave to appeal granted.

Solicitor for the appellant, *H. W. Parker*, Blandford.

IN BANKRUPTCY.

Q. B. Div.
(Vaughan Williams, J.) July 23, 1895.

In re SMITH AND HARTOGS.
Ex parte OFFICIAL RECEIVER *v.* LEVERSON. (*a.*)

Bankruptcy—Landlord and tenant—Distress—"Rent accrued due prior to date of order of adjudication"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 42 (1).

A landlord let premises at £200 a year, but agreed to take £100 a year for the first two years, and £250 a year for the succeeding two years of the term. The tenants became bankrupt before the first two years had expired, and the landlord distrained for rent at the rate of £200 a year.

Held, that he was entitled to distrain for rent at that rate, for the agreement had not altered the rent, but only the mode of paying it, and was not such that the tenant could claim to enforce it if he were in default in the payments thereunder.

Motion by the official receiver for an order that the respondent should pay over to him £78 10s., forming part of a sum of £103 10s., the proceeds of a distress levied by the respondent, upon the premises occupied by the bankrupts, after the date of the receiving order.

In the month of October, 1890, the respondent, Mr. Leverson, let the premises to one Flatau, for twenty-one years, at the rent of £150 per annum for the first two years of such term, and £200 per annum for the remainder. In 1893, when the rent payable was £200 per annum, Flatau assigned the lease to Smith & Hartogs, the bankrupts. They were unwilling to pay rent at the rate of £200 per annum to begin with, so Mr. Leverson agreed to allow them to pay £100 per annum for the first two years of their occupation—viz., from the 29th of September, 1893, to the 29th of September, 1895—and £250 per annum for the next two years, and after that £200 per annum for the remainder of the term assigned to them by Flatau. Smith & Hartogs having gone into occupation on the 29th of September, 1893, paid one instalment of £25 on account of rent on the 31st of January, 1894, a second instalment of £25 on the 30th of April, but defaulted in payment at the Midsummer quarter, and Mr. Leverson distrained upon their premises for £25 in August.

Upon the 29th of September a receiving order was made against Smith & Hartogs, whereupon Mr. Leverson distrained upon the premises for £100, proportion of rent due at the rate of £200 per annum.

Muir Mackenzie, for the official receiver.—The rent was only at the rate of £100 per annum, and all that was due at the date of the receiving order was £25 in respect of the quarter from the 24th of June to the 29th of September. The agreement by the landlord to accept £100 per annum has altered the rent. He cited *Fitzgerald* v. *Portarlington*, 1 Jones 431. [VAUGHAN WILLIAMS, J.—The rent was not altered at all, merely the manner of paying it. In the case of *Fitzgerald* v. *Portarlington*, the tenant was ready and willing to pay his rent at the reduced rate, in this case he was not, and the landlord might have distrained for rent at the rate of £200 per annum, when he levied the distress in August.]

Leverson, for the respondent.—Not only was the rent not altered, but there was no consideration for the agreement to accept payment at the rate of £100 per annum for two years, and it was therefore *nudum pactum*.

Muir Mackenzie, replied.

VAUGHAN WILLIAMS, J.—In my opinion the agreement in this case was merely an agreement by the landlord not to enforce his remedies for the recovery of rent in the event of the instalments agreed upon being duly paid. It being admitted that the terms of the agreement were not carried out by the tenant, it appears to me that the rent originally reserved became payable. Putting the case in the most favourable way for the official receiver, it can only be said that if the tenant paid the rent by certain instalments, the landlord could not enforce his rights to the higher rent. It seems to me that the agreement is not one which the tenant could insist upon if he were in default. I am not sure that the contention is not right that there was no consideration for the agreement, but that it was a mere voluntary statement by the landlord that he would accept the rent in this way. But even if there was consideration, the agreement was not such that the tenant could claim to enforce it if he were in default in the payments agreed upon.

Application dismissed.

Solicitors for the official receiver, *Adams & Adams.*

Solicitors for the respondent, *Campbell, Reeves, & Hooper.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — June 17, 18, 19, 20, 21; Aug. 6, 1895.

In re THE LONDON AND GENERAL BANK. (*a.*)

Company — Winding up — Auditor — Duties of — Misfeasance — Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10 — *Companies Act*, 1879 (42 & 43 *Vict. c.* 76), *s.* 7, *sub-sections* 1, 5, 6.

It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do, and he is not concerned as to whether the business of the company is prudently or imprudently carried on, or as to whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders.

The duty of an auditor is to ascertain and state the true financial position of the company at the time of the audit, and, in examining the books of the company for that purpose, to take reasonable care to ascertain that they show the company's true position.

A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more, and an auditor who gives shareholders means of information, instead of information, does so at his peril. The words "the value of the assets as shown in the balance-sheet are dependent on realization," though unusual in an auditor's report, are unimportant, the auditor's duty being to convey in direct and express terms any information which he may think proper to be communicated.

Appeal from an order of Vaughan Williams, J., made, under section 10 of the Companies (Winding-up) Act, 1890, on the 20th of December, 1894, whereby he found W. Theobald, the appellant, liable as one of the auditors of the London and General Bank (Limited) to make good to the assets of the company, jointly with other persons and severally, two sums of £5,946 12s. and £8,486 11s., being respectively the amounts declared and paid by the bank for the years 1890 and 1891, with interest on those sums.

The auditor's certificate, in respect of the balance-sheet for 1891, was as follows: "We have examined the above balance-sheet and compared it with the books of the company, and we certify that it is a correct summary of the accounts therein recorded. The value of the assets as shown in the balance-sheet is dependent on realization."

By section 7 of the Companies Act, 1879, it is enacted as follows:

"(1) Once at the least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting."

"(5) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company; and any auditor may, in relation to such books and accounts, examine the directors or any other officer of the company. . . ."

"(6) The auditor or auditors shall make a report to the members on the accounts examined by him or them, and on every balance-sheet laid before the company in general meeting during his or their tenure of office; and in every such report shall state whether, in his or their opinion, the balance-sheet referred to in the report is a full and fair balance-sheet properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, as shown by the books of the company; and such report shall be read before the company in general meeting."

Article 106 of the articles of association was as follows: "At every ordinary meeting the directors shall lay before the meeting a balance-sheet showing the financial state of the company for the previous financial year, duly audited, and every such balance-sheet shall be accompanied by a report of the directors as to the state and condition of the company, and as to the amount which they recommend to be paid out of the profits by way of dividend or bonus to the shareholders, after allowing for any *interim* dividend which the directors may have declared and any sum which they may have set aside under article 116 hereof."

Article 107 provided that "the accounts of the company shall be from time to time examined and the correctness of the statements shall be from time to time ascertained, by two or more auditors, in accordance with these presents."

Article 114 was as follows: "The auditors shall be supplied with copies of the statement of accounts intended to be laid before the meeting, and it shall be their duty to examine the same with the accounts and vouchers relating thereto."

The circumstances under which the auditor's reports were made and the arguments of counsel appear from the judgments of the court.

Cohen, Q.C., Cozens-Hardy, Q.C., and *Whinney*, for the appellants, referred to *The Bernina*, 35 W. R. 314, 12 P. D. 58; *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 W. R. 322, 36 Ch. D. 787.

Finlay, Q.C., E. S. Ford, and *Muir Mackenzie*, for the respondent, the official receiver.

Cohen, Q.C., in reply, referred to *Cavendish Bentinck* v. *Fenn*, 36 W. R. 641, 12 App. Cas. 652.

Cur. adv. vult.

LINDLEY, L.J.—This is an appeal by Mr. Theobald, one of the auditors of the above bank, which is being wound up, against an order made by Vaughan Williams, J., under section 10 of the Companies (Winding-up) Act, 1890. By this order Mr. Theobald and the directors of the bank are declared jointly and severally liable to pay to the official receiver, as liquidator of the company, two sums of £5,946 12s. and £8,486 11s., being respectively the amounts of dividends declared and paid by the bank for the years 1890 and 1891, with interest on those sums. The grounds on which this order was made on Mr. Theobald are, that these dividends were paid out of capital, and that such payment was made pursuant to resolutions of the shareholders based upon recommendations of the directors of the bank, and upon balance-sheets prepared and certified by Mr. Theobald, and which did not truly represent the financial position of the company. Mr. Theobald's appeal was supported by arguments to this effect:—(1) That Mr. Theobald was not an "officer" of the company within the meaning of section 10 of the Act of 1890; (2) that the balance-sheets and certificates given by Mr. Theobald were in accordance with the books of the bank, and that his duty as auditor was confined to framing balance-sheets, which showed the position of the bank as disclosed by its books; (3) that the dividends in question were not really paid out of capital, and that, however improvident and reckless it may have been to pay them, Mr. Theobald, as auditor, is not legally responsible for that payment; (4) that, even if Mr. Theobald, as auditor, failed adequately to discharge his duty, and even if

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

the dividends were paid out of capital, his failure to discharge his duty was the remote, and not the proximate, cause of the wrongful payment of the dividends, and that he consequently is not legally liable to make good the amount so paid; (5) that at any rate the order is wrong in declaring him jointly and severally liable with the directors to repay the dividends in question.

The first of these contentions was argued and decided last April (43 W. R. 481, 1895, 2 Ch. 166), and this court then held that an auditor of a banking company, governed by the Companies Act, 1879, and by such articles as regulated the present company, was an "officer" of the company within the meaning of section 10 of the Winding-up Act of 1890, and was liable to have proceedings taken against him under that section. This point having been then decided was, of course, not again raised, and nothing further need be said about it.

It remains, however, to consider what the duties of an auditor are as respects banking companies governed by the Companies Act, 1879, and by such articles as regulated this particular company. It will be convenient to do this before examining the facts relied upon by the liquidator as rendering Mr. Theobald liable to make good the dividends which he has been ordered to pay. The duties of the auditors in this case were governed by section 7 of the Companies Act, 1879. [His lordship referred to sub-sections 1, 2, 5, 6 & 7 of that section, and to articles 106, 107 & 114 of the Articles of Association, and continued:—] These are the enactments and relations which bear directly on the duties of the auditors, and although clauses 107 & 114 are in terms more explicit than section 7 of the statute as regards the duty of the auditors to examine and ascertain the correctness of the statements laid before them, and of the accounts laid before the shareholders, yet it is tolerably plain from the language of section 7, clause 5, that the articles add little, if anything, to the duty imposed on the auditors by the statute alone. In connection with these articles, and in order to save repetition, it should be stated that by the articles of this bank it is the duty of the directors, and not of the auditors, to recommend to the shareholders the amounts to be appropriated for dividends (clause 98), and it is the duty of the directors to have proper accounts kept, so as to show the true state and condition of the company (clause 103), Lastly, it is for the shareholders, but only on the recommendation of the directors, to declare a dividend (clause 115). It is impossible to read section 7 of the Companies Act, 1879, without being struck with the importance of the enactment that the auditors are to be appointed by the shareholders and are to report them directly, and not to or through the directors. The object of this enactment is obvious. It evidently is to secure to the shareholders independent and reliable information respecting the true financial position of the company at the time of the audit. The articles of this particular company are even more explicit on this point than the statute itself, and remove any possible ambiguity to which the language of the statute taken alone may be open if very narrowly criticized. It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that.

But then comes the question: How is he to ascertain that position? The answer is, by examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit will be worse than an idle farce. Assuming the books to be so kept as to show the true position of a company, the auditor has to frame a balance-sheet showing that position according to the books and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. This is quite in accordance with the decision of Stirling, J., in *Leeds Estate Co.* v. *Shepherd*. An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor; he must be honest—*i.e.*, he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice, I believe, business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but still an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required. Mr. Theobald's evidence satisfies me that he took the same view as myself of his duty in investigating the company's books and preparing his balance-sheet. He did not content himself with making his balance-sheet from the books, without troubling himself about the truth of what they showed. He checked the cash, examined vouchers for payments, saw that the bills and securities entered in the books were held by the bank, took reasonable care to ascertain their value, and, in one case, obtained a solicitor's opinion on the validity of an equitable charge. I see no trace whatever of any failure by him in the performance of this part of his duty. It is satisfactory to find that the legal standard of duty is not too high for business purposes, and is recognized as correct by business men. The balance-sheet and certificate of February, 1892—*i.e.*,, for the year 1891—was accompanied by a report to the directors of the bank. Taking the balance-sheet, the certificate, and report together, Mr. Theobald stated to the directors the true financial position of the bank, and, if this report had been laid before the shareholders, Mr. Theobald would have completely discharged his duty to them. Unfortunately, however, this report was not laid before the shareholders, and it becomes necessary to consider the legal consequences to Mr. Theobald of this circumstance.

A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more. Information and means of information are by no means equivalent terms. Still, there may be circumstances under which information given in the shape of a printed document circulated amongst a large body of shareholders would, by its consequent publicity, be very injurious to their interests, and in such a case I am not prepared to say that an auditor would fail to discharge his duty if, instead of publishing his report in such a way as to insure publicity, he made a confidential report to the shareholders, and invited their attention to it, and told them where they could see it. The auditor is to make a report to the shareholders, but the mode of doing so and the form of the report are not prescribed. If, therefore, Mr. Theobald had laid before the shareholders the balance-sheet and profit and loss account, accompanied by a certificate in the form in which he first prepared it, he would, perhaps, have done enough under the peculiar circumstances of this case. I feel, however, the great danger of acting on such a principle, and, in order not to be misunderstood, I will add that an auditor who gives shareholders means of information instead of information respecting a company's financial position does so at his peril and runs the very serious risk of being held judicially to have failed to discharge his duty. In this case I have no hesitation in saying that Mr. Theobald did fail to discharge his duty to the shareholders in certifying and laying before them the balance-sheet of February, 1892, without any reference to the report which he laid before the directors, and with no other warning than is conveyed by the words, "The value of the assets as shown on the balance-sheet is dependent upon realization." The most important asset on that balance-sheet is put down as "Loans to customers and other securities, £346,975," and on these a full and detailed report was made to the directors, showing the very unsatisfactory state of these loans and securities, and it is impossible to read the oral evidence, the report of Balfour and Brock, dated the 22nd of December, 1891, and the report of the auditor to the directors of the 3rd of February, 1892, without coming to the conclusion that the entry of that large sum as a good asset without explanation was unjustifiable. It is a mere truism to say that the value of loans and securities depends on their realization. We were told that a statement to that effect is so unusual in an auditor's certificate that the mere presence of those words was enough to excite suspicion. But, as already stated, the duty of an auditor is to convey information, not to arouse inquiry, and, although an auditor might infer from an unusual statement that something was seriously wrong, it by no means follows that ordinary people would have their suspicions aroused by a similar statement if, as in this case, its language expresses no more than any ordinary person would infer without it. But Mr. Theobald relies on the fact that he was induced to omit from his certificate all reference to the report which he made to the directors because Mr. Balfour, the chairman, promised to mention such report in his speech to the shareholders, and he did so. But, although Mr. Balfour twice alluded to the report, he did so in such a way as to avoid attracting attention to it. The second time he mentioned it was after a dividend had been declared, and when a motion to reappoint the auditors was before the meeting. The truth is that not a word was said to convey to shareholders the substance of the information contained in the report or to induce them to ask any question about it. The balance-sheet and profit and loss account were true and correct in this sense—that they were in accordance with the books. But they were, nevertheless, entirely misleading, and misrepresented the real position of the company.

Under these circumstances I am compelled to hold that Mr. Theobald failed to discharge his duty to the shareholders with respect to the balance-sheet and certificate of February, 1892. Possibly he did not realize the extent of his duty to the shareholders as distinguished from the directors, and he unfortunately consented to leave the chairman to explain the true state of the company to the shareholders instead of doing so himself. The fact, however, remains, and cannot be got over, that the balance-sheet and certificate of February, 1892, did not show the true position of the company at the end of 1891, and that this was owing to the omission by the auditor to lay before the shareholders the material information which he had obtained in the course of his employment as auditor of the company, and to which he called the attention of the directors.

But then it is contended that, even if this be so, there was after all no payment of dividend out of capital, and further that, even if there was, still that payment was not the natural and immediate result of Mr. Theobald's certificate and of the accounts which he prepared. Whether payment was made out of capital or not is a question of fact. The payment was professedly made out of profits made by the bank, by charging its customers with interest and commission on loans and discount. The books showed such profits, but the question is, Where did the money come from with which the dividends were paid? The money came from cash at the bankers' or in hand, but this cash could not be properly treated as profit, and the directors and auditors knew this perfectly well. This part of the case has been most carefully investigated by the learned judge whose decision we are reviewing, and, after attending closely to the observations of counsel on the reasonings and conclusions contained in the judgment appealed from, I see no reason whatever for dissenting from them. On the contrary, I entirely agree with the learned judge in saying that the profits for the year 1891 never really existed, except on paper, and that, to use his words, "whatever may be the right line to draw as to when profit not received may be carried to profit for the purpose of the annual revenue account, it is plain that there was no justification for so doing in the present case." The real truth is that the assets of the bank were put down in the balance-sheet at far too high a figure, and this entry, though not misleading if explained (as it was to the directors), was seriously misleading in the absence of explanation. Mr. Theobald says that he regarded the assets of the bank as only locked up, but his report and the schedule to it go far beyond this. The value of the principal asset depended on the probability of the Balfour group of companies and some of the other large borrowers repaying their loans. They were financing each other; their indebtedness to the bank had increased largely during the year; the securities held by the bank for these loans were, to say the least, to a great extent of very doubtful value; and yet the total amount due to the bank in respect of these loans is inserted in the balance-sheet as a good asset, without any deduction and without a word of explanation to the shareholders. We know now that those assets have realized a comparatively small sum, and we were very properly warned against the danger of doing injustice by being wise after the event. But, disregarding the result of realization, and attending only to what was known to the auditors in February, 1892,

the entry in the balance-sheet of the sum of £346,975 as a good asset was wholly unjustifiable, unless explained. We are now in a position to understand the true meaning of the passage contained in the auditors' report to the directors of the 3rd of February, 1892, and which runs thus:—"We cannot conclude without expressing our opinion unhesitatingly that no dividend should be paid this year." I find it impossible to treat this as a statement by the auditors that there are profits divisible amongst the shareholders, but that the auditors cannot recommend a dividend. I can only regard the passage as meaning that there are no funds out of which a dividend can properly be paid, and, therefore, no dividend ought to be paid this year. A dividend of seven per cent. was, nevertheless, recommended by the directors, and was resolved upon by the shareholders at a meeting furnished with the balance-sheet and profit and loss account certified by the auditors, and at which meeting the auditors were present, but silent. Not a word was said to inform the shareholders of the true state of affairs. It is idle to say that these accounts are so remotely connected with the payment of the dividend as to render the auditors legally irresponsible for such payment. The balance-sheet and account certified by the auditors, and showing a profit available for dividend, were, in my judgment, not the remote, but the real operating cause of the resolution for the payment of the dividend which the directors improperly recommended. The auditors' accounts and certificate gave weight to such recommendation, and rendered it acceptable to the meeting. It was wholly unnecessary for the Official Receiver to call a shareholder to say that he was induced by the auditors' certificate to concur in the resolution to pay a dividend. As to this part of the case *res ipsa loquitur*.

A point was made that the form of the order was wrong. But there is nothing in this. Mr. Theobald could obviously be sued alone in an action at law for breach of his statutory duty as auditor, and for damages resulting from such breach of duty, and the measure of damages would be the sum which he has been ordered to pay. Whether a similar action at law could be maintained against him and the directors jointly is more open to question. I am by no means satisfied that it could not, seeing that the wrongful payment of the dividend was caused by his improper certificate and accounts, and by the use made of them by the directors. But, be this as it may, there was a clear breach of trust by the directors, facilitated, and, indeed, only rendered possible, by the auditor who failed in discharging his own duty to the shareholders; and I have no doubt that in equity both he and they could be properly declared jointly and severally liable for the misapplication of the company's money which constituted that breach of trust: see *Leeds Estate Co.* v. *Shepherd*. With respect, therefore, to the sum of £8,486 11s., wrongly paid as dividend in 1892, in respect of the alleged profits made in 1891, the appeal, in my opinion, fails.

I agree with Vaughan Williams, J., in holding that the dividend for 1890 was in fact improperly declared and paid. But the evidence that Mr. Theobald was guilty of any breach of duty in certifying the accounts in February, 1891, is far less cogent than that which presses so heavily against him with reference to the accounts of February, 1892. The truth is that the conviction that the bank's affairs were every year getting worse and worse grew upon him year by year. This state of things was shown by the decrease of its investments and reserve capital and the increase of its loans to customers. But the loans to customers and other securities were, speaking roughly, £100,000 less at the end of the year 1890 than at the end of 1891, and, seeing that the accounts prepared by the auditors did accurately represent the position of the company as shown by the books, and that it is not proved that Mr. Theobald really knew, or ought then to have known, that the position of the bank was not correctly shown by the books, I think Vaughan Williams, J., has gone too far in holding Mr. Theobald liable for this sum. The reasons which induced the learned judge to decide that Mr. Theobald was not liable for the dividends paid in 1889 and 1890 appear to me to apply also to the dividend paid in 1891 in respect of the profits of 1890. No doubt the change made by the auditors in 1886 in the form of the certificate they had previously given is very significant, and, unexplained, leads to the inference that the auditors did not believe that the books of the company and the balance-sheet prepared from them correctly showed the position of the bank. But Mr. Theobald's evidence does, in my opinion, show that in February, 1891, matters were not known or believed to be so bad as to lead him to the conclusion that there were then no profits out of which a dividend could properly be paid. It is true that the position of the bank was very unsatisfactory in 1890, and the auditors knew it to be so. This, however, appeared from the balance-sheet and accounts which they laid before the shareholders. It is known now that the assets were put down at too high a figure; but it is not proved that the auditors knew it, or ought to have known it. The Balfour group of companies, though dependent on each other, were by no means in so tottering a state as they were a year later. Wilkinson's debt was still treated by the directors as bearing interest and as a good, or at all events, not as a bad debt. Benham's debt was unsatisfactory, but the auditors can hardly be blamed for treating it as good, having regard to the solicitor's statement as to the security held for it. This part of the case is very near the line, but, having carefully considered it, I do not think that the evidence is sufficiently strong to establish a case of misfeasance on the part of Mr. Theobald in February, 1891. I am not satisfied that he was then guilty of more than an excusable error of judgment; although, now that all the facts are known, the error is seen to have been very serious in its consequences.

As to the sum of £5,946 12s., therefore, the appeal must be allowed. As regard's costs, Mr. Theobald's appeal has resulted in reducing the sum for which he has been held liable, but in other respects, and as regards his main contention, it has failed. Under these circumstances he ought not to receive or pay any costs of the appeal, and the only order as to costs will be that the official receiver be paid his costs out of the assets of the company.

[The Lord Justice added that Lopes, L.J., had read his judgment and concurred in it.]

RIGBY, L.J.—I have had the advantage of reading and considering the judgment just delivered by Lindley, L.J., and I might have confined myself to saying I concur in it, but as I have gone carefully into the evidence as against the appellant, I think that I shall do well to show how I have come to the conclusion on which my judgment is founded. I shall not attempt to repeat all that is contained in Lindley, L.J.'s judgment. Where no reference is made to a particular topic it must be taken that I have nothing to add, though I do not wish to detract from anything said.

The appeal is against that part of the order of the 20th of December, 1894, of Vaughan Williams, J., which finds Mr. Theobald liable as one of the auditors of the London and General Bank, Limited, to make good to the assets of the company, jointly with other

persons, and severally, the amount with interest from the date of the order, of two sums, £6,768 6s. 9d. and £9,328 17s. 4d., being the dividends with interest thereon down to the date of the order recommended by the directors and declared by meetings of the company in the years 1891 and 1892 for the years 1890 to 1891. I have not taken the same figures as Lindley, L.J., did, because there has been added to to dividends the amount of interest down to the date of the order. I think it will be the exact figure. The order was made on a summons taken out by the liquidator of the company in the matter of the Companies Acts and in the matter of the bank, asking, so far as is material for the present appeal, for a declaration of the joint and several liability of the directors and auditors of the company, on the ground that the dividends before mentioned were not paid out of profits but out of capital, and so far as the auditors were concerned on the ground that they certified and reported that the balance-sheets which were laid before the company at the said meetings purported to show profits in excess of the sum paid as dividends. I understand the application to have been in substance an application against the auditors as officers of the company under the 10th section of the Act of 1890 to compel them to contribute to the assets of the company by way of compensation for their misfeasance such sums as the court may think just.

The main issues seem to be—(1) whether the auditor has been guilty of any misfeasance in relation to the company; (2) whether the misfeasance had occasioned to the company loss for which compensation ought to be directed to be made, which will involve the question whether the dividends were in fact paid, not out of profits, but out of capital, and whether such payment was the fault of the auditor; and (3) the amount of compensation which ought to be made. In order to determine the first question it will be necessary to consider in some detail the position and duty of the auditors—what they ought to have done and what they have done. [His lordship referred to the provisions of the Companies Act, 1879, and the articles of association set out above, and continued:—] The articles of association cannot absolve the auditors from any obligation imposed upon them by the statute, and it may be that, in this case, they do not impose any greater obligations as to the balance-sheet, though they make it clear that similar obligations extend to the accounts placed before the company, including the profit and loss account, as well as the balance-sheet. Under the statute the members of the company are entitled to have the safe-guard of an expression of an opinion by the auditors to the effect that the balance-sheet is a full and fair balance-sheet, and that it is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs. The words "as shown by the books of the company" seem to me to be introduced to relieve the auditors from responsibility as to affairs of the company kept out of the books and concealed from them, but not to confine their duty to a mere statement of the correspondence of the balance-sheet with the entries in the books. A full and fair balance-sheet must be such a balance-sheet as to convey a truthful statement as to the company's position. It must not conceal any known cause of weakness in the financial position, or suggest anything which cannot be supported as fairly correct from a business point of view. The provision as to its being properly drawn up so as to exhibit a correct view of the state of the company's affairs is taken from, though it does not go quite so far as, article 9 of table A and the schedule to the Act of 1862. Treated as an addition to the requisition for a full and fair balance-sheet it may not be easy to define the full extent of the obligation which it imposes, nor is it necessary to do so in this case; for it certainly requires a more detailed explanation of the affairs of the company than is contained in any of the balance-sheets of this bank. It will be important to see what information the auditors actually acquired as to the business of this company and the way in which they reported upon the successive balance-sheets. Mr. Theobald and Mr. Timms were auditors of the bank from its incorporation in 1882, and they made the audits for successive years, down to and including the audit for 1891. The reports of the auditors to the members always took the form of a certificate or memorandum written on the balance-sheet for the year. Their reports on the accounts for 1882 and 1883 contained a statement to the effect that, in their opinion, the balance-sheet exhibited a true and correct view of the position of the bank. In their report on the accounts for 1885 a somewhat less emphatic statement to the same effect appears; but in the subsequent reports no such statement is to be found. In a report to the directors, dated February 11, 1886, dealing with the accounts for 1885, Mr. Theobald, after noticing that the first-class investments, kept by bankers for quick realization in case of need, stood at a considerably reduced sum, and that more than the whole capital of the company was invested in four accounts—namely, the Liberator Society, the Lands Allotment Company, the House and Lands Company, and the Building Estates Company—and that these investments would not be easily realized in critical times, proceeds to say:—"You are doubtless aware that it is a rule with bankers to have at hand, in cash or easily realizable securities, an amount equal to at least one-third of the customers' current accounts. Considering the small amount of uncalled capital, I think that in this case this proportion is scarcely sufficient." There can be no doubt that, even at that time, Mr. Theobald was aware that the state of affairs of the bank was unsatisfactory in the important points of lock-up of capital and consequent deficiency in realizable securities. The reports of the auditors to the members for the years 1886-1890, both inclusive, are simply to the effect that the cash and bills receivable were correct, that securities had been produced for the investments and loans (no information being given as to the amount of the securities), and that the balance-sheet agreed with the books of the company. The report on the accounts for 1891 states that the balance-sheet is a correct summary of the accounts recorded in the books, and contains, for the first time, the statement, "The value of the assets, as shown in the balance-sheet, is dependent on realization." Great stress has been laid by counsel for the appellant on the statement last quoted. They argued that it was sufficient to put members upon inquiry, and that from the course taken at the trial they were debarred from giving the evidence of experts as to its importance and signification. But I may say at once that it was the duty of the auditors to convey in direct and express terms to the members any information which they thought proper to be communicated; that the words of the statement, though perfectly clear in their meaning, are also entirely unimportant, amounting to a mere truism; and that no evidence of experts would have been of the slighest use for the purpose of giving to the words a greater importance or significance than they possess in themselves, even if such evidence were admissible. To me it appears from all the reports from 1886 onwards were imperfect, and that the auditors, in giving reports in such a form, failed entirely to fulfil the statutory duties imposed upon them. Counsel for the

appellant argued that such a failure would not amount to misfeasance, but only to negligence, and that the appellant is not charged on the summons with negligence. I cannot admit the cogency of that argument. The reports were made in order to fulfil the statutory obligation and to be read to the meetings in accordance with the statutes. Mr. Theobald says with reference to this:—"My certificate means the same as the Act," and further, "I was not aware that it was considered necessary for me to give the certificate (for 1891) either in the words of the Act, or not at all." Mr. Theobald's interpretation of his own certificate cannot be received, either in his favour or against him, and we should not unduly press against him apparent admissions made in the course of a very trying cross-examination; but his evidence does, I think, go so far as to show that the certificates were, in fact, given as reports under the Act; and, independently of that evidence, I think there can be no doubt that they were intended to be, and were, received and acted upon as reports under the Act. I consider the giving of the certificates, assuming them to be to the knowledge of the auditors misleading certificates; to be a misfeasance within meaning of section 10 of the Act of 1890, and not a mere act of negligence; and that this was the meaning of the charge contained in the summons. I can have no doubt, having regard to the terms of the certificates given and the explanations of Mr. Theobald himself, that there was a strong and growing feeling of dissatisfaction in his mind at the state of the bank's affairs, as shown by its books, and I find no sufficient communication of facts causing this dissatisfaction. The balance-sheets, when examined, do not, in my opinion, fulfil the statutory requirements of being full and fair balance-sheets, and are not properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, as shown by the books of the company.

To establish this, I think it necessary to give a short summary of the evidence, as to the years 1889, 1890, and 1891, the only years as which we have sufficient evidence to be able to arrive at definite conclusions. From the tables set out at page 7 of the official receiver's report it appears that during the years 1889, 1890, and 1891 the greater part of the business of the bank consisted in making loans to and discounting bills for a group of companies, nine in number, conveniently referred to as the Balfour group or the Balfour companies.

Loans were also made or discounting facilities afforded to other companies allied to the Balfour companies, to certain directors of the bank, and customers, including Wilkinson and Benham, who are named in the table, by reason of special considerations effecting their accounts. These accounts of allied companies and the persons last mentioned are for convenience hereinafter referred to as "the special accounts."

The balance due from the Balfour companies at the end of the years 1889, 1890, and 1891 were, for 1889, £119,000; for 1890, £218,000; and for 1891, £308,000. Corresponding balances in the "special accounts" being for 1889, £196,000; for 1890, £321,000; for 1891, £429,000. The corresponding balances due from all other customers and persons were, for 1889, £135,000; for 1890, £103,000; for 1891, £100,000. Roughly speaking, the proportion of what may be called the outside business to that with the Balfour companies and on the special accounts was, at the end of 1889 two-thirds, at the end of 1890 one-third, and the end of 1891 one-fourth. The paid-up capital increased in 1890 by about £76,000, and in 1891 about £43,000, or altogether £120,000, but the whole of this and considerably more than £100,000 in addition had been absorbed into the accounts of the Balfour companies and the special accounts.

It has already been pointed out that the amount of cash and easily realizable securities, at the end of 1891, was hardly more than one-sixth of the amount due to the customers on current accounts, or about one-half of what Mr. Theobald had in 1886, pointed out to be required according to the usual practice of bankers.

These figures show an alarming absorption during the three years of the available assets of the company in advances to the Balfour companies and on the special accounts, and a perilous diminution of easily-realizable assets. As is usual with banking companies, profits alleged to have been earned by the bank consisted with unsubstantial exceptions of interest on loans, discounting of bills, and commissions. The gross profits entered in the books as having been earned from the Balfour companies, between the incorporation of the bank and the end of 1891, amounted to upwards of £84,000. The amount distributed in dividends during the same period was upwards of £58,000, and the amount carried to reserve fund, £13,000. I include there £3,000 carried to reserve fund in accordance with the report on the accounts of 1891, making together £71,000. The reserve fund, however, was not required by the articles of association to be kept separate, and was not kept separate from the general funds of the bank. It was employed in the bank's business, quite rightly, no doubt.

Subject to an argument as to the appropriation of payments dealt with hereafter, the profits supposed to have been earned from the Balfour companies were not actually paid, but they were only debited in the accounts current of the different companies, and, speaking generally, the moneys owing by the different companies went on increasing from year to year. It is evident that, unless these profits could be fairly treated as not only earned but payable within a reasonable time, there would at the end of 1891 be no profits out of which a dividend could be paid; but, on the contrary, a large deficiency.

The learned judge, after a careful consideration and investigation of the evidence before him, has found, as a fact, that the credits of these companies at the end of each year were generally credits created temporarily for the purpose of audit, and that such credits, in the majority of cases, were created either by the discounting of bills of companies like Hobbs & Co., which bills constitute a mere paper asset, or by loans direct or indirect from the bank itself, the bulk of which were ill-secured. I see no reason to differ from this conclusion, but it is a conclusion arrived at to an important extent from comparing the books of the bank with the books of other companies of the Balfour group to which the auditors had no access, and it is only to the extent to which it is founded on entries in the books of the bank itself that it can be used for the purpose of charging the appellant, with knowledge of the facts, though it is very important on the question whether the dividends were really paid out of the capital or not. The books themselves show that in many instances the accounts were put in credit in the manner described by the learned judge, but in other cases, and especially with reference to the indirect loans, that is to say, loans made by the bank to one of the companies out of which that company made an advance to another of the group for the purpose of putting the accounts of the latter in credit at the end of the year, the auditors would have no sufficient means of tracing the transactions.

Having made these general observations, I will go on to examine more completely the important case of the accounts for the year 1891. For that purpose, as being more fair to the auditors, I will assume, with-

out at all deciding that, down to the end of 1890, no knowledge that the former balance-sheets were misleading has been brought home to the auditors, and will endeavour to ascertain what additional information the auditors acquired during the audit for 1891. In the year 1891 the indebtedness of the Balfour companies to the bank, as appearing by the bank books, was increased by the sum of between £89,000 and £90,000, without any additional securities of importance being given, though, no doubt, to a considerable but unascertained extent money was expended on buildings already charged to the bank, which would make the property charged, though not necessarily the charges in favour of the bank, more valuable. The securities consisted in the main charges on buildings being constructed under building agreements, on which large sums had already been charged in priority to the bank. The buildings were unfinished, and required further expenditure of very large sums before they could advantageously be disposed of, and, in my judgment, there was abundant evidence to show that these securities of the bank were very insufficient, and not realizable at all without the expenditure of further money, which the bank was unable to advance. The sums due on the special accounts had increased from £102,000 to £121,000—that is to say, between £18,000 and £19,000. With regard to these special accounts, I do not think it necessary to go in detail through the list, but I find that the auditors comment very unfavourably on the security for the following debts—that of William Blewitt for £7,849; that of Blewitt and Balfour for £2,148; and that of Balfour for £12,000. I think, however, that they may have considered the personal security in these cases sufficient, and I do not found anything on those cases. Wilkinson, at the end of 1890, was indebted to the bank in the sum of £24,000, practically unsecured. Mr. Theobald complained about interest being debited, on the ground that the directors had then more definite information as to the security. This was going on through the audit for 1890. The fact is that the security consisted of debentures of a tramway company whose tramway was never built. Interest, accordingly, ceased to be debited to this account in March, 1891. When Mr. Theobald was pressed to explain why the full sum was returned as an asset, he replied that it would have to be provided for out of the reserve fund. He further explained that he thought the account wanted watching, but that it was likely to turn out all right. In examination before the judge with reference to this debt, he said that he had conferred with the manager, who knew all about the circumstances. "First of all," says he, "I suggested the whole should be written off, but afterwards, Mr. Brock, I think it was, sent for Mr. Blewitt. We had a very serious conference about it, and they convinced me that the time had not come to do that (write off the whole), and they might yet get the whole of the amount back, but I thought it was not wise to charge interest."

This, I think, falls very far indeed short of showing that the auditor believed, or could have believed, that the debt was a good debt, thought it might have justified the carrying of it to a suspense account, instead of writing it off as bad. The importance of the case depends upon the fact that if the debt had not been entered in the balance-sheet as a good debt, there would have been no profit at all to show for the year 1891. At the end of 1891 Mr. Wilkinson's debt, which had arisen from discounting bills, all of which would appear by the dates to have been dishonoured, was reduced to £16,000 on account of discount by a loan of £10,000, but the indebtedness remained unaffected. With regard to Benham's debt, which increased in the year 1891 from £31,635 to £47,745, it was proved that in 1891 Mr. Theobald refused to pass the security for another year, and to satisfy him a letter purporting to come from Benham's solicitor, Mr. Waring, containing an undertaking to pay off £15,000 within a week, was produced. He had also been told, during the audit for 1890, that there was a security under a supposed will which had not been proved, and that they expected to get the will proved very soon. During the audit for 1891 he ascertained that the debt had increased from £31,000 to £47,000, that the £15,000 promised to be repaid had not been repaid, and that the alleged will had not been proved—indeed, it turned out afterwards that such a will never existed. The explanation of Mr. Theobald, that he trusted to the solicitor seeing that the security was all right is not, under the circumstances, altogether satisfactory, but I think it is safer to allow Mr. Theobald the benefit of the defence, though his own report sufficiently shows that he was not himself thoroughly satisfied. I wish to make it plain, so far as I can, that I am only relying on matters which Mr. Theobald ought to have known and must be presumed to have known. The debt of £7,300 from the Medway Portland Cement Co. had, like Wilkinson's, ceased to be charged with interest, and could not properly have been treated as a fund for the payment of dividend.

With reference to that of the Public Works Co. (Limited), amounting to £8,105, the auditors, in their schedule to their report to the directors, say this:—"The realization of this is very doubtful." There could, therefore, be no justification for treating this as a fund for payment of dividend. Whilst Mr. Theobald was engaged upon the audit of the accounts for 1891, or previously, a report of Messrs. Balfour and Brock, dated the 22nd of December, 1891, was produced to him as to the way of putting into credit current accounts of Hobbs & Co. (Limited), George Newman & Co. (Limited), the London, Edinburgh, and Glasgow Insurance Co., and C. H. Wilkinson, by loans from the bank. With reference to Mr. Wilkinson's account, the proposal "that the overdraft should be made in part by a loan and in part by fresh acceptances of both secured as may be arranged, we think the further loan should be £10,000 on loan and £15,000 on bills." The loan was made, and, apparently, £16,000 was left on security of acceptances, but it does not appear that any security was then arranged for or given, or that Mr. Theobald investigated this matter. Attention was, therefore, called in this particular case to the mode in which the accounts were put in credit as found by the learned judge. Several facts which appear to me to be most material with reference to the debt of 1891 are to be gathered from the text of the report. I have dealt, to a certain extent, with the schedule in the remarks I have previously made, but as to the text of the report of the auditors of February, 1892, almost every sentence is full of serious meaning. In it they state "that they are unable to give a more satisfactory certificate than the one set forth," which is a mere statement that the balance-sheet is a correct summary of the accounts as recorded in the books, followed by a statement that the value of the assets as shown on the balance-sheet is dependent upon realization, which I have already commented upon, an important sentence: "On this subject we have reported specifically to the board." This may mean they have reported as to the value of the assets, or as to their realization, or (as I think is the true construction) as to both. The auditors were induced to withdraw this sentence which, though it would have given no information of the slightest value to the members, yet would have been calculated to put them upon inquiry. They go on:—

"We are not qualified, nor is it the province of the auditors, to estimate with exactitude the value of the securities." The words "with exactitude" seem to me to be emphatic, and to point out that they had, as appears by the report, made a general estimate of the securities which was very unfavourable. They say:—"Nevertheless, we feel it our duty to send you herewith a schedule of the securities amounting to £487,000, which we desire should have the special and very serious consideration of the directors." In the £487,000 are included every one of the sums owing by the Balfour companies and on the special accounts, and nearly £60,000 more out of the £100,000 owing by other customers of the bank. Auditors who feel it their duty to call the special and very serious consideration of their directors to £487,000 out of a total of £530,000 of the debts due to the bank must indeed have arrived at the opinion that the state of affairs of the company was critical and dangerous, but, as will appear, Mr. Theobald does not deny this, though he attempts, unsuccessfully, I think, to explain it away by saying that all his anxiety arose from the fact of the assets being locked up. Further on in the report the auditors say, "The gravity of the situation is enhanced by the fact, as we believe it to be, that the board is, in many cases, powerless to decline further help because they are powerless to realize." This appears to me to be a very just but a very serious statement. The Balfour companies were indeed so much bound up with one another by a system of inter-financing, and some of them had committed themselves so deeply in the building schemes of Hobbs & Co., Newman & Co., and others, that they would only be kept going in the future as they had been in the past by continued advances from the funds of the bank. The last-quoted extract from the report seems to me to show that the auditors fully appreciated this view of the state of affairs of the company. They continue as follows:—"We beg also respectfully to point out that the quarters from which the bank obtains by far the larger proportion of its business," meaning, I conclude, the Balfour companies, and some of the special accounts, "are such that the constitution of the board must make it difficult, if not impossible, to obtain a sufficiently independent judgment upon many vital questions which have to be decided in its management." No doubt this refers to the fact that some members of the board of the bank, the financing company, were members also of the board of different Balfour companies requiring advances, and the difficulty arising from this is obvious and serious. Then follows a sentence which forms an appropriate ending to such a report. "We cannot conclude without expressing the opinion unhesitatingly that no dividend should be paid this year." The auditors were unfortunately persuaded by Mr. Balfour, assisted by Mr. Brock, to strike out this clause, I believe, before the report reached the hands of the other directors of the bank. Mr. Theobald explains this by saying that he came to the conclusion that it was beyond the province of the auditors to express an opinion as to the policy of declaring a dividend, and if that were all I should be disposed to agree with him. It is no part of the auditor's duty to consider what is good or what is bad policy. They have only to examine into facts, and see that the members have their opinion as to the balance-sheet showing the state of affairs of the company. But the context seems to oblige me to read the excised sentence as meaning, not that it was impolitic, but that it would be improper, having regard to the state of affairs of the company, to declare a dividend.

Having regard to the explanations given by Mr. Theobald in his evidence, I think the postscript to this report very significant. It runs thus: "We do not wish it to be understood that we consider all the accounts in the schedule are unsecured, but as a whole the capital therein represented is locked up." That is the defence, that all their alarm arose from the capital being locked up. This is not, I think, the language that would have been used if the auditors had thought that the only mischief was in the locking up, and an examination of the schedule, to my mind, confirms this conclusion. To a great extent the memoranda in the schedule explain themselves, and I have already dealt with many of the items. The accounts of each one of the Balfour companies is referred to in such a way as to show the unsatisfactory state of the securities. Mr. Theobald now says that he had no doubt as to the solvency of any of the Balfour companies, and in a certain sense I am ready to believe this; that is to say, he thought that if they continued to be financed in the future as they had been in the past, and so were enabled to complete the buildings which had been commenced, they might ultimately be able to repay the advances to them with interest and commission. But this is not the meaning of solvency in a legal or business sense, and it is quite plain that Mr. Theobald knew perfectly well that some at least of these companies were, and were likely to remain for an indefinite period, unable to meet their liabilities as they became due. In no other way can the memoranda as to the want of security, or the defective nature of the securities of the several Balfour companies be explained. Similar observations apply to the memoranda as to the special accounts. Notwithstanding this report, every item of the £487,000 was entered as a good debt in the balance-sheet for 1891. No valuation was made of any one of the debts, or of the securities for them. If any such valuation had, in fact, been made, I think it plain that there could have been no profit shown for the year.

Mr. Theobald gave evidence several times over to the effect that whilst he was engaged in the audit for 1891 he felt that it was a very important crisis in the bank's affairs, and that if they could only get over the next month or so they would save it. His explanation of his withdrawal of the words in the proposed report to the members is that on this point he had reported specifically to the board. In explanation he gave, among other carefully prepared and considered reasons, the following: That "Mr. Balfour was so thoroughly aroused to the necessity of taking the affairs of the bank resolutely in hand as to lead me to believe that he would do so, and, being a man of great financial resource, he would be able to save the bank," and that Mr. Balfour also spoke of an amalgamation. "Mr. Balfour said that, while doing this, he would confer with me continuously, and that no interim dividend should be paid without consultation with me." The first intimation received of payment of an interim dividend was an announcement in the press of an interim dividend for 1892, for which it is not suggested Mr. Theobald was in any way liable. This would have given twelve months to work, during which time it would have been quite possible for Mr. Balfour to obtain very large payments from the borrowing companies with which he was connected, and thus for the bank to be saved. That is a very important point to make.

In another place he says, "My main point is this, that the bank could be saved if many of these accounts were collected. Mr. Balfour had absolute power over most of the companies, and he was so thoroughly alarmed that I quite believe that, if we could only tide over that period, he would use his influence over other companies to bring the money

into the bank. I quite imagined he would do that, even if it meant that some of the other companies would have to go to the wall." What becomes of his statement that he thought the companies were solvent? He says, it is a critical time; if you can tide over the next month or two—as to which he never expresses an opinion—if you can do that, then the resources of Mr. Balfour are so great, his influence with the other companies so great, that it is quite possible he may collect a number of the accounts, even if the other companies have to go to the wall. I think it impossible to avoid the conclusion that Mr. Theobald, when about to make his report on the account of 1891, was thoroughly alarmed at the critical position of the bank, as he thought it more than likely the bank would not tide over another month or two, but that if it did, it could only be saved by extraordinary exertions on Mr. Balfour's part, and that in the process some of the other Balfour companies might have to go to the wall. He represents Mr. Balfour as fully sharing his alarm. If we turn to the balance-sheet to see whether the state of the companies affairs, as apprehended by Mr. Theobald, was in any way indicated therein, we shall, I think, be obliged to answer the question in the negative. The liabilities appear to be sufficiently set forth. It is the statement of the assets which most calls for criticism. The cash at the bank was correctly stated, and so are the bills receivable, though the amount £180,000 there, appears only to have been arrived at by transferring £58,000 on the 31st of December, 1891, from bills receivable to a loan account for unpaid expenses. Disregarding the small items for stamps, the only other items on the credit side are as follows:—"Investments, including reserve fund"—the reserve fund at that time was £10,000—"Two and three-quarter per Cent. Consols and Prescott and Arizona Railway Bonds, £7,820." That could not be the investments which included the reserve fund of £10,000. "Loan to customers and other securities, £346,000." In the two items, bills receivable and loans to customers and other securities are, as above pointed out, included the whole of the sums amounting to £487,000, the subject of the report of the auditors to the directors, at their full value. This item, "loans to customers and other securities," is, of course, altogether inaccurate, and may be very misleading. What the £346,000 really consists of is "loans to customers partly secured," which is a very different matter. It would be open to any ordinary reader of the balance-sheet to suppose that there were securities to an indefinite amount apart from loans to customers, and available to meet moneys due on the current accounts of customers. I am at a loss to understand for what purpose this item could have been so entered. It was not through inadvertence, for it was a correction of a still more misleading entry occurring in former balance-sheets. It was suggested that such an item frequently appears in balance-sheets. It may be so for anything I know, but it is none the less improper in the particular balance-sheet, which we have to consider. In short, the balance-sheet, as it stands, would have given no hint to any ordinary reader of the critical position arising, either from the locking up of capital or from the doubtful nature of many of the debts entered at their full value. In reporting this balance-sheet without explanation, the auditors were, in my judgment, guilty of a misfeasance within the meaning of the 10th section of the Act of 1890, as charged in the summons, and were in this case, at any rate, thoroughly alive to the unsatisfactory state of the affairs of the bank. They could not but be aware that the balance-sheet was not properly drawn up so as to show the state of the affairs of the bank as shown by the books.

The next question is whether the misfeasance was the cause of the loss to the company. On examination of the evidence there set forth, I should be led to the conclusion that the auditors did not know that a dividend could not properly be paid out of profits. Assuming all the Balfour companies and Benham and Wilkinson to have been able to pay the whole of the sum owing by them except the amounts debited in 1891 for interest and commissions, not only the profits available for dividend would be swept away, but of the reserve fund itself little or nothing would remain. Such an assumption would, however, in my opinion, be extravagantly favourable to the auditors, and it only required that one of the debts owing by Wilkinson or by almost any one of the Balfour companies should prove to be bad, in order to exhaust everything belonging to the bank that was not capital. It turned out that each one of the Balfour companies and Wilkinson and Benham, as well as other debtors of the bank, were insolvent; and it is established that the bank had no funds out of which dividends could, in any point of view, be properly paid. I wish to make it plain, as far as I can, that I am only relying upon matters which Mr. Theobald, as auditor, knew, or must reasonably be assumed to have known. The auditors must have known, and did know, that the balance-sheet for 1891 was not properly drawn up so as to show the state of the bank's affairs. That the dividend was, in fact, paid out of capital cannot, I think, admit of doubt. It has been argued that the payment of the dividend was not the proximate result of the auditors' report, as the recommendation of the directors and the vote of the meeting had to intervene. This appears to me, however, to misrepresent the state of things. The report of the auditors was a continuing representation, made, indeed, before, but in law and in good sense to be treated as repeated after, the recommendation of the dividend. It was perfectly well known to Mr. Theobald (at any rate, at the meeting where he was present and heard the reading of the report recommending a dividend, and the speech of Mr. Balfour) that this report of his was intended to be relied upon as justifying the recommendation, and as an invitation to the shareholders to vote the dividend. Not only was the report a *causa sine qua non* of the vote, but it was, in my judgment, a *causa causans*. How far the judgment should go against the appellant is a question which has given me considerable difficulty. A great deal of the reasoning which has led me to hold that the auditors reporting on the accounts of 1891 as they did, was a misfeasance in relation to the company, applies only to the case of that last report. The learned judge has held Mr. Theobald liable, not only for the 1891, but also for the 1890, dividend. I am far from saying that he is clearly wrong, but I cannot satisfy myself that he is clearly right. In the case of the 1890 dividend it is not, upon the evidence, made out to my full satisfaction that the auditors knew the balance-sheet to be substantially misleading, and I think it safer to confine the order to the dividend in respect of 1891.

Solicitors, *Walters, Johnson, Bubb, & Whatton; Phelps, Sidgwick, & Biddle.*

From Q. B. Div.
(Lord Esher, M.R., and Lopes and Kay, L.JJ.) Nov. 19.

WATSON *v.* ROYAL INSURANCE CO. (*a*.)

Inland Revenue—Income tax—Deductions—Money laid out or expended for the purposes of trade—Money paid to an employee in compensation for his dismissal—Income Tax Act, 1842 (*5 & 6 Vict. c.* 35), *s.* 100, *Schedule.*

By the terms of an agreement for the purchase by the appellant company of the business of another insurance company, the appellant company agreed to take into their service the manager of the other company at a salary of £4,000 *a year, or, in the event of their electing not to retain him, to pay him a lump sum in commutation of his salary, the manager undertaking not to enter the service of any other insurance company. Shortly after the transference took place, the appellant company elected not to retain the manager, and paid him a lump sum.*

Held, that the sum so paid could not be properly deducted from the gross profits of the business of the appellant company for the purpose of ascertaining the amount on which income tax was payable, seeing that it was not money "wholly and exclusively laid out or expended for the purposes of" the business.

Appeal from the Divisional Court upon a case stated by the commissioners for the general purposes of Income Tax Acts.

In estimating their profits for the year 1892-93, for the purpose of the payment of income tax, the Royal Insurance Co. sought to deduct the sum of £55,846. That was a sum they had paid to one who had been in their employment as manager under the following circumstances:—

The Royal Insurance Co. agreed to purchase the business of the Queen Insurance Co. By the terms of the agreement, the Royal Insurance Co. were to take into their service the manager of the Queen Insurance Co. at a salary of £4,000 a year. They also undertook, in the event of their at any time wishing not to retain the manager in their employment, to pay him in commutation of his salary a sum of money calculated according to the Queen annuity tables applicable to his then age, on condition that he bound himself not to enter the service of any other insurance company.

The business of the Queen Insurance Co. was duly taken over by the Royal Insurance Co., and the manager was taken into their service; but shortly afterwards the directors of the Royal Insurance Co. decided to terminate the manager's employment. They accordingly dismissed him, paying him the sum above referred to in commutation of his salary.

The question was whether the money so paid could be properly deducted from the gross profits of the company for the purpose of fixing the amount of income tax.

The Divisional Court disagreed. Vaughan Williams, J., did not decide the point, saying that he was unable to do so on the facts as they stood, while Wright, J., decided in favour of the Crown. Wright, J., subsequently withdrew his judgment, and Vaughan Williams, J., made an order remitting the case to the commissioners. This appeal was taken on behalf of the Crown against the order of Vaughan Williams, J.

5 & 6 Vict. 35 s. 100 Schedule D. first case, deals with "duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act."

By rule 1 "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years . . . and shall be assessed, charged, and paid without other deduction than is hereinafter allowed."

By rule 1 of those applying to the first and second cases "in estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from or allowed to be set against or deducted from such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern."

Sir Robert Finlay, S.G. (*Danckwerts* with him), for the appellants.—The sum of money paid to the manager is practically a part of the purchase-money paid for the business of the Queen Insurance Co.: *City of London Contract Corporation* v. *Styles*, 2 Tax Cas. 239. The election made by the company to pay him off involves the negation of the contention that the money payment was made for his services, and for the purpose of earning the profits of the year. This deduction is even more objectionable than the deduction of annuities expressly disallowed by rule 4.

Joseph Walton, Q.C. (*Maxwell* and *Horsfall* with him), for the respondents.—Taking into consideration the agreement under which the manager came into the company's employment, the lump sum paid to him in the event of their dismissing him must be considered as payment for his services, and was therefore a proper deduction. *Gresham Life Assurance Society* v. *Styles*, 38 W. R. 696, 25 Q. B. D. 351.

Sir Robert Finlay, S.G., in reply, cited *Dillon* v. *Corporation of Haverfordwest*, 39 W. R. 478, [1891] 1 Q. B. 575.

Lord ESHER, M.R.—In order to construe the Act, one must in the first place know what it is dealing with. It is dealing with the profits or gains earned in a trade or business on an average of three years. That is to say, for instance, not profits or gains earned in fifty years. How is that amount which is to be taxed to be ascertained? It is to be estimated according to rules laid down in the Act, not according to the rules which a tradesman might adopt in ascertaining his position at the end of the year, or which a partnership might adopt in estimating the profits which are to be divided among the partners. The amount is to be ascertained by taking the gross earnings, and by making certain deductions therefrom. There must be an account with two sides to it; on the one side, the gross earnings—and no earnings are to be brought into the account, except earnings of the trade; on the other side, deductions from the earnings. What deductions? Disbursements. What disbursements? Those disbursements which are named in the Act. They are—any disbursement "wholly and exclusively laid out and expended for the purposes of the trade."

Now we have to put a construction on those words. It seems to me the only construction we can put upon them is—disbursements wholly and exclusively laid out for the purpose of earning that profit which is the subject-matter of taxation—the average profit on three years. In this case I doubt whether this disbursement could be considered as a part of the purchase-money of the business of the Queen Insurance Co. What I think was, as it were, part of the

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

price agreed to be paid for that business, was an undertaking by the Royal Insurance Co. to enter into a contract with the manager on the terms indicated in the agreement. They fulfilled that undertaking by taking the manager into their employment on those terms, and in that way they paid the price.

Therefore, we must now consider the case as if the Queen Insurance Co. had never existed, and the Royal Insurance Co. had agreed to employ the manager for an indefinite time, and had further agreed to compensate him if they dismissed him. Under such a contract they would pay him for his services, and such payment would be properly deducted in estimating the profits of the business. Then they dismiss him. When once he has been dismissed it cannot be said that anything they paid to him afterwards is a disbursement for services which go to earn the profits, the subject-matter for taxation. It is a payment for him not to serve them. On the true construction of the rule this money cannot be brought into the computation of the sum on which income tax has to be paid.

LOPES, L.J., after stating the facts and after setting out the material portions of the Income Tax Act, proceeded as follows:—It is necessary to show that the sum claimed to be deducted was a sum expended for the purpose of the trade—that is, a sum contributing to the earning of the profits and reducing those profits. I cannot say that this sum was paid for the purpose of making the profits. It was paid in order that the company might get rid of the manager, and it in no way contributed to the earning of the profits. For myself, I say, further, that it might be maintained that the money was part of the price to be paid in respect of the acquisition of the Queen Insurance Co.

But I think the former reason a complete answer to the claims of the Royal Insurance Co. to deduct the sum paid to the manager from the profits to be taxed.

KAY, L.J.—Besides the undertaking on the part of the Royal Insurance Co. to employ the manager at a salary of £4,000 a year, or to pay him a sum in commutation of the salary if they dismissed him, it was also part of the contract that the manager was to be bound not to act for any other company. This is a point for consideration. The real question is whether the deduction of the sum paid in commutation is one allowed by the Income Tax Act.

Now that Act does not use the word "profits" in the same sense as a tradesman would do when estimating his "profits" at the end of the year. A tradesman might possibly deduct a sum like the sum in question. The truth is that certain deductions are allowed by the Act, and section 159 says that "it shall not be lawful to make any other deductions than such as are expressly enumerated in the Act." In order that a deduction may be allowed, it must be brought within rule 1 of the first and second cases. Was this money "wholly and exclusively laid out and expended for the purposes of the trade"? It was expended in order to enable the company to dispense with the services of the manager. Whether they were reducing their staff or not is not shown. But the actual reason for paying the money to the manager was to get rid of him. Can that be said to be for the purposes of the trade?

It is admitted that while he was manager the £4,000 a year salary was paid for his services, and was properly deducted; but how can it be deducted when it was not paid for his services, but in order to get rid of him? Suppose it were the case that the company's object in dismissing the manager were that they were dissatisfied with him, and wished to get another manager. They would deduct the second manager's salary, and that would be a proper deduction. But suppose they were to deduct also a sum paid as compensation to the old manager, that would be making a double deduction in respect of the same services. Again, suppose the company had never employed him at all, but had dispensed with his services at once, as they had the right under their agreement to do, how would it be possible to say that the money then paid to him was a payment for his services, when, in fact, he never rendered any services at all? Mr. Walton said that this money was paid to the manager in respect of his engaging never to enter into the service of any other insurance company, and that, to that extent, it might be said to be expended for the purposes of the business. But suppose the company had had a manager in their employment with whom they had made no such agreement about commutation, and on his expressing a desire to leave, they had agreed to compensate him on his undertaking not to enter the service of any other company. Could it, then, be said that the compensation so paid would be a proper deduction? I think not. But, Mr. Walton went on to say, here the money was paid under an antecedent bargain that this should be the arrangement with the manager, and it was because of that antecedent bargain that the company could obtain the services of the manager on no other terms than that they should pay him compensation if they dismissed him. I confess that that distinction is altogether too fine, and I do not see it. The truth is that the necessity for the payment arose from the company dismissing the manager, a course which it was entirely within their option to pursue.

I think that this payment was not a deduction that could properly be made.

Appeal allowed.

Solicitor for the appellants, *Solicitor for Inland Revenue.*

Solicitors for the respondents, *G. L. P. Eyre & Co.*, for *Garnett, Tarbett, & Co.*

From Q. B. Div.
(Lord Esher, M.R., and Lopes, and Kay, L.JJ.) } Nov. 13.

STRACHAN *v.* UNIVERSAL STOCK EXCHANGE CO. (*a.*)

Gaming—Stocks and shares—Payment of differences—Money deposited as cover—Repudiation of gaming contract—Betting Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

The plaintiff deposited with the defendant a sum of money as cover in respect of certain gaming transactions in stocks and shares entered into with the defendant. Before the plaintiff gave notice that he repudiated the gaming contracts, the deposit had been absorbed by the winnings of the defendant.

Held, that, having regard to the provisions of section 18 *of the Betting Act*, 1845, *the money could not be recovered.*

Appeal from the decision of Cave, J.

The action was brought to recover certain securities and money deposited with the defendants as security or cover in respect of transactions in stocks and shares.

At the trial of the action the jury found that the transactions were gambling transactions, and Cave,

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

J., gave judgment for the plaintiff in regard to the securities, but for the defendant in regard to the money deposit.

The defendants made an application to the Court of Appeal for judgment or a new trial, which was dismissed on the 23rd of May last. A report of this appeal is given 43 W. R. 611.

The plaintiff now appealed from that part of the judgment which had reference to the money deposited as cover.

The facts, as well as the arguments used, sufficiently appear from the judgments of the Master of the Rolls and Kay, L.J.

Bigham, Q.C., and *Muir Mackenzie*, for the apellant.

Lawson Walton, Q.C., and *Pollard*, for the defendants, were not called upon.

Lord ESHER, M.R.—The plaintiff was an officer in the army. He betted with a broker, knowing him to be the principal, to the extent of £3,000,000. The broker was unwilling to trust to the honour of the plaintiff, so he insisted on the plaintiff giving him security. Accordingly the plaintiff deposited with the broker certain securities, together with a sum of £3,000. The bets came off, the plaintiff lost, and the broker assumed to pay himself with the money deposited and kept the securities. Whereupon the plaintiff brought an action to recover both the money and the securities. Cave, J., held that he was entitled to recover the securities but not the deposit. An appeal was made against that judgment by the defendant in this court on a former occasion, and this court decided that the learned judge was right in holding that the plaintiff could recover the securities. The question is now whether he can recover the money as well. I believe the necessity for delivering this further judgment is mainly due to me, because I was unwilling that the plaintiff should not recover, for the broker is a person who understands this business, and he persuades the people who bet with him to give him a deposit. What I am bound to hold is that where a person is so foolish as to give a deposit he can never afterwards recover it, so that, even if he were to win his bet, the other person could laugh in his face and say: "I am neither going to pay you the money you have won nor return you your deposit." It seems to me that the decision must go that length. That is the proper construction of the Betting Act. I am aware that it has been held that before the wager has been determined the deposit can be recovered. Though these decisions seem to me to be an encroachment upon the Act, I do not wish to say anything against them, but when I am asked to go further still, I must decline to do so. I am fortified in this opinion by the judgments in *Manning* v. *Purcell*, 3 W. R. 274, 7 De G. M. & G. 66.

Knowing the result—the disgusting result—of my decision, nevertheless I am bound to pronounce that that is the law. The ruling of Cave, J., must be affirmed.

KAY, L.J., read the following judgment:—The plaintiff and defendant in September, 1893, entered into a contract for gambling in stocks and shares by pretending to buy for a future day, and debiting and crediting one another for any change in the market price over the day named, without, in fact, buying or selling any stock or shares. The plaintiff deposited with the defendants, who are brokers, certain property as security for the performance of this contract. These securities were not realized, and he has been held entitled to recover them.

But he also deposited with the defendants £3,000 in money, in two different sums of £2,000 and £1,000. The former sum on the 10th of February, 1894, the latter on the 27th of the same month. The receipts for these sums show that they were deposited as what is called cover, that is to abide the result of the gambling, and if the result was in favour of the brokers to enable them to pay themselves by appropriating the deposit or so much of it as was necessary. Accounts were furnished by the brokers every three months, and in the first rendered after these deposits were made, they were entered to the brokers' debit on the days of receipt, the balance being £2,413 16s. 11d. in favour of the plaintiff. Thus £586 3s. 1d. of the £3,000 was shown to have been used, and the account showed that to make up the required cover of £3,000 for future transactions £586 3s. 1d. must be paid to the brokers, and on the assumption that this would be done there was an entry "Deposit retained, £3,000."

Interest was credited to the plaintiff upon this £3,000 on one side of the account, and on the other he was debited with interest on the particular purchases. The plaintiff paid £586 3s. 1d. on the 8th of March, and the £3,000 having been thus made good the gambling went on till the 25th of April, when the plaintiff gave notice to the defendants to close the account. On the 26th of April the plaintiff commenced this action to recover the £3,000.

It appears from the account since rendered, which has been put in by the plaintiff, that at that date he was indebted to the defendants to an amount much exceeding the £3,000, the account being stated precisely in the same way as the former account which he had received, and the £3,000 being entered in two sums of "Balance, £2,413 16s. 11d. and cash, £586 3s. 1d." as the first items to the plaintiff's credit.

But attention was particularly called to the fact that interest on £3,000 was credited to the plaintiff up to the 22nd of June, the day of delivery of this last account, this it was said showed that the £3,000 had not been appropriated. Before the commencement of this action there was no repudiation by the plaintiff of the gambling transaction.

By section 18 of 8 & 9 Vict. c. 109, the contract between the plaintiff and the defendants for gambling was null and void. By the latter part of the same section it is provided that "no suit shall be brought or maintained in any court of law or equity for the recovery of any sum of money or valuable thing alleged to be won upon any wager or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." If this deposit comes within those words it cannot be recovered. It is suggested that the statute only refers to money or valuables deposited with a third person as stakeholder. The statute does not say so. It says with "any person." And I am not able to conceive any valid reason for construing it to have the suggested meaning. The object is to discourage gaming and wagering by making the money won or lost irrecoverable, and also by making any deposit made to abide the event irrecoverable. What can it matter with whom it was deposited? If it could be recovered, the intention as well as the letter of the statute would be violated. It was quite familiar that money was deposited with one of the gamblers as well as with a third party as stakeholder. For example, it was common in betting with a bookmaker to deposit the amount which he might win on cash bets in his hands, to be his in case he won; if not, to be returned when he paid his loss.

In *Manning* v. *Purcell* the testator kept a betting office and betted on horse races, and received deposits

from the persons who betted with him. Some of these bets were determined against him in his lifetime. Some after his death. His widow and administratrix paid the bets decided in the testator's lifetime, and returned the deposits as to them. She also returned the deposits as to those bets which were decided after the testator's death. With respect to the latter it was held that she was right to return the deposits, because the bets undecided were cancelled by the testator's death. But as to those decided in his lifetime she was not allowed to retain the amount out of the estate, on the ground that 8 & 9 Vict. c. 109, s. 18, made both the bets and deposits irrecoverable. Turner, L.J., said that as to these payments, "having regard to the provisions of the statute they could not have been recovered from the testator in his lifetime, and that, therefore, the payments by the administratrix in respect of these can be regarded only as voluntary payments, and not valid against the estate." I should consider this decision binding on me if I disagreed with it. But for the reasons already indicated I respectfully say I entirely agree with it.

But then it was argued that at any time before the money was appropriated by the defendants the plaintiff could repudiate the void contract, and reclaim the deposit. This was decided in *Varney* v. *Hickman*, 5 C. B. 271; *Hampden* v. *Walsh*, 24 W. R. 607, 1 Q. B. D. 189; and in the Privy Council case *Trimble* v. *Hill*, 28 W. R. 479, 5 App. Cas. 342. One of the grounds in the first of these cases—and, I confess, the most intelligible to me—is that upon the repudiation the money ceased to abide the event and became money of the plaintiff in the hands of the defendant without any good reason for detaining it. But in *Gatty* v. *Field*, 9 Q. B. 431, it was held that the repudiation must be made before action brought, and, as there is no cause of action until repudiation, this is not a merely technical objection. But there is a question whether the plaintiff in this case at the time of bringing the action had repudiated so as to entitle him to a return of the deposit. And upon the facts which I have stated I do not think he could. He did not bring this action until the £3,000 was more than absorbed by his losses, and he knew, from the manner in which the accounts sent to him were stated, that the £3,000 would be treated as appropriated towards these losses. It was sought to avoid this difficulty by saying that in this account rendered after action the plaintiff was credited with interest on the £3,000 down to the date of sending in that account, although it showed a large balance against him. But as the £3,000 was entered as the first item of the plaintiff's credit, this credit of interest must be treated as a mistake if it credited interest beyond the 25th of April, when the account was closed. For these reasons I think the appeal fails.

A. L. SMITH, L.J., in a written judgment, after stating the facts and section 18 of the statute 8 & 9 Vict., c. 109, proceeded as follows:—It will be seen that this section does not make the agreement illegal but renders it void, and, as was well pointed out by Lush, J., in *Haigh* v. *Town Council of Sheffield*, 23 W. R. 547, L. R. 10 Q. B. 109, a wager by the statute is made a thing of a neutral character, it is not forbidden, it leaves an ordinary betting debt a mere debt of honour depriving it of all legal obligation, but not making it illegal. It is manifest that no action can be brought by the one against the other to enforce any contract so declared to be void, but it has been held by authorities that it is far too late now to question that as soon as one party to a gaming contract receives notice from the other party that the former declines to abide any longer by the wagering contract, money deposited by him thereupon ceases to be money deposited in the hands of the latter "to abide the event on which any wager shall have been made," and any money still in the latter's hands unappropriated by him, becomes money of the former without any good reason for the latter detaining it, and in such circumstances an action for money had and received to the plaintiff's use will lie. This was held as long ago as the year 1828 by the King's Bench in *Hastelow* v. *Jackson*, 8 B. & C. 225; *Varney* v. *Hickman;* followed by *Hampden* v. *Walsh;* and adopted in 1880 by the Privy Council in *Trimble* v. *Hill*. This principle was also, as it appears to me, enunciated by Turner and Knight Bruce, L.JJ., in the case of *Manning* v. *Purcell*. This notice may be given both before as well as after the event, to abide which the money has been deposited, has come off, but in the latter case it must be given before the money has been appropriated to the purpose for which it had been deposited, for if appropriated it is no longer money of the plaintiff's in the defendant's hands. If it is still unappropriated the defendant cannot set up the gaming and wagering contract to retain it, for the statute enacts that such a contract is void, and the result, therefore, is that if one party to a gaming and wagering contract gives to the other party notice in time that he withdraws from the contract, he can recover back his deposit whether in the hands of his co-better or of a third party. *Aliter* if he does not.

Now, in the present case, when the plaintiff gave the notice to the defendants that he withdrew from any further carrying on of the gaming contract, which he was entitled to do, it is admitted that he was largely indebted to the defendants for differences, and, in my judgment, my brother Cave took the correct view (notwithstanding Mr. Bigham's criticism of the accounts) of the transactions between the parties when he held that, as the plaintiff became from time to time in debit to the defendants for differences, the £3,000 *pro tanto* became used up, and that, as a matter of fact, every farthing of the £3,000 had been exhausted and more, when the notice was given by the plaintiff, and that this being the real truth of the case the plaintiff could not recover back the £3,000 nor any part of it.

Cave, J., was right in refusing to order the return to the plaintiff of the £3,000. In the case of the securities deposited, the plaintiff was in time with his notice, and in this he was not. His appeal must share the same fate as that of the defendant's appeal, and be dismissed, with costs.

Appeal dismissed.

Solicitor for the plaintiff, *Theodore Allingham.*

Solicitors for the defendants, *Last & Sons.*

From Q. B. Div. (A. L. Smith and Rigby, L.JJ.) Nov. 11.

THE SHOE MANUFACTURING CO. (LIMITED) *v.* CUTLAN. (*a*.)

Practice — Patent action — Jurisdiction of Court of Appeal to allow amendment of particulars of objections—46 & 47 Vict. c. 57, s. 29—R. S. C., ord. 58, *r.* 4.

The Court of Appeal has, under ord. 58, *r.* 7, *juris-*

(*a*.) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

diction to allow the amendment of particulars of objections; but,

Held, that, on the merits, leave to amend ought not to be given, as the defendant would not be prejudiced by the judgment in the action if he afterwards sought to have the plaintiff's patents revoked.

This was a motion by the defendants to an action for the infringement of certain letters patent, for leave to amend their particulars of objection and adduce further evidence upon the hearing of the appeal.

The action was brought seeking an injunction to restrain the infringement of three letters patent (hereinafter respectively referred to as patents A., B., & C.).

The defendants delivered with their defence particulars of objections, by which as finally reamended the defendants in effect alleged that the patents were invalid by reason of twelve instances of prior publication or user therein mentioned.

The action was tried before Romer, J., on the 3rd, 4th, 13th, 14th & 15th of May, 1895.

By his judgment delivered on the 12th of June, 1895, his lordship held that the plaintiffs' patents A., B., & C. were respectively valid, and his lordship further held that the defendants had infringed patents A. & B. respectively, and granted an injunction and other relief in respect of such last-mentioned patents.

The defendants served notice of appeal against that judgment, and now moved that they might be at liberty to further amend their particulars of objections, by alleging seven further instances of alleged anticipations specified in their notice of motion. From an affidavit filed by the defendants it appeared that the failure of the defendants to discover these seven alleged anticipations and include them in the particulars of objections prior to the trial of the action was due to the mistake of the person employed to search at the Patent Office.

T. Terrell, Q.C., and *Micklem*, for the appellants.—This court has a discretion under ord. 58, r. 4, to allow such an amendment as now asked for, and whether such leave will be granted depends on the circumstances of each case: *Pirrie* v. *York-street Flax Spinning Co., Limited*, 11 Pat. Rep. 429; *Cropper* v. *Smith*, 33 W. R. 60, 26 Ch. D. 700 (in the House of Lords, 33 W. R. 753, 10 App. Cas. 249). The judgment of Bowen, L.J., in the last case (26 Ch. D., at p. 711) shows that this amendment ought to be allowed. If allowed of course it will be on the terms settled in the case of *Baird* v. *Moule's Earth Closet Co.*, 17 Ch. D., at 139*n*.

Moulton, Q.C., and *Lawson*, for the respondents.—This court has no jurisdiction to allow the amendment of particulars of objections in a patent action. The words "the court or a judge" in ord. 58, r. 4, refer solely to a judge of first instance: see the judgment of Cotton, L.J., in *Cole* v. *Saqui*, 37 W. R. 109, 40 Ch. D., at p. 133. [A. L. SMITH, L.J.—After the trial the judge of first instance is *functus officio*.] Section 29 of the Patents, Designs, and Trade-Marks Act, 1883, does not apply to the Court of Appeal. [RIGBY, L.J.—The words of rule 4 are very wide.] If the judge at the trial omitted to certify in respect of certain of the particulars of objections, the Court of Appeal would have no power to supply the omission. [SMITH, L.J.—It is only a question of costs.] Yes, but it envolves a question of right. Even if the defendants fail on this appeal they will not be estopped from applying to have these patents revoked: *In re Deeley's Patent*, 43 W. R. 517; [1895] 1 Ch. 687.

Terrell, Q.C., in reply, referred to *In re Haddan's Patent*, 33 W. R. 96, 54 L. J. Ch. (N. S.) 126.

A. L. SMITH, L.J.—This is a application under ord. 58, r. 4, that the defendants may be allowed to make an amendment in their particulars of objections, and to introduce evidence upon the hearing of the appeal.

The action was brought in respect of the infringement of certain patents, and it occupied five days before Romer, J. The defendants gave particulars of objections, amounting to twelve in number. Romer, J., gave judgment that the defendants had infringed patents A. and B. The defendants appeal to this court, and say that Romer, J.'s judgment was incorrect. They now apply for leave to add seven further particulars of objections, and they ask us to overhaul Romer, J.'s judgment on the twelve objections, and to go into a new case as to the seven. I should be very reluctant to accede to such an application, because if it were to accede to it this court would be inundated with similar applications.

It is said that we have no jurisdiction to allow these amendments. In my opinion we have that power. It is said that section 29 of the Patents, Designs, and Tramways Act, 1883, has enacted that the amendment of particulars of objections shall only be made by "the court or a judge," and it is said that in *Cropper* v. *Smith* it has been decided that the Court of Appeal is not a court or a judge within the meaning of that section. [His lordship pointed out that in *Cropper* v. *Smith* the defendant had expressly refused to ask for leave to amend: 26 Ch. D., at p. 708.] Now we have the express provision of ord. 58, r. 4. [His lordship read the rule.] In my judgment a patent and any other action stand in the same position in this respect, and there is no difference between the law in a patent action and in any other action in this court. If authority were wanted I think the case of *Cropper* v. *Smith* in this court decided that there is this power given to this court to order amendment. In that case both Cotton and Fry, L.JJ., base their decisions on the fact that the applicants had deliberately refused to ask for leave to amend. With what Bowen, L.J., said in the same case on the question of amendment I cordially agree. I have not the slightest doubt that we have a discretion to allow amendment in this action.

Ought we, however, to exercise our discretion by allowing these amendments? If we grant leave this would happen. When this appeal comes on we shall have to try the question not only as to the twelve old objections, but also as to the seven new ones.

Nothing could be more inconvenient than that. How the defendant missed discovering these specifications, which, as he alleges, show that these patents are invalid, I cannot understand. There will be no irremediable damage done to the defendant if we refuse this application, for our decision in *In re Deeley's Patent* shows that the defendant will not be estopped by the judgment in this action from taking proceedings to have the plaintiff's patents revoked. In this case the defendant, owing to a blunder, has not been able properly to impeach these patents, but he can properly impeach them by means of a petition for their revocation. The application ought, therefore, in my judgment, to be dismissed with costs.

RIGBY, L.J., concurred.

Solicitors, *Sharpe, Parker, Pritchard & Barham; J. H. Johnson, Son, & Ellis*, for *Dennis & Faulkner* Northampton.

High Court of Justice.

Chan. Div.
North, J.

Oct. 26.

In re Copland.
Mitchell *v.* Bain. (*a.*)

Administration—Costs—Real and personal estate.

Where the costs of administration are increased by the administration of real estate, such increased costs must be borne by the real estate.

Further consideration.

Caroline Stewart Copland, by her will dated the 18th of July, 1889, devised three freehold houses to trustees to the use that her sister should receive thereout an annuity of £100 a year during her life, and, after her death, the testatrix directed that the three houses should fall into her residuary estate, and, except as aforesaid, she devised all her real and leasehold estate upon trust to sell and stand possessed of the proceeds upon trust to pay her just debts, funeral, and testamentary expenses and legacies, and in case the proceeds should be insufficient for that purpose, she directed that such deficiency should be made up and payable out of her personal estate; and after giving her personal estate other than chattels real upon trust to pay certain charitable legacies, she gave the residue of her estate to her executors absolutely.

The testatrix's real estate consisted of the three houses devised by her will.

On the same day, but subsequently to signing her will, testatrix signed and handed to the trustees of her will a letter, directing them to hold the three houses upon a secret trust for charitable purposes.

The testatrix died on the 7th of July, 1891.

On the 9th of November, 1892, her trustees commenced an action for the administration of her estate, in the course of which questions of considerable difficulty arose, owing to the way in which the testatrix had disposed of her real estate.

The point was raised, whether part of the costs ought not to be borne by the real estate.

Vernon Smith, Q.C., and *Kenyon Parker*, for a co-heir in gavelkind.—The testatrix has directed how "testamentary expenses" are to be paid, but the devise of real estate is invalid, and the testamentary expenses, which include costs in this action, must be paid out of personal property.

Ingle Joyce, for the Attorney-General.—It is only just, that, so far as costs have been increased by the administration of the real estate, they should be borne by the real estate. That was the view taken in *Patching* v. *Barnett*, 51 L. J. Ch. 74, 30 W. R. Dig. 54, and followed in *In re Middleton*, *Thompson* v. *Harris*, 30 W. R. 293, 19 Ch. D. 552.

Vernon Smith, Q.C., replied.

S. Eady, Q.C., and *H. Greenwood*, *L. T. Dibdin*, and *J. H. Boome*, for other parties.

North, J.—I consider that the question is settled by the two cases cited. The proper order will be that costs are to be paid out of personal estate, except so far as they have been increased by administering real estate.

Solicitor for the co-heir in gavelkind, *T. F. Adshead.*

Solicitor for the Attorney-General, *The Solicitor to the Treasury.*

(*a.*) Reported by G. B. Hamilton, Esq., Barrister-at-Law.

Solicitors for the other parties, *R. H. Bentley*, *A. Slater*, *Clayton, Sons, & Fargus.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Cave, J.)

Oct. 25.

Moore *v.* Pearce's Dining and Refreshment Rooms (Limited). (*a.*)

Margarine—Exposure for sale—Restaurant keepers—Sale of margarine by retail—Margarine Act, 1887 (50 & 51 *Vict. c.* 29), *ss.* 4, 6.

The defendants were restaurant keepers, and supplied their customers with (inter alia) "*slices*" *of bread and broiled haddocks, to be consumed on the premises. In the shop was a lump of margarine which was only used to spread upon the slices of bread, and small portions of it were also placed as a condiment upon the broiled haddocks. In both cases the price charged for the slices of bread and for the haddocks was the same whether a portion of margarine was supplied with them or not. The lump of margarine had no label upon it.*

Upon an information laid by one of the customers the magistrate refused to convict the defendants of exposing for sale margarine not labelled as required by the 6th section of the Margarine Act, 1887.

Held, on appeal, that the magistrate was right, as there was evidence to show that the defendants did not sell margarine except in conjunction with some other article, and, therefore, that there was no "exposing for sale" by retail within the meaning of the section.

Special case.

This was an appeal by John Moore, an officer of the Butter Association, against the decision of Mr. Haden Corser, a metropolitan police magistrate, sitting at Worship-street, who had refused to convict the respondent company for an alleged offence under the Margarine Act of 1887.

The facts were substantially as follows: On the 22nd of January, of this year, Moore, with another officer of his association, went to the defendants' establishment known as the "Wilberforce" in Great Eastern-street, City. He called for some coffee, bread and butter, and was served. Subsequently Moore asked the attendant for four slices of dry bread and three-penny worth of butter, and was told that the compound used as butter was a mixture of margarine and butter, and he replied that that would do. Then, according to his version of what took place, the girl went to the counter and cut a piece off a big lump of margarine on the shelf and weighed it, but the manager intervened, and told Moore that he could not be supplied with the article in order to take it away. The complainant said he wanted it for analysis and offered 3d. The manager then repeated his former observation and pointed out notices on the walls containing the following announcement:—"Pearce's Dining and Refreshment Room, Limited.—Notice.—Slices, ½d. each. Nothing but a mixture of the best Danish butter and margarine is sold at this establishment." The defendants admitted that except these notices there was no label either on the plates containing the slices or on the big lump of the compound; and also admitted that in the shop there was a board on which was a notice to the effect that "bread and butter" was sold there. In the end Moore and his colleague were ordered out of the shop by the manager without their obtaining the piece of the compound which had been cut off.

(*a.*) Reported by Erskine Reid, Esq., Barrister-at-Law.

In the evidence given before the magistrate it was stated that slices were mostly cut behind the counter from which customers helped themselves. The margarine was only sold spread on slices or placed on haddocks and in neither case was the price of the article reduced if no margarine was taken. For the complainant it was contended, that having regard to the facts the mixture had been exposed for sale under circumstances, which brought the defendants within reach of the Margarine Act. Reliance was more especially placed on the fact that no label was placed upon the large lump of the mixture. For the defendant company the contention was that they did not sell margarine by retail but only on slices, and that they were therefore not bound to comply with the provisions of the Margarine Act.

The magistrate dismissed the summons, being of opinion that the Act did not apply. In his opinion the defendants were refreshment-room keepers and were not sellers of margarine by retail. They only sold margarine as a compound article — *i.e.*, as "slices," or bread spread with margarine, and not separately as margarine. He considered that the Act only applied to shops, such as butter shops or grocers' shops, where margarine was usually sold. The lump on the shelf was only there for the purpose of being used to spread on bread and was not "exposed for sale" within the meaning of the 6th section, and, therefore, neither it nor the slices required a label.

From this decision Moore appealed.

Morton Smith (with him *Dickens*, *Q.C.*), for the appellant.—The object of the Act is to protect the public from having margarine palmed off on them as butter. I shall be contented if your lordships hold that the lump on the shelf must have a label, though strictly speaking one should also be attached on every plate of slices. The Act applies to everybody dealing in margarine for profit. Section 4 directs that every person dealing in margarine whether wholesale or retail, whether a manufacturer or importer, or as a consignor or consignee, or as a commission agent or otherwise, who is found guilty of an offence under this Act shall be liable to a fine. Section 6 directs that where margarine is exposed for sale by retail there shall be attached to every parcel thereof so exposed and in such manner as to be clearly visible to the purchaser a label on which is printed the word "margarine," otherwise the vendor is liable to a fine under section 4.

Ogle, for the respondents, was not called upon.

Lord RUSSELL OF KILLOWEN, C.J.—It is an important question which is raised in this case. The statute on which the point turns was, no doubt, mainly passed to protect the public against deception. Before I say anything else, I should like to make this general observation, that the persons here charged with the offence have throughout acted entirely above board, and no manner of deception has been alleged against them. The question the court has to decide is whether the defendants have committed a technical offence under the Act. Section 4 of the Act does not create the offence, it only imposes the penalty. Section 6 creates the offence, and it is with that section that we have to deal. Did the defendants commit an offence within the meaning of the middle clause of that section, which deals with "exposure for sale"? That section directs that every person dealing in margarine in the manner described in the preceding section, shall conform to the following regulations:—"Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'margarine,' and if such margarine be exposed for sale by retail, there shall be attached to each parcel, in such manner as to be clearly visible to the purchaser, a label marked 'margarine,' and every person selling margarine by retail, save in a package duly branded or durably marked shall, in each case, deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, of a certain size, the word 'margarine.'" Has that section been contravened in this case? In my opinion it has not. The facts were these. The defendants kept a refreshment house, and did not sell any of the articles in which they dealt to be taken away. It was strictly a refreshment room in which the customers eat whatever they called for. There was a notice in the shop that nothing but a mixture of the best Danish butter and margarine was sold at this establishment. The slices of bread that were sold at ½d. each had the mixture spread upon them, and the twopenny haddocks had a piece of it supplied with them as a condiment. The informant asked to be supplied with some of the butter from the lump, in order that he might take it away. If this had been sold to him, I think there would have been a great deal to be said for the view taken by the complainant that in fact margarine was sold at that establishment by retail. The manager, however, promptly informed him that they did not sell margarine, and that it was only used by them in conjunction with bread or haddocks.

Then I come to this question: Was this a case of "exposing for sale by retail 'margarine'" within the the meaning of the last part of the section? To answer that we must carefully read the last part of the section, which provides that every person selling margarine by retail must sell it either in a package or wrapper in order to get light upon the meaning of the words "exposed for sale by retail" in the middle clause of the section. Reading the two together it seems to me that such words are wholly inapplicable to the business as it was carried on by the defendants. It would be ridiculous to attempt to enforce the directions as to the labelling of every portion of margarine sold to a purchaser, when they came to be applied to the pats of margarine that were spread on each slice of bread or supplied as a condiment to the haddocks. The evidence shows, however, that the margarine was only used at that establishment in these two ways, and was, in fact, never sold as a separate article. I think, indeed, the learned counsel, when he came to argue the point, found great difficulty in supporting the wider view taken by the prosecution. It is as if the Act was sought to be enforced in respect of melted butter or *pommes frites*, if margarine had been used in the cooking. The main stress of the complainant's argument was directed to show that the lump on the shelf ought to have had a label on it. But before he could establish that point he must establish this point—that the lump was exposed for sale by retail. In my opinion it was not an exposing for sale by retail at all within the meaning of the section.

I think it is also of importance to note that it was in the one case a sale of slices of bread with the mixture spread upon them, and in the other of haddocks to which a piece was added as a condiment, and that in both cases the price charged for the bread and the haddocks was not reduced if no margarine were taken. For these reasons I think the decision of the learned magistrate was right.

CAVE, J.—I am of the same opinion.

Appeal dismissed, with costs.

Solicitor for the appellant, *C. Urquhart Fisher.*

Solicitor for the respondent, *Thomas Charles.*

IN BANKRUPTCY.

Q. B. Div.
(Vaughan Williams and Kennedy, JJ.)

Oct. 28, 29.

In re MORGAN.
Ex parte TURNER. (*a*.)

Bankruptcy—Protected transaction—Notice of act of bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (h); *s.* 49, *sub-section* 2.

Knowledge by a creditor that the debtor's solicitor has instructions to prepare a notice that the debtor intends to suspend payment of his debts is not notice to such creditor that the debtor has committed an act of bankruptcy.

Appeal from an order of His Honour Judge Harris Leigh, in the County Court at Hereford, declaring that an assignment by the debtor, Morgan, of a debt due to him from one Terry, to the appellant Turner was void by reason of Turner having taken the same with notice of an act of bankruptcy committed by Morgan.

Upon the 12th of March, 1875, Turner sold Morgan seventy bullocks and received in return a cheque dated the 13th of March, which was dishonoured on the 14th of March.

Morgan resold the bullocks to Terry on the 13th of March, and received from him a cheque which he ultimately returned, leaving Terry indebted to him for the price of the bullocks.

Upon the 14th of March Morgan committed an act of bankruptcy by writing to the manager of his bank that he should be compelled to suspend payment, and asking the manager to instruct Philpin, a solicitor, to prepare a circular calling a meeting of his creditors for the 19th.

The circular, though prepared, was never, in fact, sent out.

Upon the 15th of March Turner called on Philpin, who said to him, "Morgan has given me instructions to call his creditors together because he cannot pay his debts," but he did not tell Turner of the letter written by Morgan to the bank manager.

Turner wrote to Terry on the 16th of March, saying, "Morgan is now compounding with his creditors"; and upon the 20th of March went to see Morgan and compelled him to assign Terry's debt to him.

The petition was presented upon the 1st of April, receiving order made on the 10th of April. A trustee was appointed who moved upon the 21st of May in the County Court of Hereford for a declaration that the assignment of the 20th of March was void as against him.

The county court judge decided in favour of the trustee, and from that decision this appeal was brought.

Muir Mackenzie, for the appellant, stated the facts, and was stopped by the court.

Gwynne James, for the respondent.—A debtor commits an act of bankruptcy when he gives notice to a creditor that he is about to suspend payment, therefore if Turner knew that Philpin had instructions from Morgan to call a meeting of his creditors, then he must have known that Morgan had given notice that he was about to suspend payment.

Muir Mackenzie, in reply.—Philpin had no right in the course of conversation with Turner to give him notice of an act of bankruptcy on the part of Morgan, nor was he Morgan's agent to commit an act of bankruptcy for him by telling Turner that he could not pay his debts.

VAUGHAN WILLIAMS, J.—With every possible desire not to differ from the learned county court judge, I have come to the conclusion that he was wrong in the judgment he gave. I am not at all sure that I really am differing from him at all. The case made before him was that there had been an act of bankruptcy committed by the debtor, by his notice to the bank manager of his intention to suspend payment within section 4, sub-section 1 (*h*) of the Bankruptcy Act, 1883, the bank manager being a creditor. That was the case in the county court. Now if one looks at the evidence of the two people, who might have given notice of that act of bankruptcy to the appellant—viz., the bank manager and Philpin, I think it plain that neither of them did in form give notice to the appellant, that the debtor had given this notice of intention to suspend payment of his debts. First, take the conversation between the appellant and the bank manager. The affidavit of the bank manager does not suggest that he gave the appellant any notice of the letter he had received from the debtor, and the appellant, in his evidence, gave a point-blank denial to the suggestion that he had received any such notice from the bank manager.

Then take the conversation with Philpin, the same observations apply, his affidavit does not say that he told the appellant the contents or effect of that letter. It is impossible to say that Philpin, in conversation, gave any notice of this act of bankruptcy.

It did, however, occur to me that the conversation between the appellant and Philpin might constitute a notice of an act of bankruptcy, for it might be said that the very conversation was notice by the debtor, through his agent, that he had suspended or intended to suspend payment of his debts. Nevertheless, I have come to the conclusion that Philpin was not authorised by the debtor to give any such oral notice, he only had authority to issue a circular calling a meeting of creditors on a date which had not arrived, and the debtor might have withdrawn that authority at any time before that date.

Knowledge that a debtor intends to give notice of his intention to suspend payment is not notice of an act of bankruptcy, nor is knowledge that the debtor's solicitor has instructions to prepare a notice of intention to suspend payment, notice that the debtor has committed an act of bankruptcy; and it does not amount to notice by the debtor to the appellant, unless we hold that the instructions to the solicitor gave him authority to give oral notice before the circular was issued.

KENNEDY, J.—I concur. It seems to me, on the evidence, that it is quite clear that the appellant never knew of the contents or effect of the debtor's letter to the bank manager, and also that the solicitor had no authority to give oral notice of an act of bankruptcy on behalf of the debtor, but that his authority was limited to sending out the circulars.

Appeal allowed.

Solicitor for the appellant, *A. Hunt.*

Solicitor for the respondent, *H. P. Davies.*

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Kay, L.J.) — Nov. 11.

SOUTH STAFFORDSHIRE TRAMWAYS CO. (LIMITED) *v.* EBBSMITH. (*a.*)

Practice—Evidence—Bankers' Books Evidence Act, 1879 (42 & 43 *Vict. c.* 11), *s.* 7.

The court will refuse an application, made under the Bankers' Books Evidence Act, 1879, *for leave to inspect before trial bankers' books containing entries of the banking account of a party to the action, if that party swears in an affidavit that there is no item therein relevant to the matters in question, unless the applicant can show from some other document in the cause that such affidavit is inaccurate.*

Semble, *that the court has jurisdiction under that Act to give leave to inspect the banking account of a person not a party to the action, if items in it would be evidence at the trial against a party to the action; but the court will act in such an application with great caution, and will require evidence from the applicant that items of that nature are to be found in the banking account in question.*

Per Kay, L.J.—*An application for leave to inspect the banking account of a person not a party to the action should not be granted without his being heard in opposition.*

Appeal from an order made by Hawkins, J., at chambers, reversing a decision of the master, and refusing an application by the plaintiff company under section 7 of the Banker's Books Evidence Act, 1879, for leave to inspect, before trial, the books of the Staffordshire Joint Stock Bank, Limited, containing entries of the banking accounts of the defendant and of the Dickinson Tramway Appliances Co.

The plaintiffs were a tramway company, and had taken over the rights and property of another company, called the South Staffordshire and Birmingham District Steam Tramways Co., Limited.

The plaintiffs alleged that the defendant, who had been solicitor to the latter company, had promoted the Dickinson Co., and had used his fiduciary position to induce the tramway company, his employers, to purchase articles, and obtain licenses to use patents at exorbitant prices from the Dickinson Co. They alleged also that the Dickinson Co. was a sham, and was in fact identical with the defendant, and they claimed an account of the defendant's profits in the transactions between the tramway company and the Dickinson Co., and a rescission of the contracts between them.

Hawkins, J., refused the plaintiff's application.

The plaintiffs appealed.

Affidavits were filed on their behalf with the view of showing that the Dickinson Co. was identical with the defendant, and that the banking account kept in their name was, in fact, the defendant's banking account. In an affidavit sworn by the secretary of the Dickinson Co., he stated that there were no entries in the company's banking account, shewing payments to the defendant, except entries of payments of dividends. The defendant swore an affidavit, in which he said that there were no entries in his banking accounts, in respect of which inspection was being then sought relating to the matters in question, other than and except three items which he mentioned.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Sir Frank Lockwood, Q.C. (*Scrutton* with him), cited *Howard* v. *Beall*, 37 W. R. 555, 23 Q. B. D. 1, and *Arnott* v. *Hayes*, 36 W. R. 246, 36 Ch. D. 731.

G. Spencer Bower, for the defendant, cited *Parnell* v. *Wood*, 40 W. R. 564, [1892] P. 137, and *Emmott* v. *The Star Newspaper Co.*, 62 L. J. Q. B. 77, 41 W. R. Dig. 76.

Lochnis, for the Dickinson Co.

Sir Frank Lockwood, Q.C., in reply, referred to *Perry* v. *Phosphor Bronze Co.*, 71 L. T. N. S. 854, 43 W. R. Dig. 138.

LORD ESHER, M.R.—This is an application under the Bankers' Books Evidence Act, 1879, in which the plaintiffs ask for leave to inspect before trial the banking accounts of the defendant, and of the Dickinson Tramway Appliances Co. There is no doubt that the court has jurisdiction to grant the application so far as regards the defendant's banking account. The question is as to the rule of conduct by which the court should be guided in an application under this Act. Previously to the passing of the Act the court had made a rule not to grant an application for leave to inspect documents before trial, if the person, against whom it was made, put forward at the time in his affidavit an answer of a particular kind. The rule of the court was that the answer must be accepted and acted upon for the purposes of that application. The present application is made under the provisions of the Bankers' Books Evidence Act, 1879, but I think that the court should exercise its jurisdiction under that Act in granting inspection before trial, in accordance with that rule of the court I have mentioned. The defendant has in his affidavit made the answer I referred to, and has sworn that the three items in his banking account which he mentions, are the only items in it which are relevant to the issues in the action. We must accept that statement and act upon it, and we must therefore refuse the application for inspection before trial. Any future application for inspection must be made to the judge at the trial.

The other part of this application is as to the banking account of the Dickinson Tramway Appliances Co. That company is not a party to the action, but I have no more doubt as to the power of the court to grant inspection in their case than in the case of the defendant's banking account, and for the reasons given in *Howard* v. *Beall*. But I think that the jurisdiction of the court to give leave to inspect a banking account, which is, at least nominally, that of a person not a party to the action, should be exercised with very great caution. One rule of conduct—I do not lay this down as exhaustive—which should guide the court, is this: if it be proved to the satisfaction of the court, so that the court is persuaded that the banking account, said to be that of a third person, is really, and in truth, an account of a person who is a party to the action, or if the court is persuaded that though the banking account in question may not belong to a party to the action, yet that he is so closely connected with it that items in it will be evidence against him at the trial, in such a case as that the court would be justified, if there should be no valid reason to the contrary, in making an order for inspection before trial. But the court should, at least, be convinced to that extent. In the present case I believe that the account of the Dickinson Co. was either the account of the defendant or else he was so intimately connected with it that it might contain items which would be evidence in the action. But that is not enough. I think that the applicant should show to the court that there are strong reasons for

expecting to find some items which would be evidence against the defendant. Now in the present case no item has been fixed upon as one which would be of use to the plaintiffs at the trial, nor can I imagine why there should be any item in the account which would suggest itself as useful, in addition to facts of which they are already aware. Therefore, though we have jurisdiction to grant inspection of the Dickinson Co.'s banking account, we should, in exercising that jurisdiction, be merely giving to the plaintiffs an opportunity to search the account in hopes of finding some entry which would be useful to them. We cannot give leave to inspect for such a purpose as that. I think that the order of Hawkins, J., was right, and this appeal must be dismissed.

KAY, L.J.—I entirely agree with what the Master of the Rolls has said. The Bankers' Book Evidence Act, 1879, gave to the court a power which it had not possessed before of giving leave to inspect before trial the books of bankers who were not parties to the action. Now the rule as to inspection of documents before trial has always been that liberty was given to the person against whom the application was made, to seal up any parts of the documents if he swore that they were not relevant to the issues in the action. The rule which the court made was that no affidavit should be received in contradiction of such an affidavit as that, which was accepted as true for the purposes of the application unless the applicant could show from documents in the cause that the statement in the affidavit was inaccurate.

The question is whether that rule applies to an application under the Bankers' Books Evidence Act, 1879. I agree with what was said by the Court of Appeal in *Parnell* v. *Wood* that it was never intended that that Act should do away with any privilege which a person might have in resisting inspection. The Act was intended to enable the Court to give leave to inspect banker's books in certain cases where, before the Act, inspection could not have been obtained at all. Now in the present case the defendant mentions in his affidavit three items in his banking account, and swears that they are the only ones relevant to the matters in dispute in the action. We must accept that statement, and, therefore, we must refuse leave to inspect his banking account before trial.

Then as to the banking account of the Dickinson Co. That company is not a party to the action. The plaintiffs seek to get over that fact by saying that, though it is a corporation, it is practically identical with the defendant, and the banking account of the company is really an account kept by the defendant in a name other than his own. Now it is not necessary at present to give any decisive opinion on this point. But I may say I see no reason for differing from the decision of the Divisional Court in *Howard* v. *Beall*, that the Act gives power to the court to order inspection of the banking account of a person not a party to the action. But if the court acts with caution in the case of an application to inspect the account of a party to the action, it will act with still greater caution in an application for leave to inspect the banking account of some one who is not a party to the action. Such a person should appear before the court, and he should be heard in opposition to the application. Notice has in this case been served on the Dickinson Co., and they have appeared here and argued their case. Now I admit that there is strong ground for suspecting that the Dickinson Co. is identical with the defendant, but it is not necessary to give any decision on this point because the court ought to be satisfied, not only on that point, but that there are items on which, so to speak, a finger can be laid which would be evidence at the trial against the defendant. I am not satisfied that there is any such item in the company's account, and leave to inspect their banking account must, therefore, be refused. In coming to this conclusion we are not in any way interfering with the power of the judge at the trial to make any order which, in his discretion, he may think fit. All that we now decide is that this is not a case in which, in the exercise of the discretion of the court, inspection should be ordered at this stage of the action.

Appeal dismissed.

Solicitors for the plaintiffs, *Munns & Longden.*

Solicitors for the defendant, *Walter Webb & Co.*

Solicitors for the Dickinson Co., *Walker, Son, & Field.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) Nov. 5.

HODDER *v.* WILLIAMS. (*a.*)

Sheriff—Execution—Writ of fieri facias*—Breaking open outer door—Shop.*

It is lawful for a sheriff in executing a writ of fieri facias *to break open the outer door of a shop which is not connected with a dwelling-house.*

Appeal from the judgment of Vaughan Williams, J., at the trial of the action with a jury.

The action was brought to recover damages from the Sheriff of Dorset for having, by his officer, broken open the outer door of the plaintiff's premises in the execution of a writ of *fieri facias* directed against the plaintiff's goods.

The premises in question were not a dwelling-house, but consisted of a shop where the plaintiff carried on the business of a coachbuilder, and a place of storage for his stock-in-trade.

The jury returned a verdict for the plaintiff for £50, but Vaughan Williams, J., directed judgment to be entered for the defendant. From this judgment the plaintiff appealed.

Mackaskie, for the plaintiff.—It is a well-established rule that a sheriff may not, in executing a writ of *fieri facias*, break the outer door of a house. It was so laid down in an *Anonymous case*, 1 Brownl. & Gold. 50, decided in the 44th year of Elizabeth. In *Semayne's case*, 5 Coke 91, 1 Smith's Leading cases, 9th ed., p. 115, the rule was affirmed in one of the resolutions of the judges, where it was crystallized into the maxim that "a man's house is his castle"; but in that case the goods were not the goods of the person in whose premises they were, and it was resolved that the privilege did not extend to such a case. *Penton* v. *Browne*, 1 Keb. 698, Sid. 186, was a similar case, and it was there held that the sheriff was justified in breaking open a barn to levy execution. It must be admitted that *Penton* v. *Browne* is cited in all the text books as an authority for the proposition that the privilege only extends to a dwelling-house. But that doctrine is not necessary to support the decision, nor is there any express authority that the privilege is so limited. It is certainly not limited to the place where a man sleeps, and a distinction ought to be drawn between a barn and a shop. *Brown* v. *Glenn*, 16 Q. B. 254, was a case of a landlord distraining for rent, and Lord Campbell's remarks on

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Penton v. *Browne* were *obiter*. In *American Concentrated Must Co.* v. *Hendry*, 5 R. 331, Bowen, L.J., expressed disapproval of *Penton* v. *Browne*.

Channell, Q.C. (*E. U. Bullen* and *Muir Mackenzie* with him), for the defendant.—The rule that the protection extends only to a dwelling-house was clearly recognized by Lord Mansfield in *Lee* v. *Gansel*, 1 Cowp. 1; by Lord Campbell in *Brown* v. *Glenn*; and by Lord Blackburn in *Hobson* v. *Thellusson*, 15 W. R. 1037, L. R. 2 Q. B. 642.

Lord ESHER, M.R.—Where we have a decision two hundred years old on a matter which is the subject of daily practice, I think it is a good rule that we should not overrule it unless we are obliged to do so. And if we find that such decision has, through all that space of time, been handed down as law in text books which have to be acted on every day, and, further, that it was founded on a definite principle, which has since been recognized by many judges, we should be still more disinclined to overrule it, even if we differed from it.

In the case of *Penton* v. *Browne*, which is reported by Keble, the court, acting on the view which they took of *Semayne's case*, decided that the privilege, which was there said to be founded on the maxim that a man's house is his castle, exists only in favour of a man's dwelling-house, and that, therefore, a barn or outhouse not connected with a dwelling-house may be broken open in order to levy execution. The rule so laid down was considered by Lord Mansfield in *Lee* v. *Gansel*, and he adopted it, and gave a reason for it. He thought that the privilege was founded on the protection of a man and his family, and that such protection did not require the privilege to be extended to such a place as a barn, where, certainly, a man's wife and children would not be likely to be found. It is clear that, in his opinion, the mischief against which the privilege was intended to protect a man was mischief to his dwelling-house. The question then came before Lord Campbell in *Brown* v. *Glenn*, and he adopted the rule laid down in *Penton* v. *Browne* as good law. And subsequently it has been adopted by Lord Blackburn in *Hobson* v. *Thellusson*. It is admitted that it has been stated as settled law in all the text books dealing with the subject.

The doctrine being that the privilege only extends to a dwelling-house, no question arises whether any distinction can be drawn between a shop and a barn. The only question is whether the premises are a dwelling-house. That this is so has been the uniform view of lawyers from the beginning, and we cannot now overrule a doctrine which has been handed down for ages, and give in to a view which is now presented for the first time. In the present case the premises were not a dwelling-house, and, therefore, whatever they were, they were not protected.

LOPES, L.J.—The principle that the privilege for which the plaintiff contends is grounded on the protection of a man in his dwelling-house is of old standing. And, in accordance with this principle, it has been said again and again that the privilege only extends to a dwelling-house and buildings connected with a dwelling-house or within the curtilage. The leading authority for this is *Penton* v. *Browne*, which is referred to in every text book of authority, and has been recognized by Lord Mansfield, Lord Campbell, and Lord Blackburn.

I agree that the protection does not extend to buildings not within the curtilage, and I think that the appeal must be dismissed.

KAY, L.J.—This is not the case of a distress by a landlord for rent, but of a sheriff acting under a *fieri facias*. In *Brown* v. *Glenn*, which was an instance of the former, Lord Campbell said that a distinction might reasonably be made between the two cases. The question is, Can the sheriff, in levying a writ of execution, break open the door of a warehouse of the debtor which is not connected with his dwelling-house? In *Penton* v. *Browne*, decided in the 16th year of Charles II., it was held that the sheriff might break open a barn or outhouse not within the curtilage of a dwelling-house. And it is admitted that all the text books cite that case as an authority for the proposition that the privilege which was established in *Semayne's case* only extends to a man's dwelling-house. Lord Campbell so accepted it in *Brown* v. *Glenn*, without expressing any disapproval; and so, again, did the Court of Queen's Bench in *Hobson* v. *Thellusson*. It is said that Bowen, L.J., disapproved of it in *American Concentrated Must Co.* v. *Hendry*. But he only said that *Penton* v. *Browne* seemed to him to be a departure from the older law. He did not say that it was not law, nor did he suggest that it should be overruled.

I do not think that we ought to reverse what has been taken to be the law for 232 years; and, inasmuch as the sheriff's officer in this case did nothing more than he was by law entitled to do, I think that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Nicholson, Graham, & Graham*, for *Richard Tucker*, Bridport.

Solicitors for the defendant, *Lovell, Son, & Pitfield*, for *Symonds & Sons*, Dorchester.

From Chan. Div.
(Lord Halsbury, L.C., and A. L. Smith and Rigby, L.JJ.)

Nov. 6.

In re BELL.
JEFFERY *v.* SAYLES. (*a*.)

Trustee—Trust fund—Mortgage by cestui que trust—*Power to first mortgagee to give receipt for payment of the fund—Puisne incumbrancers—Whether first mortgagee can compel trustees of fund to pay whole fund mortgaged to him.*

Where the cestui que trust *of a fund in the hands of trustees assigned the trust premises by way of first mortgage with power to the mortgagee to demand payment of, and give receipts for, the same; and afterwards executed further mortgages of the trust premises;*

Held, following the settled practice applicable to the case of a fund in court, that the trustees of the fund, having notice of puisne incumbrancers, could not be compelled by the first mortgagee to pay over to him the whole fund, but only what was due to him on his security.

Appeal from a decision of Kekewich, J.

The testator, William Bell, by his will, dated the 8th of June, 1866, after certain specific legacies, bequeathed to his trustees a sum of £8,000, to be held upon trust for his daughter Eliza Morton for life, and after her decease (in the events which happened) as to one moiety of the said legacy of £8,000, and the investments and annual income thereof, to divide the same equally between the four children of his sister Janet Wells, as tenants in common, who should be deemed to have vested interests in their respective shares at the testator's decease.

The testator died on the 11th of August, 1866;

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

the four children of Janet Wells survived the testator, and each of them became thereupon entitled in reversion to one-fourth of a moiety of the said legacy of £8,000—*i.e.*, £1,000.

Dudley Wells, one of the children of Janet Wells, by deed of the 31st of May, 1879, assigned by way of mortgage his undivided fourth share or interest, to George Garland for £380 and interest, together with full power for George Garland to demand, sue for, recover, and receive and give valid receipts for, all or any part of the premises thereby assigned, in the name or names of Dudley Wells, his heirs, executors, or administrators, or otherwise, to hold the premises unto George Garland, his executors, administrators, and assigns, subject to a proviso for redemption. Such mortgage became ultimately vested in the plaintiff, William Jeffery, by deed of transfer, dated the 22nd of January, 1891.

On the 18th of September, 1880, Dudley Wells further charged his reversionary interest with the payment of £70 and interest, to Messrs. Williams & Graham.

On the 13th of September, 1882, Dudley Wells executed a deed of arrangement with his creditors in bankruptcy, by which his share was assigned to a trustee, Charles Garland, for the benefit of his creditors, subject to the prior mortgages.

The reversionary interest fell into possession in November, 1894, by the death of the tenant for life of the legacy of £8,000. On the 27th of January, 1895, the solicitors of the first mortgagee, William Jeffery, formally requested the trustees of the will of the testator to hand over to William Jeffery the share of Dudley Wells, as the mortgage contained an absolute assignment of the property to the mortgagee, who could give a valid receipt for the money. This the trustees declined to do, but offered to pay to the first mortgagee his principal, interest and costs (if any).

Jeffery then took out an originating summons, asking that the trustees might be ordered to pay the whole fund to him.

Kekewich, J., made an order as prayed, and directed the trustees to pay the costs. The trustees appealed.

Warrington, Q.C., and *Johnston Edwards*, for the appellants.—If the money were in court no order could or would be made for payment out of the whole fund to the first mortgagee; and no order of a similar nature ought to be made on the trustees. The first mortgagee is entitled to his principal, interest, and costs, and no more, and this has been tendered to him.

Marten, Q.C., and *W. G. Lemon*, for the respondents.—[RIGBY, L.J.—You must prove that the trustees committed a breach of trust in not handing over the whole of the £1,000 to the first mortgagee—that it was their duty to do so.] Under the Judicature Acts the tendency has been to make the recovery of legal *choses in action* more easy. The method of recovering debts has been facilitated rather than cut down.

The following cases were referred to: *Burlinson* v. *Hall*, 32 W. R. 492, 12 Q. B. D. 347; *Tancred* v. *Delagoa Bay and East Africa Railway Co.*, 38 W. R. 15, 23 Q. B. D. 239; *Foligno's Mortgage*, 32 Beav. 131, 12 W. R. Ch. Dig. 107.

Johnston Edwards replied.

Lord HALSBURY, L.C., said that for the reasons which would be stated by the Lords Justices he was of opinion that the appeal should be allowed.

A. L. SMITH, L.J., stated the facts, and said: It is clear that the utmost sum to which William Jeffery is entitled is the £380 and interest and costs. It is most peculiar that a man should come into court saying he is owed £400 only, and yet that the court should make an order for the payment of £1,000 to him. Mr. Marten admitted that if the fund had been in court, the only order possible would have been to pay to Jeffery merely what he was entitled to. If that be so, why should the trustees of a fund not in court act otherwise? It is clear that Kekewich, J., was wrong in making an order that Jeffery should administer £600 over and above what he was entitled to. The trustees were justified in refusing to pay over the whole of the £1,000. The appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. The trustees were not bound to pay the £1,000 to Jeffery, having had notice of *puisne* incumbrancers. I am content to rest my decision on the acknowledged practice of the Court of Chancery in such cases; if the money had been in court, it would not have been paid out to the first mortgagee; and if so, why should the trustees be bound to hand it over? It was their duty to distribute the fund to those who were entitled to it in their proper proportions. The originating summons was entirely wrong and misconceived, and must be dismissed with costs, and the order of Kekewich, J., reversed.

Appeal allowed.

Solicitor for the appellants, *Edward F. M. Ryan.*

Solicitors for the respondent, *Hepburn, Son, & Cutcliffe.*

From Chan. Div. (Lord Halsbury, L.C., and Lindley and Rigby, L.JJ.) } July 25; Aug. 9, 1895.

In re RUSSELL.
DORRELL *v.* DORRELL. (*a.*)

Will—Remoteness—Share settled on granddaughters of tenant for life—Splitting gift.

A testator gave all his real and residuary personal estate upon trust for his wife for life, and after her death for his niece M. D. for life, and after her death for her husband J. D. for life, and after his death in trust for the daughter or daughters of M. D. who should attain twenty-one or marry under that age, with a proviso that the share of any such daughter should be settled upon her for life, with remainder to her daughters.

M. D. had three children—a son, a daughter who died an infant and unmarried, and the plaintiff, C. M. D., who had attained her age of twenty-one years during the testator's lifetime.

Held, that if M. D. had had a daughter born after the testator's death, the settlement over directed by the proviso would, so far as regarded the share of such after-born daughter, have been void for remoteness; yet the proviso was good as to the interest taken by the plaintiff, C. M. D., the proviso in no way mixing up the shares of the daughters, but operating separately upon each share.

Appeal by the plaintiff, Catherine Mary Dorrell, from a decision of Chitty, J., who held that a proviso contained in the will of George Russell, whereby he directed that the share of any daughter of the testator's niece, Mary Dorrell, who should attain twenty-one, should be brought into settlement, was not void for remoteness in respect of the share taken by the plaintiff (a daughter of the testator's niece,

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Mary Dorrell) who had in fact attained twenty-one in the testator's lifetime; and, consequently, that the plaintiff was only entitled to a life interest in such share.

The facts are fully stated in the judgment.

Cozens-Hardy, Q.C., and *Upjohn*, for the appellant.—We submit there is no distinct gift to the plaintiff as an individual: it is a gift to a class, and there is no indication of intention in favour of any one member of the class, rather than any other member of the class.

They referred to *Wilson* v. *Wilson*, 7 W. R. 26; *Herbert* v. *Webster*, 15 Ch. D. 610, 28 W. R. Dig. 197; *Pearks* v. *Moseley*, 29 W. R. 1, 5 App. Cas. 714, at p. 723; *Leake* v. *Robinson*, 2 Mer. 363; *Lord Dungannon* v. *Smith*, 12 Cl. & F. 546; *Arnold* v. *Congreve*, 1 Rus. & My. 209; *Greenwood* v. *Roberts*, 15 Beav. 92; *In re Bence, Smith* v. *Bence*, [1891] 3 Ch. 242, 39 W. R. Dig. 263; *In re Ridley, Buckton* v. *Hay*, 27 W. R. 527, 11 Ch. D. 645; *In re Michael's Trusts*, 46 L. J. Ch. 651, 25 W. R. Dig. 318; *Proctor* v. *Bishop of Bath and Wells*, 2 Hy. Bl. 358.

Hewitt, for the respondent.—The plaintiff being born at the date of the death of the testator, there is a valid limitation to her and her children.

He referred to *Griffith* v. *Pownall*, 13 Sim. 393; *Cattlin* v. *Brown*, 11 Hare, 372; *Knapping* v. *Tomlinson*, 12 W. R. 784; Jarman on Wills, pp. 234, 235; and Theobald on Wills, 4th ed., p. 483.

Oldham, for the trustees of the will.

Upjohn replied.

Cur. adv. vult.

Aug. 9.—The judgment of the court was read by

RIGBY, L.J.—George Russell, the testator in this case, by his will dated the 11th of September, 1877, gave to his trustees therein mentioned all his real and the residue of his personal estate upon trust to permit his wife to receive the rents, interests, and annual produce during the term of her natural life, and after her decease upon trust to pay the legacies therein mentioned. And he directed his trustees to stand possessed of his said real estate and the residue of his personal estate upon trust to pay the income to his niece Mary Dorrell, the wife of James Dorrell, for her natural life as therein mentioned; and after her decease to James Dorrell, her husband, for the term of his natural life; and after his decease upon trust to sell and dispose of his said real estate and to dispose of and convert into money his said residuary personal estate and to stand possessed of the proceeds: "In trust for all and every, the children or child, of the said Mary Dorrell, who being a son or sons, shall live to attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry under that age, to be divided between them, if more than one, in equal shares and proportions, and if there shall be only one such child in trust for that one and only child." Then followed a proviso for the settlement of the share of any daughter of Mary Dorrell.

By a fourth codicil to his will dated the 2nd of June, 1883, the testator revoked the bequest of any share or interest any son or sons of Mary Dorrell might become entitled to under the trusts of his will arising from the proceeds of sale of his real estate and the conversion of his residuary personal estate after the decease of them the said Mary and James Dorrell. And he directed his trustees should stand possessed of the whole of such proceeds in trust for the daughter or daughters of the said Mary Dorrell as in his will directed. The effect of the codicil was to exclude sons of Mary Dorrell and to make the trustees hold the proceeds of sale and conversion of the real and residuary personal estate, subject to the life interests, in trust for the daughter or daughters of Mary Dorrell who should attain twenty-one or marry under that age.

The testator died in October, 1885, leaving him surviving his wife, the first tenant for life, who died in December of the same year; his niece Mary Dorrell who died in 1894, and her husband James Dorrell who is still living and is the present and last tenant for life. Mary Dorrell, the niece, had three children—viz., a son, a daughter who died an infant and unmarried, and the plaintiff, Catherine Mary Dorrell, who had attained the age of twenty-one years when the testator died.

Under the combined effect of the will and fourth codicil, and subject only to the life interests and the settlement, the plaintiff immediately on the death of the testator became entitled to all the proceeds of the testator's real and residuary personal estate for a vested interest, liable only to be partially divested in the event (which never took place) of any sister or sisters living to attain twenty-one or marrying under that age. After the death of her mother and sister this vested interest became absolute subject only to a life interest in her father and to the proviso on which the question in this case turns.

The plaintiff has taken out an originating summons to have it determined whether she is entitled absolutely or whether she takes a life interest only.

So far as we have gone there can be no question that she takes an absolute interest, but the proviso above referred to, runs: "Provided also and I do hereby expressly declare that the trustees or trustee for the time being of this my will shall stand possessed of the share of my daughter under the provision hereinbefore made, upon trust to invest the same as hereinbefore expressed, and to pay the rents, interest, and dividends arising therefrom unto her for the term of her natural life for her sole and separate use and benefit free from the debts, control, or engagements of any husband with whom she may intermarry, and her receipt alone to be a good discharge for the same; and from and after her decease then upon similar trusts for the benefit of her children as are hereinbefore provided for the children of the said Mary Dorrell."

It is suggested that this proviso is void for remoteness, inasmuch as there might have been a daughter of Mary Dorrell, born after the testator's death, who would live to take a vested interest, and whose children would not necessarily attain twenty-one within the period allowed by law for the postponement of the vesting of a benefit. No doubt in the case of such a daughter the settlement over directed by the proviso would have been void; but it would be perfectly good as to the interest taken by the plaintiff, who was alive at the testator's death, unless the possible operation of the proviso with reference to the share of a daughter not in existence at the testator's death makes the whole proviso void. Looking at the state of things at his death it was then clear that the plaintiff must take either the whole or a share, and other daughters of Mary Dorrell might come in and take shares. Assuming them to do so, yet the share of the plaintiff and the shares of such other daughters would be perfectly separate and distinct and completely ascertained and separated within the limits of time allowed by the law. The proviso in no way mixes them up, but operates separately upon each share. The settlement of the plaintiff's share directed by it is perfectly legal, and would have been so even though there were other shares to which the proviso could not legally apply. If indeed there had been a proviso which could only operate upon all the possible

shares, if it operated at all, the case would have been different; but the settlement of the plaintiff's share is to take place whether there are other shares or not, and takes place as from the testator's death in favour of the children of a person then living, and is quite unobjectionable. This is not the case of a gift over, which depends upon events so stated as to involve a possibility of its taking effect outside the permitted limits or in favour of persons who might take interests vesting beyond those limits. No splitting of the clause is necessary since it is so framed as to apply separately to the plaintiff's share. On principle, therefore, the judgment of Chitty, J., ought to be supported.

The supposed conflict of authority when the decisions are looked into is not so great as the appellant's counsel attempted to make out. No case binding on the Court of Appeal has been cited which in any way conflicts with the conclusion above arrived at, and indeed there is no case in which, after argument, any conflicting decision has been arrived at.

On the other side the cases of *Griffith* v. *Pownall*, *Cattlin* v. *Brown*, *Wilson* v. *Wilson*, *Knapping* v. *Tomlinson*, decided respectively by Shadwell, Page Wood, and Kindersley, V.CC., and concurred in since, are all authorities in support of the conclusion arrived at; and so the weight of authority is clearly in favour of it.

Appeal dismissed.

Solicitors for the appellants, *Crowders & Vizard.*

Solicitors for the respondent, *Kingsford, Dorman, & Co.*, for *Willoughby*, Daventry, Northants.

Solicitors for the trustees, *Crowders & Vizard*, for *S. B. Garrard*, Worcester.

From Prob. Div. & Adm. Div. (Lindley, Lopes, and Rigby, L.JJ.) — Aug. 8, 1895.

RICHARDSON *v.* RICHARDSON AND PLOWMAN. (*a.*)

Divorce—Practice—Costs—Solicitor—Pauper—Petition by husband suing in formâ pauperis—*Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 51.

Section 51 *of the Divorce Act*, 1857, *gives the court a discretion as to costs. The best exercise of such discretion, except under special circumstances, is to follow the rule laid down in* Carson *v.* Pickersgill & Sons, 33 *W. R.* 589, 14 *Q. B. D.* 859, *and to allow a husband suing* in formâ pauperis, *or his solicitor, only out-of-pocket expenses, including a reasonable sum for office expenses, against the co-respondent.*

The adoption of such rule is intended to introduce a new uniform rule into all the divisions of the High Court.

Appeal from a decision of the president of the Probate Division.

The petitioner, the husband, presented a petition *in formâ pauperis* for a dissolution of his marriage. The suit was undefended, and a decree *nisi* was granted with damages and costs against the co-respondent. On the taxation of costs the registrar disallowed all costs except out-of-pocket expenses and a sum of six guineas for office expenses. The petitioner applied to the president for an order that the taxation of his costs should be reviewed.

The president upheld the decision of the registrar, on the ground that such had been the practice of the Divorce Division since the decision of the Court of Appeal in *Carson* v. *Pickersgill & Sons*, 33 W. R. 589, 14 Q. B. D. 859, and refused the application.

The petitioner appealed.

Tebbutt, for the appellant.—In all the text-books on ecclesiastical law no distinction is drawn between a pauper claimant and a dives claimant in the recovery of costs. [LINDLEY, L.J.—The old ecclesiastical practice never applied to a co-respondent, and your claim for damages is still the common law action.] I submit that the practice of the old Court of Chancery, of allowing a pauper litigant if successful, dives costs should be followed. On the same analogy in a divorce suit, the costs of the wife payable by the husband are not limited to the amount paid into court by the husband for that purpose: *Robertson* v. *Robertson*, 29 W. R. 880, 6 P. D. 119.

LINDLEY, L.J.—This case is new to me. The question is whether the president of the Divorce Court was wrong in following in that division the rule about costs which now obtains universally in all the other divisions and in the House of Lords. That rule was carefully considered and laid down in *Carson* v. *Pickersgill*. Looking at the matter on principle I was much struck with it. This is a case in which a co-respondent was concerned. Therefore, the practice of the old ecclesiastical courts can have nothing to do with it as that practice did not deal with co-respondents. By the Divorce Act of 1857 a co-respondent can be joined. It is important to observe that there can be no old principle applicable to the case. When you look at old suits for judicial separation, I am by no means satisfied that the practice in the ecclesiastical courts is so well settled as we are asked to assume. I am told the senior registrar, who ought to know better than any man living, is of opinion that the practice never was so settled.

The Divorce Act gives a discretion as to costs, and the president has considered this matter and has come to the conclusion that, having regard to the modern practice, in the best exercise of his discretion, except under special circumstances, the rule in *Carson* v. *Pickersgill* should prevail. Now we are asked to say that a different rule should prevail. I am not prepared to say that. I think the old Chancery rule was wrong, and proceeded on a wrong principle. The object of ordering a party to pay costs is to indemnify his successful opponent. Why should the latter recover more than he is liable to pay? I cannot see why he should make a profit. That is the view which has prevailed lately and has led to the abolition of the Chancery rule, and to the introduction of a new rule into all the divisions of the High Court except the Probate Division. I am of opinion that the president was right, and that the appeal must be dismissed.

LOPES, L.J.—I also am of opinion that the president was perfectly right. I think it would be a great mistake to have one rule in the Divorce Division, and and another rule in all the other divisions. To have such a distinction without sufficient grounds would be a very great mistake.

What are costs? Costs are given to indemnify a successful party against expenses to which he has been put by his unsuccessful opponent. A pauper litigant has incurred no expenses; there is nothing against which he should be indemnified. If you allow him dives costs, he might put them into his pocket and thereby make a profit, and thereby take an undue advantage of the great indulgence afforded him of being allowed to sue as a pauper. Stress has been laid on the practice of the old ecclesiastical courts; that has no application here. The ecclesiastical courts had no power to grant a divorce *a vinculo*. There-

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

fore, so far as any analogy is called in aid, the analogy of the common law courts should be adopted rather than any other.

RIGBY, L.J.—I am also of the same opinion. Even if it were made plain that the practice of the ecclesiastical courts had established the rule which has been contended for, I do not see how it can have any application here. Sir James Hannen laid down a rule, and established a practice which does not seem to be unreasonable. It has been adopted by the other branches of the court, and has been accepted by the House of Lords as the better practice. It is a good rule, and we should be taking upon ourselves a great responsibility if we overruled the President on the ground that we are bound by an old practice which is not admitted.

Appeal dismissed.

Solicitors for the appellant, *Bramall, White, & Sanders.*

High Court of Justice.

Chan. Div.
Chitty, J.

Nov. 22.

WAYNES MERTHYR CO. *v.* D. RADFORD & CO. (*a.*)

Practice—Particulars, Application by defendants for—Discovery, Application by plaintiffs for—Fraud—Discretion of court to order discovery before particulars.

There is no general rule that delivery of particulars by the plaintiff should precede the making of discovery by the defendant in all cases except those where there is a fiduciary relation between the parties.

The judge must in every case exercise his discretion, having regard to all the circumstances.

Dictum *of* Kay, L.J., *in* Zierenberg *v.* Labouchere, 41 *W. R.* 675, [1893] 2 *Q. B.* 183, *at p.* 189, *explained.*

Motion.

The plaintiffs were colliery proprietors and the defendants were coal merchants.

The action, which was for an injunction and damages, was in respect of coal alleged to have been fraudulently supplied and sold by the defendants to their customers on divers occasions as coal from the plaintiffs' colliery, being in fact other and inferior coal, and sold at a lower price than the defendants could purchase the plaintiffs' coal for.

It was in particular alleged that the defendants on two stated occasions had sold such coal to the C. Brewery Co. as coal from the plaintiffs' collieries and had produced to the C. Co. false permits or vouchers, the same being two out of six blank forms handed by the plaintiffs to a clerk of the defendants on a representation by him that the defendants desired them as models for their own permits. The defendants admitted the two particular cases made against them, but they alleged that those cases had occurred through the fraud of the clerk and without their knowledge or authority, and they also stated that they were unable to find the four remaining forms of permit.

After delivery of the statement of claim, the defendants, having taken out a summons for particulars of the allegations therein, the plaintiffs took out a summons for discovery. Both summonses were heard together. and an order was made in chambers for the plaintiffs to give particulars without prejudice to any application as to amendment or delivery of further particulars after discovery, and an order was also made for the defendants to give discovery within fourteen days after particulars.

The plaintiffs now moved that such order might be varied by directing discovery by the defendants before delivery by the plaintiffs of particulars.

Byrne, Q.C., and *Dare*, for the applicants.—Regard being had to the facts here, the order was wrong and should be varied.

Farwell, Q.C., and *Younger*, for the defendants.—The order was right. The rule is that delivery of particulars by the plaintiff precedes discovery by the defendants except where he stands in a fiduciary relation to the plaintiff: *Zierenberg* v. *Labouchere*, 41 W. R. 675, [1893] 2 Q. B. 183, *per* Kay, L.J.

Byrne, in reply, cited *Miller* v. *Harper*, 36 W. R. 454, 38 Ch. D. 110, *Sacks* v. *Speilman*, 36 W. R. 498, 37 Ch. D. 295; and *Maxim-Nordenfelt, &c., Co.* v. *Nordenfelt*, 42 W. R. 38, [1893] 3 Ch. 122.

The Annual Practice for 1896, p. 613, was also referred to.

CHITTY, J.—The plaintiffs' action is founded on fraudulent misrepresentation. They give two specific instances of fraud, and allege generally divers other instances of similar fraud. The plaintiffs state that they have information tending to support their case, but are not in a position to substantially comply with the order for particulars. They say if they give the best particulars they can they will be useless, and the defendants will then try to be relieved altogether from discovery, on the ground of the insufficiency of the particulars. The defendants, by their counsel, avow that they will make this use of the particulars, if insufficient. Their argument was founded chiefly on the judgment of Kay, L.J., in *Zierenberg* v. *Labouchere*, and was to the effect that particulars should precede discovery in all cases except those where there was a fiduciary relation between the parties. I am unable to deduce any such proposition from that judgment. Kay, L.J., did explain the practice in that respect, where the parties are in a fiduciary position to one another, and he put it on the ground, not only of the trustee having exclusive knowledge or superior means of knowledge of any fraud, but also of the *cestui que trust* or principal being entitled to all the knowledge which his trustee or agent might have. He did not lay down any such proposition as is contended for by the defendants, and in my opinion there is no such rule that particulars, except where there is a fiduciary relation between the parties, should precede discovery. The judge must in every case exercise a reasonable discretion, having regard to all the circumstances. [His lordship, after commenting on the above facts, continued:—] It seems to me that this is a case having regard to the position of the parties, and to the whole circumstances, including the admission of alleged frauds, where discovery should precede the delivery of particulars. I think that, for the purpose of effecting justice, the order should be varied as asked by the plaintiffs, because I see the use which will be made of the order as it stands, and that the plaintiffs may fail to obtain justice by reason of their being ordered to give particulars before discovery. I, therefore, vary the order for particulars, by directing the plaintiffs to deliver particulars within twenty-one days after discovery, and vary the order for discovery, so far as is necessary in consequence of this order.

Application allowed; leave to appeal refused.

Solicitors for the applicants, *Heath, Parker, & Brett.*

Solicitors for the defendants, *Radford & Frankland.*

(*b.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Chan. Div. }
Stirling, J. } June 13; July 24, 1895.

RUTTER v. EVERETT. (a.)

Bankruptcy—Order and disposition—Consent of true owner — Assignment of book debts — No notice by assignee to book debtors — Receiver appointed under Conveyancing Act, 1881 — *Extent of authority — Bankruptcy Act*, 1883, *s.* 44, *sub-section* 2 (3).

The general rule is that the assignee of a debt, in order to take it out of the order and disposition of the assignor, must give notice of the assignment to the debtor.

In the absence of such notice, and on the bankruptcy of the assignor, consent on the part of the true owner of the debt to the debt remaining in the order and disposition of the bankrupt is primâ facie *to be inferred, but that inference may be rebutted if the true owner takes every possible step to obtain possession of the debt, or if the failure to obtain possession is not attributable to any fault of his own.*

The appointment of a receiver under a mortgage deed, although subsequently confirmed by the court, is, however, not sufficient to rebut that inference.

By a deed dated the 31st of December, 1891, the defendant E., who then carried on the business of a tobacconist at No. 289, Oxford-street, demised No. 289 aforesaid to the plaintiffs for the residue of a term of twelve and a-half years, less ten days, by way of mortgage to secure the repayment of a sum of £1,000 and interest thereon, and also assigned by way of further security certain trade-marks, the goodwill of his business, and also "all moneys to be received by or owing to" the mortgagor in respect of his said business. The £1,000 was to be repaid by monthly instalments, and it was provided that if the mortgagor should make default for fourteen days in payment of an instalment, the whole should become payable forthwith. The deed contained no express power to appoint a receiver. In November, 1892, default was made in payment of an instalment in accordance with the terms of the deed. On the 9th of May, 1893, the plaintiffs executed a written instrument, as follows: "We, . . . by virtue of the power conferred on us under the Conveyancing and Law of Property Act, 1881 (as mortgagees of the under-mentioned property) and of every other power enabling us in this behalf, hereby appoint Charles Ford . . . to be receiver of the income of the premises known as 289, Oxford-street, . . . and of trade-marks . . . and the goodwill and connection of the business carried on by E., . . . with all the powers by the said Act conferred on a receiver appointed under the provisions thereof. . . ." Ford thereupon took possession of No. 289 aforesaid, and thenceforward carried on the business of a tobacconist there.

It was a matter of dispute whether he did or did not take possession of the stock-in-trade on the said premises.

On the 16th of May, 1893, E. committed an act of bankruptcy. On the 17th of May, 1893, the present action was commenced by originating summons, in which the plaintiffs claimed relief by way of foreclosure, and the appointment of a receiver. On the 18th of May, 1893, E. excluded Ford from No. 289 aforesaid, and kept the shop closed during that day, for the purpose, as E. alleged, of preventing Ford from selling the stock-in-trade. On the 19th of May, 1893, an order was made in the action, whereby, without prejudice to the power already possessed by him as receiver under the Conveyancing Act, 1881, Ford was appointed receiver of the said premises, of the trade-marks, and of all moneys to be received by or owing to the defendant in respect of the said business, and to manage the said business. On the 16th of June, 1893, a receiving order was made against the defendant, founded on the aforesaid act of bankruptcy committed by him on the 16th of May. The defendant was subsequently made a bankrupt, and on the 24th of October, 1893, the trustee in bankruptcy was made a defendant to the action.

Neither the plaintiffs nor the receiver ever gave the debtors of the bankrupt any notice of the mortgage of the 31st of December, 1891. The receiver carried on the business, and in the ordinary course received book debts due to the bankrupt at the commencement of the bankruptcy to the amount of over £400. Upon the receiver's accounts being taken in chambers, the trustee in bankruptcy claimed such amount as represented book debts in the order and disposition of the bankrupt, with the consent of the true owner at the commencement of the bankruptcy, and the question of the validity of such claims was adjourned into court, and now came on for decision.

The rest of the facts sufficiently appear from the judgment.

H. T. Eve, for the trustee in bankruptcy.—The debtors never received notice of the appointment of a receiver. Hence the book debts belong to the bankrupt's trustee, as the mortgagees did not get possession of them before his title accrued. Section 24 of the Conveyancing Act, 1881, under which the receiver was appointed, only applies to the receivership of income and not of book debts. The trustee in bankruptcy rests his title on the order and disposition clause, section 44, sub-section 2 (3), of the Bankruptcy Act of 1883; "Book debts" are "Goods" within the meaning of that section: *Tailby* v. *The Official Receiver*, 37 W. R. 513, 13 App. Cas. 523. Williams on Bankruptcy, p. 204.

E. Cooper Willis, *Q.C.*, and *Butcher*, for the mortgagees.—The very fact of the appointment of a receiver by the court takes the goods out of the "order and disposition of the bankrupt": *Taylor* v. *Eckersley*, 25 W. R. 527, 5 Ch. D. 740, see page 744: "There can be no implication of assent." There is no distinction as to the description of the goods. What the court has to determine is whether the goods were in the order and disposition of the bankrupt with our consent. [STIRLING, J.—But if you do not give notice, you must be taken to be consenting.] The receiver is the officer of the court, and his appointment operates as an injunction to the bankrupt not to receive debts due to him. Assuming that the order was made immediately before or at the time that the act of bankruptcy was committed, the fact of the application for a receiver is sufficient to shew that we no longer consent. Hence on the 19th of May, we had an injunction restraining the bankrupt from receiving the goods, and after that date they could not be in his order or disposition without our consent. Until the 19th of May, the receiver was there to take anything which came in. The bankrupt could take nothing. The official receiver gave no notice, and we continued to receive the money. It was all received before January, 1894, and up to that time the official receiver did nothing and made no claim. Our writ claiming appointment of a receiver was issued on the 17th of May. At that time we had no notice of an act of bankruptcy, so we were within section 49 (*d*). This was a "dealing" Anything which puts an end to the consent is a "dealing" within the meaning of that section: *Brewin* v. *Short*, 3 W. R. 514, 5 E. & B. 227. A notice to the debtor

(a.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

not to pay is not so strong as an injunction of the court to the creditor not to receive. The moment the order is made the goods are not in the disposition of the bankrupt: *Ex parte Ward*, 21 W. R. 115, L. R. 8 Ch. App. 144. Very little is sufficient to prove dermination of consent: *In re Kelsall*, *Ex parte Beattie*, De Gex's Rep. 352. If a demand is made or an order obtained or a writ issued claiming the goods without notice of an act of bankruptcy that is sufficient.

Eve, in reply.—The trustee in bankruptcy took no steps to get in the assets, because he could not get at the books. If the mortgagees had got possession of the goods without notice of the act of bankrupty between the date of the said act and the receiving order, I admit they would have got a good title. But they did not get possession. In the cases cited by counsel for the mortgagees possession had been obtained. *Ex parte Ward* has nothing to do with this. The effect of the appointment of the official receiver as trustee of choses in action is shown by section 44 of the Bankruptcy Act, 1883. It includes debts: see sections 50 (5), and 54. Hence, on the 16th of May, to which date the title of the trustee related back, there was in effect an assignment to the trustee of all choses in action. The mere appointment of a receiver under the Conveyancing Act does not complete the possession of the mortgagees unless they give notice, and hence the title of the trustee in bankruptcy was not rendered inoperative by the appointment of the receiver: *Wigram* v. *Buckley*, 43 W. R. 147, [1894] 3 Ch. 483, 491, 494; *Edwards* v. *Martin*, 14 W. R. 25, L. R. 1 Eq. 121. In any case, this was only an appointment of receiver of income of property, not of the book debts. Hence the receiver could not receive book debts or give a good receipt. The issue of the writ is not a "dealing" with the bankrupt for valuable consideration. The title of the trustee in bankruptcy to the book debts is paramount.

STIRLING, J.—[His lordship, after stating the facts as above set out, continued:—] It was alleged at the hearing that the plaintiffs had, on the 16th and 17th of May, notice of the act of bankruptcy committed by E., but, in my opinion, such notice has not been established by the evidence. It was admitted by the plaintiffs that, at the commencement of the bankruptcy, the debts were in the order and disposition of the bankrupt, but it was contended (1) that they were not in such order and disposition with the consent of the true owners, the plaintiffs; (2) that at all events they were not in such order or disposition with such consent on or after the 17th of May, at which date, as I have already found, the plaintiffs had no notice of any act of bankruptcy on the part of E.

In support of their first contention the plaintiffs rely on the instrument of the 9th of May, 1893. It is objected by the trustees in bankruptcy that this instrument does not in terms include the book debts, and further that the Conveyancing Act, 1881 (sections 19 and 24), only enables a mortgagee to appoint a receiver of the income of the mortgaged property, and that the book debts are not such income, but constitute the mortgaged property itself. There is certainly weight in these objections, but they do not appear to conclude the case in favour of the trustee in bankruptcy. It may be that the acts of the receiver, although not authorized by the instrument in question, amount to or are evidence of a determination of their consent to the receipt of the debts of the bankrupt, and I pass on to consider how the law on this point stands. As a general rule the assignee of a debt, in order to take it out of the order and disposition of the assignor, is bound to give notice of the assignment to the debtor. This is laid down by Turner, L.J., in *Bartlett* v. *Bartlett*, 5 W. R. 541, 1 De G. & J. 127, see pp. 140, 141, where the subject-matter of the assignment was a reversionary interest under a will. It is not, however, to be inferred that it is absolutely necessary as regards goods that they should be in the actual possession of the true owner at the commencement of the bankruptcy, or as regards chattels "in which there is no visible ownership" that notice should be given before that time. In *Smith* v. *Topping*, 5 B. & Ad. 674, the true owner of the goods permitted them to remain in the possession of the bankrupt until the day before the commencement of the bankruptcy and then demanded them to be given up but was met by a refusal, and it was held that at the commencement of the bankruptcy the goods were not in the possession of the bankrupt with the consent of the true owner. This decision was acted upon by the Court of Appeal in *Ex parte Ward*, 21 W. R. 115, L. R. 8 Ch. App. 144, where the goods of which possession had been demanded from the bankrupt were not actually in his hands, but in those of a warehouseman to whom no notice was given. [His lordship here read the judgment of Mellish, L.J., at page 148, and having referred to the case of *Belcher* v. *Bellamy*, 2 Exch. 303, and the judgments of the learned judges therein at pages 308, 310, and 311, he continued:—] The conclusion from these authorities appears to be that although from absence of notice consent on the part of the true owner to the debt remaining in the order and disposition of the bankrupt is *primâ facie* to be inferred, still that inference may be rebutted by other facts, and will be rebutted if, in the language of the judges of the Court of Exchequer, the true owner takes every possible step to obtain possession of the debt, or if, in the language of Mellish, L.J., the failure to obtain possession is not attributable to any fault of his own. I may add that the cases of *In re Styan*, 2 M. D. & D. 219; *Young* v. *Hope*, 2 Exch. 105; and *Brewin* v. *Short* appear to me to establish that if the proper steps are taken while the assignee has no notice of any act of bankruptcy, the assignee will be entitled to the benefit of the protection conferred by section 49 of the Bankruptcy Act, 1883.

This being my view of the state of the law, I have now to apply it in the present case. If the bankruptcy had occurred within a short time after the 9th or 16th of May, 1893, I should have thought that the doctrines laid down in *Smith* v. *Topping*, *Ex parte Ward*, and *Bellamy* v. *Belcher* applied. In point of fact, however, the receiving order in bankruptcy was not made until the 16th of June, 1893, a month later than the receivership order. In the interval there was ample time to give the usual notice to the debtors of the bankrupt.

The question arises, Why was not this notice given? The bankrupt in his affidavit says it was not given because it would injure the business. The receiver who answered that affidavit takes no notice of this statement by the bankrupt, but says that notice was not given because he was advised that his appointment on the 9th of May and his subsequent appointment by the court on the 17th of May took the book debts out of the order and disposition of the bankrupt. In my judgment the receiver's view of the law was not well founded. I think that neither the appointment of the 9th of May nor the subsequent appointment by the court was sufficient to take the debts out of the order and disposition of the bankrupt with the consent and permission of the true owner unless followed within a reasonable time by the appropriate step for obtaining possession of the debts by giving notice to the debtors. This was not done, and the

failure appears to me to be attributable to a default on the part of the plaintiffs.

I think, therefore, that the trustee in bankruptcy is entitled to these debts.

Solicitors, *Morten Cutler & Co.*; *West, King, Adams, & Co.*

Chan. Div. }
Kekewich, J. } May 2, 3, 1895.

In re SOMERS COCKS.
WEGG PROSSER *v.* WEGG PROSSER. (*a.*)

Will—Construction—Marshalling.

A testatrix, to whose will the provisions of the Mortmain and Charitable Uses Act, 1891 (*54 & 55 Vict. c.* 73), *did not apply, gave to a charity "all the rest and remainder of my personal estate whatsoever and wheresoever situate, save and except such parts thereof as cannot by law be appropriated by will to charitable purposes."*

Held, that this did not amount to a direction to marshal, and that the gift, so far as it consisted of things savouring of land, failed, and was divisible among the next of kin.

Edwards *v.* Hall, 1 *W. R.* 348, 11 *Ha.* 1; *on appeal*, 4 *W. R.* 111, 6 *De G. M. & G.* 74, *followed*.

The testatrix, by her will of the 14th of November, 1876, gave all her personal estate and effects to her executors and trustees upon trust for sale and conversion, and out of the proceeds of sale and conversion, and with such part of her personal estate as should consist of money, to pay her testamentary expenses and debts, with power to postpone the conversion. After payment of the testamentary expenses and debts, the testatrix directed her trustees to pay a sum of £14,000 to her niece, Lady Henry Somerset, for her separate use, subject to a trust to pay certain annuities therein mentioned, and subject thereto her said niece was to stand possessed of the £14,000 for her separate use absolutely. The testatrix then devised trust and mortgage estates, and made the following residuary gift: "All the rest and remainder of my personal estate whatsoever or wheresoever situate, save and except such parts thereof as cannot by law be appropriated by will to charitable purposes, I give and bequeath to the Society of St. Margarets, East Grinstead," with a provision as to the person to give a receipt for the same.

By a codicil, dated the 17th of May, 1879, to the will, the testatrix made other provisions as to the sum of £14,000 and the annuities mentioned in her will, but in all other respects confirmed it.

The testatrix died on the 5th of August, 1879, and her will and codicil were proved on the 20th of August following by the plaintiff.

The estate of the testatrix consisted in part of a mortgage for £10,666 3s. 4d., which was applied in part payment of the £14,000 legacy in exoneration of the pure personal estate. Two sums of £5,000 and £4,000, to which the testatrix was entitled in reversion, fell into possession, and were represented by £4,994 9s. Consols and £880 1s. 9d. Bank Stock, and a sum of £2,000 which was invested on mortgage.

Doubts having arisen whether the residuary gift operated as a direction to marshal, the present summons was taken out by the proving executor, asking (amongst other things) whether the residuary bequest or any other part of the said will operated as a direction to marshal the assets of the testatrix in favour of the society.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

G. P. C. Lawrence, for the executor.

Marten, Q.C., and *G. P. C. Lawrence*, for two of the next of kin, cited *Edwards* v. *Hall*, 1 W. R. 348, 4 *Ibid.* 111, 11 Hare, 1, 6 De G. M. & G. 74. [They were stopped.]

Carson, for Lady Somers in the same interest, was not called upon to argue.

Renshaw, Q.C., and *Hornell*, for the charity.—In *Edwards* v. *Hall* the testatrix had declared her desire to die intestate.

They cited *Wills* v. *Bourne*, L. R. 16 Eq. 487, 22 W. R. Dig. 273; *Miles* v. *Harrison*, 22 W. R. 441, L. R. 9 Ch. App. 316; and *In re Arnold*, *Ravenscroft* v. *Workman*, 36 W. R. 424, 37 Ch. D. 637.

KEKEWICH, J., held that the residuary gift must be read as if it contained an express exception from the gift to the charity of all that could not be given by will for charitable purposes. The learned judge then continued:

But there are some cases which must not be passed over. Mr. Marten relied on *Edwards* v. *Hall*, on which Mr. Renshaw has commented. It appears to me that what the Vice-Chancellor said in that case is in point. These are the Vice-Chancellor's words: "She says, 'Let the one go to the charitable bequest, and the other to persons whom I may name.' In truth she did not name them." That seems to me exactly what this lady has done.

The case of *Wills* v. *Bourne*, which was decided in favour of the charity, is a decision of Lord Selborne. That case seems to me different from the present and from *Edwards* v. *Hall*. The will in *Wills* v. *Bourne* seems to me to give fairly clear directions for marshalling, using the word in the sense of an appropriation by a testator of particular assets to a particular gift. The testator declared that only such part or parts of his estate should be comprised in the residue thereof, and be so divided, paid, or transferred as aforesaid as might by law be given or bequeathed for charitable purposes. It is sought to apply that case to the present in reliance upon the interpretation put upon it by Mellish, L.J., in *Miles* v. *Harrison*. But the wills in those two cases were entirely different the one from the other, as is clear from Lord Cairns' judgment. Mellish, L.J., says, however, that the will in *Miles* v. *Harrison* and in *Wills* v. *Bourne* are identical, if you cut out the words, "and which shall be reserved by my trustees or trustee for the time being for that purpose." That, no doubt, strengthens the view that *Wills* v. *Bourne* is applicable to the present case. But cut out those words; you still have a direction that certain legacies should be respectively paid and satisfied "out of such parts of my personal estate as can lawfully be applied to the payment thereof." In the present case, however, you have not got those words. Instead of there being a direction to marshal, there is an exception of some part of the residue which is given to charity. The case of *In re Arnold*, *Ravenscroft* v. *Workman*, is open to the same criticism. There is an entire difference of language. The words of the will in *In re Arnold* perhaps followed common form more closely than either of the wills in the other cases. The testator there directed "that the foregoing charitable legacies shall be paid exclusively out of such part of my pure personal estate as is legally applicable to that purpose." I take it that what the other cases decided was, on this point, that the language of the wills there under consideration was equivalent to the language used in the will adjudicated upon in *In re Arnold*. What is the effect of these decisions? The court finds words to which effect must be given. The court does not favour the charity, or anybody else,

but treats the question as purely one of construction. All that the court says amounts to this: "We cannot give effect to that provision, except by the process of marshalling, therefore you must marshal." It is not because the testatrix has directed marshalling, but because it is only in that way that you can give effect to the direction which the testatrix has given.

Here, I repeat, it seems to me that you can give full effect to what the testatrix has directed without in any way departing from the language of the will. Nay more, as I read the will, you would not be giving effect to the direction if you marshalled. I think you would be doing just what the testatrix says is not to be done. The charity is to take the residue of her estate after payment of her debts and testamentary expenses and a legacy, with an exception which she specifies. That excepted property is undisposed of. I think all the cost ought to come out of the estate.

After some discussion the following minutes were settled:—

Declare that so much of the residue of the personal estate as consists of impure personalty was undisposed of and passed to the next of kin of the testatrix. And it appearing that there has been applied out of the impure personalty a sum at least equal to the rateable proportion which it was liable to bear for the testatrix's debts and testamentary expenses and legacy, declare that the defendants, the legal personal representatives of the next of kin, are entitled to hold the personalty which has fallen into possession.

Solicitors, *Witham, Lambert, & Roskell; Hulberts & Hussey; Leefe & Leefe.*

Chan. Div.
Vaughan Williams, J. } Nov. 7, 8.

BUILDING ESTATES BRICKFIELDS CO.
PARBURY'S CASE. (*a.*)

Company—Winding up—Fully paid-up shares—Certificate—Estoppel—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A person who was entitled to have fully paid-up shares in a limited company allotted to himself or his nominees procured fully paid-up shares to be allotted to another person as his nominee, in consideration of a money payment. The money was not paid to the company, but the company issued certificates to the allottee, stating that the shares were fully paid up. It appeared that the allottee acted on the faith of the certificate, and believed that cash had been paid to the company for the shares. The liquidator in the winding up of the company sought to make the allottee liable, on the ground that section 25 of the Companies Act, 1867, had not been complied with.

Held, that, as against the allottee, the company and the liquidator were estopped from denying that the shares were fully paid up.

This was a summons taken out in the winding up of the above-named company by Mr. A. F. Parbury that the list of contributories and the liquidator's certificate finally settling the same might be reviewed and varied by excluding therefrom the name of the applicant in respect of 80 ordinary £5 shares in the company, or for a declaration that the said 80 ordinary shares standing in the name of the applicant were, at the date of the winding-up order, fully paid up, or were to be deemed fully paid up in favour of the applicant, and that the applicant was under no liability in respect thereof.

The company was incorporated in November, 1879, and in 1878 Mr. Parbury instructed a Mr. Wright, who was entitled under an arrangement with the company to receive a certain number of fully paid-up shares in the company, to apply for 100 shares for him (Parbury) and gave him £500 to pay for them. Wright kept the £500 and procured the company to allot 100 of the shares to which he was entitled under the aforesaid arrangement, to Parbury; and Parbury's name was placed on the register in respect of these shares.

In December, 1879, the company sent a certificate for 100 shares to Parbury, stating that the shares were fully paid up. Parbury sold 20 of the 100 shares, and it was as to the remaining 80 that the present application had reference.

The company was ordered to be wound up by the court, and the official receiver was liquidator. The applicant had been placed on the list of contributories on the ground that cash had not been paid for the shares; and the official receiver and liquidator alleged that as there was no registered contract and the applicant had not paid in cash for his shares the applicant was not entitled to treat the shares as fully paid. The applicant stated that he was not aware until after the announcement of the winding up that Wright had not applied for shares for him and paid the company cash according to his instructions.

There was no evidence that the applicant had any notice that section 25 of the Companies Act, 1867, had not been complied with.

In these circumstances a question was raised whether the applicant was entitled to rely on the certificate as an estoppel as against the company and the official receiver and liquidator.

Upjohn, for the application.—As against a person who takes shares without notice that they have not been paid for in cash, a company and its liquidator are estopped by a certificate stating that the shares are fully paid up from saying that they have not been so paid up: *In re British Farmers Pure Linseed Cake Co.*, 26 W. R. 334, 673, 7 Ch. D. 533. Section 25 does not apply as between the company itself and its shareholders. *Blyth's case*, 25 W. R. 200, 4 Ch. D. 140. If the company itself has so acted as to preclude itself from denying that section 25 has been complied with, that is conclusive evidence that the section has been complied with. The company may represent and induce persons to act on the faith of the representation that shares have been fully paid up in cash. If such a representation is made and acted on by persons who have no notice that it is untrue, the company cannot afterwards be heard to say that the shares have not been fully paid up. Both the company and the liquidator are estopped: *In re London Celluloid Co.*, 36 W. R. 673, 39 Ch. D. 190.

He also referred to *Carling's case*, 24 W. R. 165, 1 Ch. D. 115, and *In re Macdonald, Sons, & Co.*, [1894] 1 Ch. 89

E. S. Ford, for the official receiver and liquidator.—The applicant is the original allottee, and estoppel is not valid in the case of the original allottee: see Buckley in the Companies Acts, ed. 6, p. 557, where he says, "The original allottee and every subsequent transferee with notice holds the shares as unpaid": *Blyth's case* (*supra*) shows that the issue of the certificate is not necessary to the issue of shares within section 25 of the Act of 1867: *In re Vulcan Ironworks Co.*, W. N., [1885] p. 120.

VAUGHAN WILLIAMS, J.—This is a very curious

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

case. It raises a new point. Mr. Parbury is the allottee of these 80 shares upon which the question in this case turns. He was originally allottee of 100 shares, and he has dealt with 20 of these 100 shares by sale, and there are only 80 left. He has been placed on the list of contributories, because cash has not been paid, and the liquidator says that by virtue of section 25 of the Companies Act, 1867, he is now liable to pay in cash for these shares, there being admittedly no filed contract in existence. Now, so far as I know, there has been no case in which an allottee of shares has been allowed to escape the stringency of the provisions of section 25. [His lordship read section 25, and continued:—] But I have arrived at the conclusion that in this particular case Mr. Parbury is not liable to be placed on the list of contributories except as the holder of fully paid-up shares. Mr. Upjohn has called my attention to *Carling's case* (*suprà*) and *In re Macdonald, Sons, & Co.* (*suprà*), but I am not going to decide the present case upon the authority of either of these cases. Mr. Parbury paid £500 to Mr. Wright before the incorporation of the company, and asked him to apply for 100 shares and to use the £500 for the purpose of paying the amount necessary to be paid on the shares, if the shares should be allotted to him (Parbury), in pursuance of the application. If Wright had made the application and paid the money Parbury would have been a member of the company and the holder of shares paid for in cash. In truth and fact Wright never did act on the instruction given him by Parbury, and never did apply for the shares in accordance with the instructions. What Wright, in fact, did was—being entitled to receive fully paid-up shares under a contract to issue fully paid-up shares to himself or his nominees—to get the company under that contract to issue fully paid-up shares to his nominees amongst whom was Parbury. Parbury had a certificate of title sent to him which was issued under no contract between himself and the company, but under a contract between Wright and the company. Those facts are not in dispute. Eighty of these shares are now held by Parbury, and he has not repudiated them in any way, they were thus standing in his name at the date of the winding-up, and he says that in respect of these shares there has been, as between himself and the company, payment in cash. It is quite true that there has not been such a payment, but Mr. Parbury says he is entitled to rely on the general law as to estoppel and that the company are estopped by reason of their certificate from denying that the shares are fully paid-up.

As I understand the case of the *British Farmers Pure Linseed Cake Co.* (*suprà*), that was a case in which it was sought to make a transferee of shares for which cash had not been paid, liable, and the transferee was allowed to say "I produce the certificate of the company stating that the shares are fully paid up, and the company cannot say that section 25 has not been complied with." Let us look at the case and see if that is so. James, L.J., says: "I think that the section to which we have been so often referred" [*i.e.*, section 25], "and which has been so often before the court, does not in the slightest degree alter the general law of the land as to the effect of the conduct or representation of companies, or of companies acting through their officers and servants. They are still liable, as they always were, to be bound by any representation made by them or by the officers to whom they have intrusted the management of their affairs. . . . A joint-stock company has no statutory immunity from the consequences of its acts and representations." Thesiger, L.J., took the same view, and says: "It seems to me clear that the present case comes within the general law as to estoppel, and that he cannot be made liable."

That being so, let me apply the law of estoppel in the case before me. Has there been a representation by the company? It is not disputed that there has been, and I have only to inquire whether Parbury was a person not aware of the untruth of the representation, and whether, being so unaware, he acted on the faith of the representation. There is no evidence that he was aware of the untruth of the representation, and there is evidence that he acted on the faith of it. Why should not the law of estoppel be acted on here? I am told that it should not, because of the principle cited by Mr. Ford from Buckley on the Companies Acts. I am asked to say that, therefore, the original allottee is to be made liable because he is allottee. If I held that, I should not be applying the "general law of the land" or giving effect to judgment of James, L.J., which I have just referred to. Section 25 does not alter the law of the land as to estoppel. All Mr. Buckley means in the passage cited from his book is that as a general rule the allottee has notice. In the present case Parbury was misled. He believed that shares had been issued under a contract with himself and that cash had been paid for them. In those circumstances is he prevented from relying on the estoppel arising from the certificate? Certainly not. He had no knowledge of the circumstances under which the certificate was issued. If he had been put upon inquiry and had wilfully abstained from inquiring he would not have been in a position to take advantage of this estoppel. But what is meant by saying that a person is put upon inquiry and, therefore, unable to rely on the truth of a representation? That cannot be said unless the person in question consciously abstained from doing that which, as a matter of business, he would naturally do. I see no evidence of that kind here. It is not argued that the general law of the land does not apply. The only reason that can be given for not allowing the applicant to take advantage of the estoppel is that there is something in the mere fact of his being allottee. Generally speaking that may be so, because the allottee is the person to whom the original allotment is made and he is likely to be aware of the facts. That is not so here, and I can see nothing to prevent Mr. Parbury from relying on the truth of the statement in the certificate.

Solicitors, *Bonner, Thompson, Burnie, & Co.; Phelps, Sidgwick, & Biddle.*

Q. B. Div. (Grantham and Wright, JJ.) May 21; July 25, 1895; Nov. 14.

HULL ROPE CO. (*Respondents*) *v.* ADAMS (*Appellant*). (*a.*)

Sale of goods—Agreement for hire and purchase—Mercantile agent—Goods passed to mortgagees as part of the appurtenances of ship—Possession of goods with consent of owner—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 2, 9—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 5, 9, 35.

Under a hire and purchase agreement A. supplied a trawl warp to B., the master of a fishing smack which was at that time mortgaged, together with its equipments. By the terms of the agreement, the hirer B. was to pay £4 a month until the full sum of £15 5s. was made up, when the warp should become the property of

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

B., but until then it should remain the absolute property of A.; the agreement contained stipulations enabling A. to put an end to the agreement and retake possession of the warp in certain events; but no stipulation enabling B. to terminate the agreement by delivering up the warp to A. Subsequently, before all the instalments on the warp were paid, the mortgagees took possession of the smack, and claimed the warp as forming part of the appurtenances of the ship, which passed to them under the terms of their mortgage.

Held, that the mortgagees' claim was valid, as B. had "agreed to buy" the warp within the meaning of section 9 of the Factors Act, 1889, and the addition of the warp to the equipment of the mortgaged ship was a sufficient delivery or transfer to the mortgagees by a mercantile agent under a "disposition," within the meaning of the provisions of that section.

Lee *v.* Butler, 42 *W. R.* 88, [1893] 2 *Q. B.* 318, *followed.*

Helby *v.* Matthews, 43 *W. R.* 561, [1895] *A. C.* 471, *discussed.*

Appeal by the defendant in the action from the judgment of His Honour Judge Eardley Wilmot sitting at the Lowestoft County Court.

The following are the facts of the case material to the present appeal:—

The trawling smack *Maude Green* formerly belonged to a Mr. Knowles, who, on the 23rd of May, 1893, disposed of her by bill of sale under the Merchant Shipping Act to George Batty, and on the following day Batty mortgaged the smack to Mr. Knowles for £835 and interest.

In October, 1894, Batty asked Mr. Adams to supply him with a trawl warp, and the latter agreed to do so on the hire-purchase system, but not otherwise. On the 20th of October an agreement was entered into between them, under which the warp was duly supplied by Adams, and placed on board the smack; the conditions of that agreement, so far as they are here material, were as follows:

First, the lessee (Batty) agreed to pay to the owner and lessor (Adams), as and for rent of the trawl warp, £4 per calendar month, to commence on the 1st of November, 1894, which sums so agreed to be paid would amount in the aggregate to £15 5s., and the lessee agreed not in any way to sell, assign, sub-let, or otherwise part with the possession of the trawl warp, or to assume the ownership of it, so long as any of the instalments remained due. Secondly, upon the payment of all the severa sums being made by the lessee, then this agreement should be at an end, and the warp should become the property of the lessee as purchaser for the sum of £15 5s., but until then the warp should remain the sole and absolute property of the owner and lessor, it being thereby expressly agreed that the warp was only let on hire to the lessee until all the sums of money due under the agreement were paid, and in the case of failure in payment, or in case the lessee should become bankrupt or suffer his effects to be taken in execution, or give a bill of sale, or on breach of any of the covenants, then the full balance of £15 5s. required for the purchase of the warp should, at the election of Adams, at once become payable to, and be recoverable by, him, who, however, instead of seeking to recover the balance, might, if he thought fit, seize and resume possession of the warp wherever the same might be, and the several sums which had been paid by Batty should in that case be forfeited.

On the 15th of November Knowles transferred his mortgage to the Hull Rope Co., who, on the 7th of March, took possession of *The Maude Green*, and placed two men on board in charge of her.

Adams, who, up to that date, had only received £5 10s. on account of the warp, thereupon applied to Batty to hand the warp back, and on the mortgagees refusing to allow Batty to do so, Adams, on the 14th of March, with several men, boarded the smack as she lay in Lowestoft Harbour, and forcibly removed the warp and certain other goods supplied by him.

The mortgagees brought an action against Adams for trespass and for damages arising from the retention of the articles.

The county court judge awarded the plaintiffs £25 damages for the trespass, to be reduced to £10 on the return of the warp within a given time.

From this judgment, so far as it referred to the returning of the warp, Adams appealed.

The Factors Act, 1889, provides as follows:—Section 2, sub-section 1: "Where a mercantile agent is, with the consent of the owner, in possession of goods . . . any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business . . . shall, subject to the provisions of this Act be as valid as if he were expressly authorized by the owner of the goods to make the same: Provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Section 9: "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods . . . the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods under any sale or pledge . . . or under any agreement for sale or pledge . . . to a third party in good faith and without notice . . . shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods with the consent of the owner."

Scrutton, for the appellant. — The question is whether, under the hire and purchase agreement, the property in the fishing gear passed to the hirer or not. I submit that it did not, and, further, that at any time before the last instalment became due and was paid the hirer had a right to return it. If this construction of the agreement is correct, then the case falls within the class of hire and purchase agreements of which *Helby* v. *Matthews*, 43 W. R. 561, [1895] A. C. 471, is the last decision, although *Gough* v. *Wood*, 42 W. R. 469, [1894] 1 Q. B. 713, is even stronger in my favour. The fact that there was a physical delivery of the gear to the master of the smack does not make the "agreement to buy" a "sale" within section 9 of the Factors Act, 1889: *Kitto* v. *Bilbie*, 72 L. T. N. S. 266, 43 W. R. Dig. 67.

A. H. Poyser, for the respondents.—This was an out and out sale to the purchaser, but the payment was not to be due on delivery, but was, by express agreement in writing, to be spread over a certain period. The fact that the agreement under which these payments were to be made, was in the form of a hire and purchase agreement does not affect the purchaser's title. The case comes within the decision of the Court of Appeal given in *Lee* v. *Butler*, 42 W. R. 88, [1893] 2 Q. B. 318. It was, therefore, a valid "agreement to buy" the fishing gear within the meaning of those words in the 9th section of the Factors Act, 1889. It is admitted that this new warp was procured for the smack in substitution for an old one that had been lost, which formed part of the equipment of the smack at the time the vessel, with her appurtenances, was mortgaged to the respondents. They took possession of the smack and her equipment under their mortgage without notice

of Adams' rights to these goods, and against him their title to them is valid: *Coltman* v. *Chamberlain*, 39 W. R. 12, 25 Q. B. D. 328; *The Horlock*, 2 P. D. 243, 25 W. R. Dig. 205. I rely also on section 35 of the Merchant Shipping Act, 1894. Section 5 of that Act says there may not be more than sixty-four shares in a vessel, and section 9 directs those shares to be registered. If part of the equipment of the smack belongs to Adams, then Adams has an interest or share in the vessel, and his 65th (?) share has not been registered.

Scrutton replied.

Cur. adv. vult.

Nov. 14.—The judgment of the court was delivered by

GRANTHAM, J.—We reserved judgment in this case because during the arguments it was contended by the appellant that the recent decision of the House of Lords in *Helby* v. *Matthews*, which had not then been authoritively reported, would directly effect this case. We have since then seen that judgment, and are of opinion that this case is not governed by that decision, but is within the decision of the Court of Appeal in *Lee* v. *Butler*, which case is, in fact, approved by the House of Lords in *Helby* v. *Matthews*. The agreement in question is ill-expressed, but it appears to us to contain an irrevocable promise by the hirer to pay £4 a month until the full price of £15 5s. is paid, and when the £15 5s. has been paid, the rope thereupon becomes the property of the hirer. Various contingencies are named in which the owner may put an end to the arrangement for sale, but there is nothing corresponding to the provision on which the decision of the House of Lords in *Helby* v. *Matthews* appears to have turned that "the hirer may terminate the hiring by delivering up to the owner the said instrument." We, therefore, think that in the present case the hirer had "agreed to buy" the rope within the meaning of section 9 of the Factors Act, 1889, (52 & 53 Vict., c. 45); and in our opinion the addition of rope to the equipment of the mortgaged ship was a sufficient delivery or transfer to the mortgagee under a "disposition" within the meaning of the Act, or at any rate became so when under and pursuant to the powers of mortgage, possession was taken by the plaintiffs. The judgment, therefore, of the county court judge must be affirmed.

Appeal dismissed, leave to appeal refused.

Solicitors for the appellants, *Dubois & Williams*, for *Chamberlain*, Lowestoff.

Solicitors for the respondents, *Pritchard & Sons* for *Wiltshire & Sons*, Great Yarmouth.

C. C. R.
(Lord Russell of Killowen, C.J., Mathew, Vaughan Williams, Wright, and Bruce, JJ.) Nov. 23, 1895.

REG. *v.* JONES AND BOWERBANK. (*a*)

Criminal law—Act of gross indecency with a male person—Criminal Law Amendment Act, 1885 (48 & 49 *Vict.* c. 69), *s.* 11.

Where two male persons are charged in separate counts of the same indictment with the commission of an act of gross indecency the one with the other, the acquittal of the one is not a bar to the conviction of the other.

It is an offence under section 11 *of the Criminal Law Amendment Act*, 1885, *for one male person to procure the commission by another male person of an act of gross indecency with himself, the first of such male persons.*

Case stated for the opinion of the court by Wills, J.

Robert Jones and Harry Lewis Bowerbank were tried at Exeter on the 13th of November, 1895, on an indictment containing three counts. The first count charged that Robert Jones, on the 6th of September, 1895, in a certain parish, "being a male person, unlawfully did commit an act of gross indecency with another male person, to wit Harry Lewis Bowerbank, against the form," &c. The second count charged Bowerbank with the commission of a similar act with Jones on the same day and in the same parish. The third count was that Jones on the same day and in the same parish, "being a male person, unlawfully did procure the commission by a male person, to wit the said Harry Lewis Bowerbank, of an act of gross indecency with another male person, to wit with him the said Robert Jones, against the form," &c.

The prosecution offered no evidence against Bowerbank, and a verdict of "not guilty" was returned in respect of the second count. The trial against Jones then proceeded; Bowerbank was called as a witness, and a general verdict of "guilty" was returned against Jones, who was sentenced to a term of imprisonment with hard labour.

The counsel for the prisoner took at the close of the case for the prosecution the following objections:—

That the prisoners being charged and tried on the same indictment, the jury could not, having acquitted Bowerbank on the second count, convict Jones on either the first or third count, the offences charged being joint, and requiring the participation of both prisoners in the act.

That the third count was bad, and should have been quashed or withdrawn from the jury, on the ground that it was not made by the Act an indictable offence for one male person to procure the commission by a second male person of an act of indecency with himself, the first of such male persons.

Wills, J., was of opinion, with regard to the first objection, that the offence charged was not a joint one, and that it was quite possible, in respect of such an indictment, to have evidence which would establish the case against one defendant and not against the other, though the act constituting the crime might involve the participation of both. As to the second objection, he expressed no opinion, but reserved both points.

The question for the court was whether the conviction was to stand upon either the first or third count.

Section 11 of the Criminal Law Amendment Act, 1885, provides that "any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor."

No counsel appeared.

LORD RUSSELL OF KILLOWEN, C.J.—Two questions are raised in this case. As to the conviction upon the first count, the objection taken by the prisoner's counsel was that both the prisoners being charged in the same indictment with a joint offence, and one being acquitted, the jury could not convict the other. But it does not appear that the offence charged in the second count is the same offence as that which is

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

charged in the first; each may be a separate offence; and it is possible for one person to commit an act of indecency with another person without that other person being a party to the commission of the offence. This disposes of the first point.

The second question arises upon the construction of section 11 of the Criminal Law Amendment Act, 1885. The charge here is that Jones procured Bowerbank to commit the offence with another person—namely, with Jones himself—and the point raised is that the offence made punishable by the section is the procuring by one person of the commission of the act by another person with a third person. But it appears to me that the words "with another person" in the section are equivalent to "with himself or with any other person." I think, therefore, that there is nothing in this point.

MATHEW, J.—I am of the same opinion, and for the reasons which my lord has given.

VAUGHAN WILLIAMS, WRIGHT, and BRUCE, JJ., agreed.

Conviction affirmed.

IN BANKRUPTCY.

Q. B. Div.
(Vaughan Williams, J.) Nov. 19.

In re MARDON.
Ex parte THE BOARD OF TRADE. (*a.*)

Bankruptcy — Appointment of trustee — Objection by Board of Trade—Notification to High Court—Discretion of High Court—Trustee an accounting party to the estate—Costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 21.

When the Board of Trade notify an objection to the appointment of a trustee to the High Court, the court will not exercise any discretion, nor take into consideration the peculiar circumstances of the case, but will merely hear the facts alleged to constitute the objection, and decide as a question of law whether they constitute a valid objection or not.

An objection that the trustee appointed in the bankruptcy has been trustee under a deed of assignment executed by the debtor for the benefit of his creditors within three months of the presentation of the petition is a valid objection.

Notification to the High Court by the Board of Trade, under sub-section 3 of section 21 of the Bankruptcy Act, 1883, of their objection to the appointment of Mr. Forster, an accountant of Middlesborough, as trustee of the estate of Mardon, a bankrupt.

The petition was presented upon the 3rd of July, 1895, one of the acts of bankruptcy alleged being the execution by the debtor of a deed of assignment for the benefit of his creditors, under which Mr. Forster and a Mr. Brown were co-trustees. The receiving order was made upon the 30th of July, adjudication followed upon the 12th of August, and at the first meetings of creditors held upon the 23rd of August, Mr. Forster was unanimously elected trustee.

The Board of Trade objected to his appointment upon the grounds that his having been a trustee under the deed of assignment made him an accounting party to the estate, and that, therefore, his connection with the bankrupt's estate made it difficult for him to act with impartiality in the interest of the creditors generally. A majority of the creditors required the objection to be notified to the High Court in order that the High Court might decide upon its validity.

Sir R. B. Finlay, S.G., and *Muir Mackenzie*, for the Board of Trade.—This is an objection by the Board of Trade to the appointment of Mr. Forster as trustee of this estate. [VAUGHAN WILLIAMS, J.—The Court of Appeal say in *In re Lamb, Ex parte Board of Trade*, [1894] 2 Q. B. 805, 43 W. R. Dig. 19, that I have no jurisdiction to do more than decide whether the objection is valid or not. I will not exercise my discretion. In *Lamb's case* I thought the Board of Trade were exercising a prejudicial discretion and I appointed the trustee nominated by the creditors, but the Court of Appeal held that I had no right to do so, and that the discretion lay with the Board of Trade alone. I am prepared to find as a fact whether the trustee has a pecuniary interest or not in the estate, and if he has I decide that is a valid objection.]

Sir R. B. Finlay, S.G.—I think I ought to state the facts, the Master of the Rolls says in *Lamb's case* at p. 815, "The judge must go into the facts which are pertinent." [VAUGHAN WILLIAMS, J.—I will hear the facts in the report of the Board of Trade if you choose to read them, and will decide on the the question of law, but I will not exercise discretion, that I will leave to the Board of Trade. I am prepared to find any facts necessary to determine whether the objection is valid or not.]

Sir R. B. Finlay, S.G. (after reading the report of the Board of Trade). The objection is that Mr. Forster was co-trustee under the deed of assignment and is, therefore, an accounting party to the estate. He will have to enforce claims due to the estate from himself and his co-trustee Brown, which makes it difficult for him to act with impartiality: *In re Martin*, 36 W. R. 698, 21 Q. B. D. 29. [VAUGHAN WILLIAMS, J.—You may take it that the objection is valid in point of form, and so far as the facts go I am prepared to find that there is a possibly pecuniary interest in the trustee.]

Herbert Reid, Q.C., and *A. H. Carrington*, for the creditors and the trustee.—The statute intends the High Court to have the controlling voice in deciding on these objections, and in *In re Martin* it was held that every case must be decided on its own circumstances. Take an extreme case, suppose the trustee owed half-a-crown to the estate, could that be held to be a pecuniary interest which made it difficult for him to act with impartiality? [VAUGHAN WILLIAMS, J.—If the Board of Trade were so to find, I should have no discretion to alter their finding. I could only say whether the facts justified it or not.] In this case Mr. Forster has sent in an account showing what is due from him to the estate, and has offered the official receiver his cheque for the whole amount. If his appointment is bad a trustee under a creditor's deed can never be a trustee in bankruptcy? [VAUGHAN WILLIAMS, J.—You must not address me on these matters. I have no discretion. In *Lamb's case* I considered the benefit of the creditors, but I will never do so again. If you can show me that Mr. Forster has no pecuniary interest I will so find as a fact.]

Muir Mackenzie, in reply.—This case falls within *In re Martin*, the trustee is an accounting party to the estate. [VAUGHAN WILLIAMS, J. Do the Board of Trade suggest any grounds for supposing that the account which Mr. Forster has sent in can be im-

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

peached?] At present they do not. [VAUGHAN WILLIAMS, J.—Then this is a purely academic question, Is he an accounting party or not?] Yes, wholly apart from any suggestion against him, I say that he is in a position which makes it difficult for him to act with impartiality.

VAUGHAN WILLIAMS, J.—The objection to the trustee in this case is that he acted as trustee under a deed of assignment, made by the debtor for the benefit of his creditors within three months of the presentation of the petition, and is, therefore, an accounting party to the estate. The Board of Trade will not, apparently, approve of trustees under such deeds becoming trustees in the bankruptcies of the makers of the deeds. No doubt there is much to be said from the creditors' point of view in favour of a trustee who has acted under such a deed, a trustee *de son tort*, I may call him, continuing to act upon the debtor becoming bankrupt.

Here the trustee is a gentleman of position and repute, against whose character and honesty there is no impeachment whatever, and the debtor having become bankrupt, it would seem important that the person who has been dealing with his estate before should continue to do so; the expenses would probably be less, and the estate more.

Against this view it may be said that cases not infrequently occur where the trustee under a deed is in the interest of the debtor, or not in the interest of all the creditors, and in such cases it is not desirable that he should be continued.

However clear it may sometimes be, that it is altogether to the interest of the creditors to appoint the trustee under the deed to be trustee in the bankruptcy, yet the Board of Trade find the balance unfavourable to such appointments. Upon their notifying their objection the court is to decide upon its validity.

In this case I ought, in my judgment, to find in favour of the validity of the objection, that is to say, I find that the trustee, as trustee under the deed, is accountable to himself as trustee in the bankruptcy, and that this position is one which, in fact, is likely to make him other than impartial. I am not finding on the facts that Mr. Forster is likely to be placed in a position which will make him other than impartial, but quite the other way, for the Board of Trade say that they do not impeach his account at present, as it has not been yet examined. This being so, I merely decide that the objection is valid, because the trustee will have to account to himself, and that this makes it difficult for him to act with impartiality.

When I decided *Lamb's case* I thought I ought to perform the same duty as the Board of Trade has in in the first instance to perform, that is, to decide whether in any particular case the Board of Trade ought to object, considering all the facts of the case, the amount of the trustee's interest, or the benefit to the creditors in getting a particular trustee; and I still think it would have been a good thing for creditors if the law had been as I supposed it to be when I decided that case. The Court of Appeal, however, thought differently, and I have here merely to decide whether the trustee has a personal interest in this estate or not.

Objection upheld.

Muir Mackenzie, asked for costs against the trustee.

Reed, Q.C., admitted that he appeared for the trustee as well as the creditors.

VAUGHAN WILLIAMS, J.—It may be a very hard case, but if the trustee appears as a litigant, and loses, the costs must go against him; unless the Board of Trade consent to waive their rights.

Solicitors, *The Solicitor to the Board of Trade*; *Iliffe, Henley, & Sweet.*

Q. B. Div.
(Vaughan Williams and Kennedy, JJ.) Oct. 29.

In re NASH & SONS.
Ex parte CROFTON, CRAVEN, & WORTHINGTON. (*a*.)

Bankruptcy—Practice—Taxation of costs—Right of official receiver to be present at taxation—Bankruptcy Rules, 1886, *rr.* 120-124.

The official receiver has no right to be present or to be heard at the taxation of the bill of the solicitors to the trustee, or of any other persons, but the court has power to order him to attend at the taxation, not as a litigant party, but merely to assist the taxing officer, or to enable himself to report efficiently to the Board of Trade, in case they should require the taxation to be reviewed.

Appeal from an order of His Honour Judge Parry, in the county court of Manchester, holding that the official receiver had a right to attend and be heard at the taxation of the bill of Messrs. Crofton, Craven, & Worthington, solicitors to the trustee in the bankruptcy of Nash & Sons.

The facts were as follows:—

Upon the 30th of December, 1894, the solicitors carried in their bill of costs.

The registrar refused to tax the bill until the requirements of rules 120 to 124 of the Bankruptcy Rules, 1886, had been complied with.

The matter was referred to the judge, who directed the official receiver to apply for a copy of the bill.

Under rule 122: "Every person whose bill or charges is or are to be taxed shall, on application either of the official receiver or the trustee, furnish a copy of his bill or charges so to be taxed, on payment of fourpence per folio, which payment may be charged to the estate. The official receiver shall call the attention of the trustee to any items which in his opinion ought to be disallowed or reduced."

The official receiver having obtained a copy of the bill, a fresh appointment to tax was given by the registrar, when the official receiver attended and claimed a right to be present and to be heard in opposition to such items as he thought ought to be disallowed or reduced.

The solicitors objected to his being present, or being heard.

The registrar referred the matter to the judge, who decided in favour of the official receiver.

The solicitors appealed.

Cooper Willis, Q.C., for the appellants.—I contend firstly, that the official receiver has no right to be present; secondly, that if he has any right to be present he has no right to be heard. There is nothing in the statutes or the rules which entitle him to be present. Rule 122 only says that he "shall call the attention of the trustee," not the taxing-master, to the items which he thinks ought to be disallowed or reduced. It should be pointed out that the draftsman of the Winding-up Rules of 1890 evidently thought that rule 122 gave no power to the official receiver to attend, because rule 25 of the Winding-up Rules,

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

which is in other respects identical with rule 122, has at the end these additional words, "and may attend or be represented on the taxation." There is no known instance in bankruptcy practice of such a claim as this ever having been made before.

C. A. Russell, for the trustee.—I do not wish to enter into controversy on this matter, and would merely observe that the scheme of the Act and the practice under it indicate that the official receiver should give his assistance to the trustee before taxation.

Muir Mackenzie, for the Board of Trade.—The position taken by the Board of Trade is this, that there is no provision in the Acts or Rules excluding the official receiver from being present, but that he should not be there as a litigant party, nor can he instruct counsel to represent him.

VAUGHAN WILLIAMS, J.—This is a case of some importance because it involves a question likely to arise not infrequently; and I am glad that we have had the advantage of having it argued by Mr. Cooper Willis, who of his own personal experience has been able to give us information as to the practice, which has been confirmed by Mr. Tanner, the taxing-master of the High Court in Bankruptcy.

In my opinion, on the rules, the official receiver has no right to be present and to be heard. This accords with all practice both in London and in the country. No official receiver has ever before put forward a claim to appear and to be heard of right. I not only say this, but I say that no order of any judge could give him that right in his character of official receiver.

As to whether he has a right to be present, I say that in my judgment he has no such right, and the rules do not seem to me to contemplate his attendance. I recognize the expediency of his attendance in some cases. It is clear that the trustee and the solicitor to the trustee are in such a position that the trustee will not be a jealous critic of his own nominee. The taxing officer, however, generally sets matters right, and has done so habitually without the assistance of the official receiver. This does not exclude the right of the court to order that he be at liberty to attend. I have no doubt of the inherent power of the court to order the official receiver to attend, not as a litigant party, but to be consulted by the taxing officer, or in order to enable him to report efficiently to the Board of Trade in cases where they require the taxation reviewed. I think it very desirable in many cases that the official receiver should be present, and am of opinion that the court has power to order him to attend.

KENNEDY, J., concurred.

Appeal allowed.

Solicitors for the appellants, *Crofton, Craven, & Worthington.*

Solicitors for the trustee, *Book & Edgar.*

Solicitor to the Board of Trade, *The Solicitor to the Board of Trade.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Nov. 25.

BRITISH WAGON CO. *v.* GRAY. (*a*.)

Practice—Writ—Service out of the jurisdiction—Defendant domiciled in Scotland—Agreement to give court jurisdiction to order service—Ord. 11, *r.* 1 (e).

Where the defendant is domiciled or ordinarily resident in Scotland or Ireland, the parties cannot by agreement give the court power to allow the writ to be served out of the jurisdiction under ord. 11, *r.* 1 (e).

Application *ex parte* for leave to serve the writ of summons on the defendant out of the jurisdiction.

The action was for the hire of certain coal wagons under an agreement in writing. By the agreement the defendant, who was domiciled and resident in Scotland, agreed to hire from the plaintiffs, who were a company registered and carrying on business in England, a number of coal wagons at a certain rent, the agreement containing the following clause:—"This agreement shall in all respects be construed and carried into effect according to the law of England, and for the purposes thereof the tenant" (the defendant) "hereby submits to the jurisdiction of the High Court of Justice in England." Mathew, J., at chambers, refused to give leave to serve the writ on the defendant out of the jurisdiction.

T. W. Chitty, for the plaintiff, moved for leave as above.—No place of payment being specified in the agreement, the debtor must seek his creditor and pay him in England. There was, therefore, a breach of the contract which ought to have been performed in England, within the first part of ord. 11, r. 1 (*e*). The second part of that rule does not apply, because the parties have contracted themselves out of it. They have agreed that the court shall have jurisdiction to give leave to serve the writ in Scotland. It is competent for the parties to make such an agreement; *per* James L.J., in *The Moxham*, 24 W. R. 650, 1 P. D. 107, at p. 109; *Tharsis Sulphur Co.* v. *Société des Métaux*, 38 W. R. 78. The court has, therefore, jurisdiction to give the leave asked notwithstanding that the defendant is domiciled in Scotland.

Lord ESHER, M.R.—This is an application to allow service of the writ of summons out of the jurisdiction on the defendant, who is domiciled and resident in Scotland. It is obvious that the case comes within the very terms of ord. 11, r. 1 (e), which provides that leave may be given to serve a writ out of the jurisdiction where the action is founded on an alleged breach within the jurisdiction of a contract, which according to its terms is to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland. Therefore, the court cannot order service of a writ out of the jurisdiction if the defendant is domiciled or ordinarily resident in Scotland or Ireland. The service of the writ is a question of jurisdiction. Accordingly, the court has no jurisdiction to order service of the writ in such a case. It is urged, however, that the defendant has contracted to give the court jurisdiction to allow service of the writ in Scotland. The first answer to that contention is that the contract has done nothing of the sort. But I shall not act upon that ground. I shall decide this

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

case upon the assumption upon which the learned judge at chambers acted—namely, that the true meaning of the contract is that the court may order service of the writ on the defendant out of the jurisdiction. In my opinion such a contract is of no avail, and the court cannot order service of the writ out of the jurisdiction, no matter what contract the parties may have made, when it is forbidden by the rule to allow such service. The two cases, which were cited in support of this contention do not support it; in *The Moxham* both parties appeared, and the question was by what law the case was to be decided. In *Tharsis Sulphur Co.* v. *Société des Métaux* it was only decided that a foreigner may appoint a person in this country to accept service for him here, and he cannot afterwards say that it is not good service. It did not raise any question of jurisdiction. In the present case the court is forbidden to exercise jurisdiction, and it will take no notice of any contract between the parties purporting to give it jurisdiction. The application must, therefore, be dismissed.

LOPES, L.J.—I am of the same opinion. I do not think that the contract has the effect contended for, but I will assume that it has, and I say that the parties cannot by any contract *inter se* give the court a jurisdiction which the rule says that it shall not have.

KAY, L.J.—I am of the same opinion. The case is a very simple one. Ord. 11, r. 1 (e), expressly excludes this case. Apart from some rule the court has no jurisdiction to order service out of the jurisdiction. By the rule it is carefully provided that leave shall not be given to serve the writ on such a defendant as this, out of the jurisdiction, and yet we are asked to allow the service. It is said that the case comes within the first part of the rule, and by the terms of the contract the defendant has submitted to the jurisdiction of the English courts. The contract, however, does not say that the defendant has submitted to be served out of the jurisdiction. I do not think that such a term can be implied. But even if it can, then it is a contract by a person domiciled or ordinarily resident in Scotland to allow himself to be served in Scotland, when the rule says that the court cannot give leave to serve him there. How can such a contract give the court power to do that which the rule says that it cannot do? In my opinion such a contract is entirely *ultra vires* and void.

Application dismissed.

Solicitors, *Bell, Brodrick, & Gray.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) Nov. 19.

CLUTTON AND OTHERS *v.* ATTENBOROUGH & SON. (*a.*)

Bill of exchange—Cheque—Payee a fictitious or non-existing person—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7 (3).

A clerk in the plaintiffs' employment, by means of a fraud, induced the plaintiffs to sign and issue cheques, the name of the payee of which was not the name of any real person, drawn in favour of fictitious or non-existing persons.

Held, that the payee was a fictitious or a non-existing person within the meaning of section 7 (3) *of the Bills of Exchange Act*, 1882, *and that the plaintiffs were liable on the cheques, notwithstanding the payee was not fictitious to the knowledge of the plaintiffs.*

Appeal from the decision of Wills, J.

The action was brought to recover the sum of £3,558 13s. 2d. which, as the plaintiffs alleged, was paid under a mistake of fact.

The plaintiffs were land agents. Among many other estates they managed those of the Ecclesiastical Commissioners. Their transactions with respect to those estates alone amounted to £700,000 a year.

In their employment they had a man named John Piper. This man managed to carry on a system of fraud, by which he obtained in the course of eight years cheques, 640 in number, and in value amounting to £18,000.

In the plaintiffs' office any letter containing an account of work done or goods delivered on any of the estates was handed by the secretary to the accounts department. The account was then handed to the management department, where it was examined by the person who had charge of the particular estate, initialed by him if correct, and afterwards handed back to the accounts department. A clerk in that department prepared a certificate of the nature and amount of account together with the name of the estate to which it was charged, and this certificate was initialed by the head of the department. On receiving the certificate, the cashier drew a cheque payable to order, which was subsequently signed by a member of the firm. The cheque was sent back to the accounts department, and from thence it was posted to the payee. The certificate remained on the table of the head of the accounts department pending the arrival of a receipt.

Piper was a clerk in the accounts department, and he took advantage of the fact that no record of an account was made in that department before it was sent to be verified in the management department, to forge certificates supposed to relate to accounts which in fact had never been presented. The names of the persons to whom the money was stated in the forged certificates to be due did not represent any real persons, but were mere inventions of Piper, coming from various non-existent and fictitious persons. After a cheque had been drawn in favour of some one or other of these "persons" and signed by one of the firm, who would not as a rule be familiar with the details of the business of the various estates, Piper would steal the cheque and remove from the table of the head of the accounts department the certificate with which it corresponded.

In order to escape detection at the annual audit he also forged vouchers for the money thus appropriated by himself.

Piper selected, as one of the names of the "persons" by whom the accounts were supposed to be presented, the name of "George Brett," and by the name of "George Brett" Piper was known to the defendants. To them he endorsed 97 of the cheques obtained in this manner, amounting in value to the sum claimed in the action. The cheques were endorsed to the defendants, sometimes in respect of the redemption of pledges, and sometimes for cash or for goods bought.

The learned judge found as a fact that the cheques were received by the defendants for value and in good faith, and gave judgment for the defendants.

Section 7 (3) of the Bills of Exchange Act provides that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."

Tindall Atkinson, Q.C., and *W. A. Meek*, for the appellants, the plaintiffs.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Sir Edward Clarke, Q.C., and *Macaskie*, for the respondents, were not called upon.

Lord ESHER, M.R.—I do not mean any disrespect to Mr. Atkinson's argument when I state that I have not the smallest doubt about this case. He did not produce on my mind any effect at all.

In this case the plaintiff signs a cheque himself. He is induced to sign that cheque by some fraud or trick of his own clerk. But he signs the cheque. He does not put it in a drawer, as Mr. Atkinson meekly tried to suggest, not to be used, but delivers it to this clerk who has tricked him into signing it. He delivers it to him in order that that clerk may pass it on to somebody else. Therefore, he signs the cheque and gives it out as a cheque. Then it comes into the hands of Mr. Attenborough for value. I, myself, have no doubt about the law in such a case, which is that if a man signs with his own hand a negotiable instrument, that is, if he signs a cheque or if he accepts a bill in his own handwriting, that constitutes a liability on his part to anybody who takes for value, the cheque with that signature of his and takes it *bonâ fide*. That is the short of it. If it is a cheque and goes to his banker, the banker looks at the signature of the cheque, and sees that it is the signature of his customer. He, at all events, has no occasion to look any further. He pays the cheque of his customer, the cheque being signed by his customer. What has he to do with anything else.

Mr. Atkinson says it is not a cheque at all. He signed it as a cheque. He gave it out of his own hands as a cheque. Therefore, in the hands of an innocent holder for value, it is a cheque in the same way as if a man accepts a bill in his own handwriting. Those who take that cheque take it upon the faith that it is the signature of the acceptor, and it is his real signature. A man to whom a bill is handed signed by a Rothchild or any great name in commerce, the signature to which he believes to be Rothchild's signature, would immediately discount the bill. It is said he would look to the drawer. So he would. But that is, if the acceptor did not pay. He looks first at the name of the acceptor, and finding a good signature he relies on the acceptor and pays the money. That was *Vagliano's case*, [1891] A. C. 107. I say, therefore, in the broadest way that a man who draws a cheque in his own hand or accepts a bill in his own hand is liable upon the signature alone to anybody to whom that negotiable instrument goes, who receives it *bonâ fide*.

What is it now that makes the law? It is the code; it is the Act of Parliament, which is a code. And that code, as to this point, is in words which Lord Herschell and other noble lords in the House of Lords in *Vagliano's case* said were perfectly clear. This code was passed when Lord Herschell was a member of the House of Commons, and it has in it those words about "fictitious or non-existing persons." But he does not very clearly explain the difference between those two phrases. Still I have no doubt myself that a "fictitious" person is a person who purports to be the person to whom the instrument is drawn when really it is another person; and "non-existing" refers to where the instrument is drawn in the name of a person who does not exist at all. This case is within those words, and that is all that is wanted according to the House of Lords. I do not understand that the code was intended to make any new law. Therefore you may take it that it is declared in the code that that is the law, and I should say it always was the law.

The appeal must be dismissed, with costs.

LOPES, L.J.—The case of *Bank of England* v. *Vagliano* appears to me conclusively to decide this case. Mr. Tindal Atkinson, in the very ingenious argument which he addressed to the court, endeavoured to import a qualification into section 7 (3) of the Bills of Exchange Act, and that qualification was this: that the payee in the case of a cheque must be a non-existing or fictitious person to the knowledge of the drawer in order to bring the case within the enactment. That contention on the part of Mr. Atkinson appears to me to be contrary to the whole effect of the decision in *Vagliano's case*.

Mr. Tindal Atkinson endeavoured to draw a distinction between the acceptor of a bill of exchange and the drawer of a cheque. Practically I can see no distinction whatever—certainly no distinction so far as this section of the code is concerned. I do not think it necessary to give any definition of "fictitious or non-existing." A definition has been given in the House of Lords and that is a definition by which this court is bound.

I think, therefore, the plaintiffs cannot recover.

KAY, L.J.—I also, notwithstanding the very ingenious argument of Mr. Atkinson, believe this case is decided by the case of *Vagliano* v. *The Bank of England*. I understand the facts here to be these. According to the routine of the office a clerk laid before one of the Messrs. Clutton, in this case one of the plaintiffs, a cheque filled up, payable to George Brett or order, for a sum of money which appears on the face of the cheque. He did this a great many times, but I will take one cheque as an instance. Mr. Clutton signed that cheque and handed it back to the clerk for the purpose of the cheque being issued and used. He understood that was what was going to be done with the cheque. The clerk, it seems, had put in the name of George Brett, who was a fictitious person, in the sense that nobody was meant by that name. There may be plenty of George Brett's in the world, but no one was really intended by that name. It was a fictitious name. Then the clerk forged the indorsement on this cheque and took it to Messrs. Attenborough, who gave him value for it. Messrs. Attenborough were perfectly innocent, were quite unaware of the forgery or any irregularity whatever. They paid money on the cheque, and have, I understand, been paid by the bankers. Now Messrs. Clutton are suing Messrs. Attenborough to recover the money which they have paid on these cheques.

Now first of all, what was the cheque. By section 7 (3) of the Bills of Exchange Act it is enacted that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." This payee was a fictitious person, therefore the bill was in fact payable to bearer. Now, it has been argued that this was not so unless Mr. Clutton, when he signed the cheque, knew that George Brett was a fictitious person. That seems to me the very point which was decided in *Vagliano's case*. The majority of the learned lords who advised the House in that case said distinctly that the act does not impose any condition of knowledge on any person. It is a positive enactment that where the payee is a fictitious person, the cheque is payable to bearer; and to say that that means where he is fictitious to the knowledge of someone or other, is to impose a limitation which the Act does not contain. In saying this, I am paraphrasing in my own words what occurs again and again in the judgments in *Vagliano's case*. [His lordship, after citing passages from Lord Herschell's judgment in that case, proceeded:—] That is the case with regard to the acceptor of a bill. A cheque differs from other bills of exchange in this respect, that the banker on whom it is drawn does not write across it his acceptance, and, therefore, he does not make himself liable to the payee; and upon a cheque

the only person who is liable to the payee, if the banker does not cash it, is the drawer.

Therefore, although the drawer is not in terms the acceptor of the cheque, still for this purpose he is in the position of an acceptor; and every word in the judgments of the learned lords, relating to the meaning of the Act, seems to me to apply as closely to the position of the drawer of a cheque as it does to the position of an acceptor of a bill of exchange. If it is the case that an acceptor is liable, when the bill is in fact drawn in favour of a fictitious person, his knowledge being entirely immaterial, it seems to follow as an irresistible consequence that in the case of a cheque, if in fact a cheque is drawn in favour of a fictitious person, the knowledge of the drawer is just as immaterial as, in the other case, is the knowledge of the acceptor; and, therefore, I think on that point that *Vagliano's case* decides the contention raised by this case.

But then Mr. Atkinson, with the ingenuity one would expect from him, said, this cheque was never issued—it never was a cheque in favour of anybody, because it was never issued. Upon the facts as I have stated them, I cannot agree with him. Mr. Clutton signed it; he intended it to be a cheque for the amount which appeared on the face of it; and he gave it to his clerk to issue. He never saw the cheque again until it came back to him, after having been paid by his bankers. After that, to allow him to say as against an innocent holder for value, "I never issued this cheque," seems to me quite impossible. One cannot help looking at the enormous danger in which all people who take cheques and give value for them would be, if such a contention were to prevail. Messrs. Attenborough have a right to say, "This was a cheque which was signed, payable to bearer; the man who signed it intended it to be issued, and gave it to his clerk to issue; the clerk in truth forged the indorsement, but the indorsement was not necessary, because it was a cheque to bearer; it was handed to me for value; I am entirely innocent of any fraud connected with the matter, and I have a right to be paid." I see no answer to that claim on their part, and, therefore, I think the appeal fails.

Solicitor for the appellants, *H. S. Clutton.*

Solicitors for the respondent, *Stanley, Attenborough, & Tyer.*

From Q. B. Div.
(Lord Esher, M.R., and Lopes, and Kay, L.JJ.) Nov. 7.

Liles v. Terry. (*a*.)

Solicitor—Client—Gift to solicitor's wife—No independent advice—Presumption of undue influence.

In the case of an irrevocable gift by a client to a solicitor, or to the solicitor's wife, made without independent advice, it is an irrebuttable presumption of law that there was undue influence on the part of the solicitor.

Appeal from the judgment of Charles, J., in favour of the defendants at the trial of the action without a jury.

The plaintiff was an elderly spinster lady, and the defendants were a solicitor and his wife, the latter being the plaintiff's niece. The action was brought to set aside a deed made in October, 1892, whereby the plaintiff had assigned certain leasehold premises to the male defendant in trust for the plaintiff for life, and then to her sister for life (the sister was since deceased), with reversion to the female defendant for her own separate use and benefit absolutely. The defendant had acted as the plaintiff's solicitor in some litigation with regard to the premises in question, and the plaintiff told him that if he would make no charge for acting for her, she would leave the premises to her niece. The plaintiff alleged that she waited on the defendant for the purpose of executing her will. He produced a will which she signed. The will did not refer to the premises in question, and the plaintiff said that after she had signed the will the defendant produced another document, which was the deed now sought to be set aside. The defendant told the plaintiff that it was a separate deed dealing with the premises, and she thereupon executed it, but she stated in her evidence that she was not told, and did not know, that the deed was an irrevocable conveyance. The defendant, having become insane, was not called at the trial, but an independent person who witnessed the plaintiff's signature to both documents was called on behalf of the defence, and he stated that the defendant explained both the will and the deed to the plaintiff before she signed them.

Charles, J., held that there had been no undue influence by the defendants, and that the deed as executed carried out the plaintiff's then wishes. He gave judgment for the defendants.

The plaintiff appealed.

Attenborough, for the plaintiff.

Stephen Lynch, for the defendants.

The following authorities were referred to in the course of the arguments:—*Goddard* v. *Carlisle*, 9 Price, 169; *Tyars* v. *Alsop*, 37 W. R. 339, 61 L. T. N. S. 8; *Morgan* v. *Minett*, 25 W. R. 744, 6 Ch. D. 638; *Allcard* v. *Skinner*, 36 W. R. 251, 36 Ch. D. 145; *Huguenin* v. *Baseley*, 14 Ves. 273; *Hunter* v. *Atkins*, 3 My. & K. 113; *Rhodes* v. *Bate*, 14 W. R. 292, L. R. 1 Ch. App. 252; *Gibson* v. *Jeyes*, 6 Ves. 266; *Wright* v. *Proud*, 13 Ves. 136.

Lord Esher, M.R.—The question in this case is whether, by virtue of a definite rule of equity, the court is bound to set aside the deed of conveyance executed by the plaintiff. I am of opinion that the facts as found by Charles, J., represent the truth—that is to say that the deed carried out the intentions of the plaintiff; that the difference between a will which she could revoke and a deed which was irrevocable was explained to her, and that she understood the effect of what she was doing. Although this deed was not intended to benefit the defendant, and could not do so; although it was only intended to benefit the defendant's wife who was the plaintiff's niece, yet, as I understand the principle which has been established by the courts of equity, the fact that the defendant is a solicitor, and that the plaintiff had no independent advice, renders the gift void, and the defendant's wife must, therefore, lose all the benefits which the plaintiff had intended to confer upon her. The rule of equity is that in cases such as this the presumption of undue influence is a presumption of law, which cannot be met or refuted by any facts whatever. That is the rule which was laid down by Turner, L.J., in *Rhodes* v. *Bate*, and that learned judge is one of the best possible guides to follow where there is any question as to what is the principle of equity applicable to a case. I must add, however, that in my opinion the principle is an unfortunate one which may in some cases work injustice, but until the cases establishing the principle have been overruled it must stand. For these reasons the

(*a*.) Reported by F. O. Robinson, Esq., Barrister-at-Law.

deed of conveyance must be set aside, and the appeal will be allowed.

LOPES, L.J.—I agree; but with great diffidence I must differ from the opinion of the Master of the Rolls as to this rule being an unfortunate one. Although being a hard and fast rule it may sometimes produce hardships, the rule is nevertheless founded upon public policy, and in the generality of cases is highly beneficial. The authorities establish this principle, that a gift to a solicitor from a client while the relationship of solicitor and client still subsists, or while any influence from that relationship lasts, is invalid, unless the client has the benefit of some independent professional advice. It is no avail that the solicitor himself has thoroughly explained the matter to the client. The client must have independent advice. It is not necessary to go through in detail all the cases in which this principle has been laid down, but I will refer to *Rhodes* v. *Bate* as a valuable authority. In that case Turner, L.J., said: "I take it to be a well-established principle of this court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them." That establishes the principle which governs this case. Under these circumstances, it is not necessary for me to refer to the particular facts of this case, or to say whether I should myself have come to the same conclusion on these facts as Charles, J., has done, for I base my decision upon the inflexible rule of equity.

With regard to the other point, that this was not a gift to the solicitor himself, but to his wife, I do not think any valid distinction can be drawn from that fact. It is clear that, in the case of a gift to a solicitor's wife, the solicitor himself must derive some advantage.

KAY, L.J.—I am of the same opinion; and I entirely dissent from the view that the principle which governs this case is an unfortunate rule. It is, in my opinion, a most important rule of public policy. When one person is under the influence of another by reason of some relationship existing between them, that other person is not allowed to accept any benefit from a gift from the former, unless the donor, before making the gift, had some independent and competent professional advice. In *Wright* v. *Proud*, 13 Ves. 136, Lord Erskine said: "Independent of all fraud, an attorney shall not take a gift from his client while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature." Then, in *Hatch* v. *Hatch*, 9 Ves. 292, Lord Eldon deals with the subject in these words: "This case proves the wisdom of the court in saying that it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty for the execution of an antecedent duty." It is to be observed that there is a slight difference between these two *dicta*, because Lord Eldon uses the expression that it is "almost impossible" for the transaction to stand. But I think that difference is explained by Turner, L.J., in *Rhodes* v. *Bate*, where he says that, in cases of gifts of a very trifling nature, the court will not interfere; but he laid it down distinctly that, where the relationship exists, the gift is invalid. For my part, I cannot conceive a wiser rule, or one more calculated to produce in the long run more justice and equity between the parties, and the rule applies especially to cases of solicitor and client. A solicitor is bound to tell his client that he cannot accept a gift from him unless the client has independent advice. That is all the solicitor has to do, and if he will not do that, the gift cannot be supported.

In this case the gift is not to the solicitor, but to his wife. That fact, however, makes no difference as to the application of the principle. As long ago as 1821, Richards, C.B., laid down, in *Goddard* v. *Carlisle*, that "there is no difference in principle between a gift of this sort to a man's wife and a gift immediately to himself, if the gift to the wife be effected by undue means on the part of the husband." The basis of the rule is the impossibility of rebutting undue influence if the transaction does not take place under independent advice; and, looking at the rule and the reason for it, it is obvious that it applies just, or nearly, as strongly, where the gift is not to the party himself, but to his wife.

With regard to the evidence in this case, I do not take the same view as the Master of the Rolls and Charles, J. [His lordship went through the evidence, and said that he came to the conclusion that the plaintiff had not known that she was executing an irrevocable deed.] I do not, however, base my decision in the slightest degree on the particular facts of this case. Even if the plaintiff had known exactly the effect of the deed, the principle of equity still assumes that she was acting under undue influence. For these reasons I am of opinion that this appeal must be allowed.

Appeal allowed.

Solicitor for the plaintiff, *J. Attenborough.*

Solicitors for the defendant, *Wilson & Sons.*

From Chan. Div. (A. L. Smith and Rigby, L.JJ.) Nov. 11, 20.

THE ALCOY AND GANDIA RAILWAY AND HARBOUR CO. (LIMITED) v. GREENHILL.

GREENHILL v. THE ALCOY, &c., CO.

THE TRUSTEES, EXECUTORS, AND SECURITIES INSURANCE CORPORATION (LIMITED) v. THE ALCOY &c., CO. (*a*.)

Practice — Pleadings — Counter-claim — Defendant to counter-claim not party to original action—Right to counter-claim against plaintiff—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-section* 3—*R. S. C.*, 1883, *ord.* 19, *r.* 3; *ord.* 21, *rr.* 11, 14.

A defendant to a counter-claim, not being a party to the original action, but brought in by the original defendant on his counter-claim, is not entitled to counter-claim against the original defendant and plaintiff.

Street *v.* Gover, 25 *W. R.* 750, 2 *Q. B. D.* 498, *followed.*

Toke *v.* Andrews, 30 *W. R.* 659, 8 *Q. B. D.* 428, *distinguished.*

The Alcoy Co. was incorporated in August, 1889, under the Companies Act, 1862, for the purpose of acquiring certain concessions of the Spanish Government for the construction and working of a railway from Alcoy to Gandia, in Spain, and of a harbour at Gandia.

In August, 1893, the company commenced an action against Thomas Arthur Greenhill and others, on a contract entered into between the defendants

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

and the company, for the construction of the railway and harbour.

The defendants delivered their defence, together with a counter-claim against the company, and also against the Trustees, &c., Corporation, in respect of a guarantee, the corporation being added by the defence as parties to the defendants' counter-claim.

The corporation subsequently delivered their defence to the defendants' counter-claim, and also counter-claimed against the plaintiff company.

Ord. 21, r. 14, is as follows:—"Any person named in a defence as a party to a counter-claim thereby made, may deliver a reply within the time within which he might deliver a defence if it were a statement of claim."

On the 22nd of July, 1895, the plaintiff company applied to Stirling, J., in chambers, for an order that the counter-claim of the Trustees, &c., Corporation should be struck out.

Stirling, J., following *Street* v. *Gover*, 25 W. R. 750, 2 Q. B. D. 498, made the order asked for.

The Trustees, &c., Corporation appealed.

Macnaghten, for the appellants.—By virtue of the Judicature Act, 1873, s. 24, sub-section 3, the court clearly has power to allow this counter-claim. Further, it is permissible under ord. 21, r. 14, the counter-claim being in the nature of a reply, and for this purpose the two words being interchangeable. I also rely on *Toke* v. *Andrews*, 30 W. R. 659, 8 Q. B. D. 428; *Beddall* v. *Maitland*, 29 W. R. 484, 17 Ch. D. 174.

Mulligan, for the plaintiff company.—I submit Stirling, J., was quite right in following *Street* v. *Gover*. It would be a strong measure now to depart from the practice which has obtained universally in all the divisions of the High Court for many years. No machinery has been provided by the orders or rules to meet such a case as this.

He referred to *McGowan* v. *Middleton*, 31 W. R. 835, 11 Q. B. D. 464; *Eden* v. *The Weardale Iron Co.*, 33 W. R. 241, 28 Ch. D. 333.

R. J. Parker, for the defendants.

Macnaghten replied.

Cur. adv. vult.

Nov. 20.—A. L. SMITH, L.J.—The question is whether a point of practice decided by Mellor and Lush, JJ., in the case of *Street* v. *Gover* in the year 1877 upon the orders and rules of 1875 (ord. 22, r. 8), which is identical with ord. 21, r. 14, in the orders and rules of 1883 now in force, is to be followed or not. Stirling, J., followed it, but gave leave to appeal.

It is argued that the decision of Mellor and Lush, JJ., is wrong, and that the practice during the last eighteen years has been wrong, and that this court should now reverse the case decided in 1877 and alter the practice.

I should be extremely loth to do anything of the kind, and unless fully convinced that that decision was wrong I most certainly should refuse to do so, more especially as since that decision the old order and rule of 1875, upon which it was given, have been replaced by the orders and rules of 1883, which have subsequently been often altered and amended, and yet the old order and rule of 1875, with knowledge of that decision upon it, was re-enacted in 1883 and remains still untouched. This shows that no inconvenience has been felt in practice in adopting the construction of the rule as laid down by Mellor and Lush, JJ., in the year 1877. The question is this, whether, when a defendant to an action brings in another person in order to counter-claim against him and the plaintiff, which he can do by virtue of section 24, sub-section 3, of the Judicature Act, 1873, and ord. 21, r. 11, that other person is entitled, under rule 14 of order 21, not only to defend himself against such counter-claim of the defendant, but also to raise a counter-claim against the defendant and the plaintiff. Ord. 21, r. 14, is as follows. [His lordship read the rule, and continued:—] Mellor and Lush, JJ., held that the word "reply" in this rule did not embrace a counter-claim, and so the practice has been since 1877. I would point out the result if the person brought in by a defendant can counter-claim as is now suggested. He was no party to the plaintiff's action. The plaintiff wanted nothing out of him. All the plaintiff wanted was something out of the defendant. But it is the defendant who alleges that he wants something out of the plaintiff and the person brought in, in order that he, the defendant, may obtain relief for himself; and it is argued that the person so brought in, can counter-claim against the original plaintiff so that the plaintiff is driven to a contest with that person, although the plaintiff has no claim whatever against him, and has never litigated and does not desire to enter into litigation with him at all.

It strikes me as odd that the rules should allow this; but it is said that they do, and that Field and Huddleston, JJ., in the case of *Toke* v. *Andrews* in the year 1882 in reality so held, and that their judgment is preferable to that of Mellor and Lush, JJ. In my opinion Field and Huddleston, JJ., did not decide what it is now said that they did. In the first place they had not to decide upon the construction of ord. 22, r. 8, of the Rules of 1875. What they decided was that where a plaintiff sued a defendant, and the defendant counter-claimed against the plaintiff, the plaintiff could counter-claim against the counter-claim of the defendant for a cause of action which accrued to the plaintiff after the issue of the writ. That is all those learned judges decided. It will be seen that this is a decision that an original plaintiff can counter-claim against the counter-claim of an original defendant and for a cause of action which accrued after the issue of the writ, but it is no decision that a person brought in by a defendant can counter-claim against an original plaintiff. It is true that Field, J., points out that Lush, J., in *Street* v. *Gover*, had doubts as to whether he was placing the correct construction upon the word "reply" in ord. 22, r. 8; but he and Mellor, J., did, nevertheless, expressly hold that the word "reply" did not include a counter-claim, and so it has remained until the present time.

In my judgment, if this construction of the rule is to be altered, such alteration must be brought about by the Rule Committee by adding thereto the word "counter-claim" after the word "reply"; but whether it would think right to do so, I much doubt, seeing, as was pointed out by Mellor and Lush, JJ., that it would produce such a complexity as would render an action untriable.

I should notice that this ord. 21, r. 14, applies to actions both in the Chancery and Common Law Divisions. If it would produce no complexity in the Chancery Division as it is said it would not, well and good; but the same construction must be placed upon the rule whether it is being applied to a Chancery or a common law action—and if, as I have no doubt, in a common law action, the complexity pointed out would arise, I prefer the construction placed upon the rule by Mellor and Lush, JJ., and not the one contended for—viz., that the word "reply" as used in the rule embraces a counter-claim.

In the case of *Eden* v. *The Weardale Iron Co.*, in which a third party was brought in by a defendant under ord. 16, r. 48, in order that the defendant

might obtain indemnity or contribution from him, it was argued that such third party could file a counter-claim against the original plaintiff, but this court held that he could not, and Bowen and Fry, L.JJ., pointed out the inconveniences which would arise if this were allowed, and similar inconveniences would, as it appears to me, arise in the present case if the application were allowed.

For these reasons I am of opinion that the appeal must be dismissed, and with costs in any event.

RIGBY, L.J.—I have arrived at the same conclusion. Whether, if the case of *Street* v. *Gover* had come before me in the first instance I should have been impressed by the reasons there given and have arrived at the same conclusion, I very much doubt. But from the first I have been strongly impressed with the great inconvenience of attempting to interfere now with a rule as to procedure laid down so long ago as 1877, and my only hesitation has arisen from a doubt which I entertained for a short time, whether *Toke* v. *Andrews* really had not in substance laid down a law not to be reconciled with *Street* v. *Gover*. But after looking into the case, and the judgment of the Divisional Court as delivered by Field, J., I see that they did not intend to overrule, and they carefully avoided overruling, *Street* v. *Gover*. To a certain extent, seeing that the learned judges in *Toke* v. *Andrews* may, like myself, have had some doubt about the original correctness or necessity of the decision in *Street* v. *Gover*, and seeing that they would not act upon that doubt, I think we ought not to do so. But in conclusion, without hesitation, now after consideration, I agree with what has been said as to the inconvenience of attempting to interfere with that decision.

Appeal dismissed.

Solicitors for the corporation, *Slaughter & May.*

Solicitors for the plaintiff company, *Ashurst, Morris, Crisp, & Co.*

Solicitors for the defendants, *Batten, Proffitt, & Scott.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) July 30, 31; Aug. 1, 1895.

In re ENGLAND.

STEWARD *v.* ENGLAND. (*a*.)

Limitations, Statute of—Money charged on land—Devise of lands charged to tenant for life of charge under a settlement—Presumption of payment of interest by devisee in fee—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

A testator, having covenanted to pay within twelve months of his death to the trustees of his son's marriage settlement a sum of money, and having charged certain real estate with payment of the same and interest, devised the estate, subject to the charge, to his son in fee. The son was tenant for life under the settlement, and entered into possession of the estate on the death of his father, and received the rents and profits for more than twelve years. The money had never been raised, nor had any interest ever been paid in fact.

Held, that there had been no payment of interest so as to prevent the Statute of Limitations running in favour of the personal estate.

Decision of Kekewich, J. (43 W. R. 491), *affirmed.*

Appeal by the plaintiff (a trustee of a settlement made by the testator W. England on the 20th of September, 1870) from a decision of Kekewich, J. (reported 43 W. R. 491), where the facts are set out, as also in the judgment of Lindley, L.J., so far as they are material.

Kekewich, J., held that the claim—in respect of a sum of £4,000 which the testator by the settlement of 1870 had covenanted to pay to the trustees within twelve months after his decease, and had thereby also charged upon certain real estate—was barred as against the personal estate, by the Statutes of Limitations.

Ingpen and *L. S. Bristowe*, for the appellant.—The question arises under the statute 3 & 4 Will. 4, c. 42, s. 3, and there is a conflict between the two decisions of *Roddam* v. *Morley*, 5 W. R. 510, 1 De G. & J. 1, and *Coope* v. *Cresswell*, 14 W. R. 568, L. R. 2 Eq. 106, and on appeal, 15 W. R. 242, L. R. 2 Ch. App. 112. The tendency has been to follow *Roddam* v. *Morley*. *Dickenson* v. *Teasdale*, 1 De G. J. & S. 52, 11 W. R. Ch. Dig. 55, though rather like the present case, was a decision on a different statute, 3 & 4 Will. 4, c. 27; the decision really was whether a charge of debts could be created into a trust for the benefit of creditors. The next cases are *Peare* v. *Laing*, 19 W. R. 653, L. R. 12 Eq. 41, *In re Hollingshead*, *Hollingshead* v. *Webster*, 36 W. R. 660, 37 Ch. D. 651, *In re Frisby*, *Allison* v. *Frisby*, 38 W. R. 65, 43 Ch. D. 106; the latter case turned on the Act of 1874, which was a re-enactment of 3 & 4 Will. 4, c. 27, and decided that although a mortgagor might be statute-barred, the surety was not barred. A payment by a person who is liable to pay, and who can be sued on the covenant, as here, is sufficient to prevent the statute running.

They also referred to *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511, and *Dibb* v. *Walker*, 41 W. R. 427, [1893] 2 Ch. 429. [LINDLEY, L.J., referred to *Forsyth* v. *Bristowe*, 1 W. R. 356, 8 Ex. 716, and *Barclay* v. *Owen*, 60 L. T. N. S. 220, 37 W. R. Dig. 111.]

Warmington, *Q.C.*, and *Badcock*, for the respondents the residuary legatees.—This case is a case under 3 & 4 Will. 4, c. 27, and the reason why *Sutton* v. *Sutton* was fought in this court was to decide whether twenty years or twelve years was the requisite time. In *Fordham* v. *Wallis*, 1 W. R. 118, 10 Hare 217, the principle of the old common law rule of joint contractors is applied by the Vice-Chancellor at p. 226.

They referred to Shelford's Real Property Statutes, 9th ed., p. 176, and followed *In re Morley*, *Morley* v. *Saunders*, 17 W. R. 959, L. R. 8 Eq. 594; *Burrell* v. *Earl of Egremont*, 7 Beav. 205; *Cockburn* v. *Edwards*, 30 W. R. 446, 18 Ch. D. 449; and *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539.

Ingpen, in reply.—Your lordships must presume payment as a fact, with its natural consequences. If the time has not run out as against Captain England, it cannot have run out as against those who are jointly liable with him. *Coope* v. *Cresswell* was an action on covenant against the devisee, and *Roddam* v. *Morley* and the other cases which follow it apply equally to the Act of 1874 as to the earlier Acts.

He referred to *In re Powers*, *Lindsell* v. *Phillips*, 30 Ch. D. 291, 34 W. R. Dig. 108; *Lord Kensington* v. *Bouverie*, 3 W. R. 469, 7 De G. M. & G. 134, and to Eddis on the Administration of Assets, p. 59.

LINDLEY, L.J.—This case is a little peculiar, and involves a point that, so far as I know, has never actually arisen before, and is not governed by any of the numerous authorities to which our attention has been directed.

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

The appeal is against a declaration made by Kekewich, J., by which he declared that "no part of the residuary personal estate of the testator, William England, is liable for the said sum of £4,000 by the said indenture of settlement covenanted to be paid by the said testator or any part thereof, or to make good any deficiency in respect of the said charge of £4,000 in case the said estates are of insufficient security for the same." On the 20th of September, 1870, the testator made a settlement by which he covenanted to pay £4,000 twelve months after his death. The person entitled to sue upon that covenant is a Mr. Steward, who is the trustee of the settlement. By the same settlement certain estates belonging to the settlor and the testator were charged with the payment of that £4,000. Now the settlor died in June, 1871, leaving a will by which he devised the estate so charged with that £4,000 to Captain England in fee, and Captain England was himself the tenant for life, or the beneficiary entitled to the interest on that £4,000 for his life; after that the beneficial interest went to his wife. The residue of the testator's estate was devised to executors, upon trust to sell, and to pay the residue to his daughters and their children. The executors were Captain England and a gentleman of the name of Fraser.

The position of affairs is this. After the testator's death there was clearly a right to sue upon that covenant for the £4,000, a right on behalf of the trustee, as it were, to sue the executors twelve months after the testator's death. When that sum became payable there was a right on the part of the same trustee to take proceedings to have that charge raised out of the real estate — that is obvious. Captain England, the devisee of the estate so charged, was liable not to pay the charge, but was liable, under the statutes, to the amount of the value of the estate, to pay it; the statutes being the Statute of William and Mary, or the Statute of Will. 4 which has replaced that. It is important to observe that under these statutes he is liable to account for the value of the estate, and I do not know if it has been decided whether the value of the estate is to be taken when proceedings are brought or at the death of the testator; but it would seem wrong that the value at the death should be the proper value, if the payment is not enforced for long afterwards. But he is not liable to pay the money, but to account for the assets.

What took place was this. He naturally entered into possession of these estates devised to him in fee, and inasmuch as he was beneficially entitled to the interest of the £4,000 charged on that estate, no payment would be made by him to the trustee of the interest on that £4,000; and of course, if he had paid it, it would have come back to him in the shape of a return to him of the cheque he payed. He is entitled to the money, to the interest; and what is important to bear in mind is this, that by no procedure could he be made to pay the interest on that sum. He was entitled to receive it himself, and neither he nor his executors could ever be compelled to pay one farthing. If anybody else had a beneficial interest in it, of course he would be liable, but there was nobody else with a beneficial interest in the interest, and he was not liable to pay it. As regards the capital, he being only tenant for life, the estate of course was liable, and he was liable under the statute to the value of the estate.

For more than twelve years nothing has been done, and now three summonses have been taken out which have been consolidated, and it has been ascertained, or at all events it is apprehended, that the estate on which this £4,000 is charged is not, or may not be, sufficient to raise that sum, and the question, therefore, arises whether the personal estate of the testator, and settlor, and covenantor, is or is not liable to pay that £4,000. Kekewich, J., has held that it is not, and hence the appeal to us.

In the first place, what is the statute, if any, applicable to the case? We must try it in this way:— Suppose that the action were brought by the trustee, Mr. Steward, against the legal personal representative of the covenantor; he would plead the statute. Now what are the governing statutes? There are two possible statutes—viz., the unrepealed statute of Will. IV. c. 42, and the statute of 1874, 37 & 38 Vict. c, 57, which amended the third and fourth of Will. IV. c. 27, and the point as to which statute is applicable appears to me to be decided by the case of *Sutton* v. *Sutton*. That case determines, whatever else it determines, that section 8 of the Act of 1874 applies, which is in these words, "No action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent." The case of *Sutton* v. *Sutton* determines that when any action, suit, or other proceeding is brought not only to recover any sum of money out of land, but is brought against the legal personal representative of the covenantor whether the covenant is contained in a deed, or, as in the case before Fry, J., in collateral documents, in such case the governing statute is 37 & 38 Vict. c. 57, s. 8, and to that and that alone we must have recourse.

Now let us read section 8. [His lordship read the section, and continued:—] Now, what we have to ask ourselves is, Has there been any part payment of the principal money or of the interest, or any acknowledgment given in writing "by the person by whom the same shall have been payable or his agent to the person entitled thereto or his agent"? That is a question of fact, and admits of but one answer—"No; there has been no payment in fact and no acknowledgment in fact." As regards the principal sum, it is not contended that there has been; but then it is said that, although there has been no payment of interest in fact, that there has been that which is equivalent to a payment, and it is put in this way. It is said that Captain England, having been devisee of the estate and also tenant for life of the charge upon it, must be treated to have paid himself—that is to say, to have paid the trustee and got the money back again. One must be careful before one substitutes what I would call a fiction for a fact. If an action were brought, I apprehend the statute would be relied upon as a defence, and there having been no payment in fact — no acknowledgment in writing—there would be a complete defence. Now let us see what the suggested answer to that difficulty is, and how it is to be got over. Captain England was never liable to pay one farthing of this interest. That is the cardinal point to keep one's mind on. He was entitled to interest, but was not liable himself. He never was liable, and, therefore, a constructive or fictitious payment of interest to himself is not sufficient, for there was no payment of interest by any person liable. The whole thing is a fiction.

That really seems to me to get rid of the whole of these cases, because, although I quite concede this, that if proceedings had been taken against Captain England to raise this £4,000 out of the land, he could not have set up the statute, because he had been enjoying all the devise and all the charge, yet it does not at all follow that because he is open to that personal objection that the same objection can be made available against other persons, and there is

not a single case in the books which goes the length of saying that it can. There are cases which go to show or tend to show this, that, if he had to pay interest, that interest might avail against the legal personal representative. *In re Frisby* is most important in that respect; but in that case the person who paid interest was a person, in fact, liable to pay interest; and in this case there has been no payment, in fact, of a shilling of interest, and no person liable to pay a shilling; that is the peculiarity of this case.

Now, bearing that in mind, it appears to me we may make a clean sweep of all the cases that have been referred to. There is not one of them applicable, it appears to me, under the circumstances of this case.

I think, therefore, that the appeal ought to be dismissed.

LOPES, L.J.—I do not propose to follow the points that have been taken in the judgment of Lindley, L.J. I am satisfied to say that I found my decision upon this. That there has been no payment of interest in this case by anybody liable to pay. Captain England was not liable to pay a penny. He was tenant for life of this charge, and devisee in fee simple of the lands, and he was entitled to put every halfpenny of this interest into his pocket. That, to my mind, would be a complete answer to the case, and I think the learned judge was perfectly right in the court below when he held that the statute was a bar against the personal estate.

RIGBY, L.J.—I am of the same opinion, and I will add nothing, except as to the liability of Captain England to pay interest. The statute of fraudulent devises places devisees in the same position as the heir-at-law, but under that statute—I do not quite remember whether, by express words or by judicial decision—it has been held that the heir-at-law cannot be made accountable for any interest that is received by him before the issue of the writ. If he takes it and puts it into his pocket, it belongs to him absolutely and entirely, and as devisees are placed on exactly the same footing with the heir-at-law, there is no power to recover from them. That interest would be left out of the account altogether; they would be chargeable only up to the value of the land; and for the interest which they had received before the issuing of the writ, they would not be liable at all. It is plain, therefore, to me, that Captain England never was liable, and, giving full effect to all the decisions, including that in *In re Frisby*, there has been no payment within the meaning of section 8 of the Act of 1874. Section 8 of the Act of 1874 has been decided by this court to be the section which applies in such a matter. I have not the slightest doubt that that was absolutely in accordance with the plain provisions of the Act, when they are looked into. In any event, of course, we could not consider whether it was right or wrong. We accept it, and for my part I accept it with full conviction that it was absolutely right.

Appeal dismissed.

Solicitors for the appellant, *Rhodes & Son.*

Solicitors for the respondent, *S. W. Johnson & Son.*

App. Bankruptcy.
(Lord Esher, M.R., and Lopes and Kay, L.JJ.)

Nov. 15.

In re GALLARD.
Ex parte GALLARD. (*a*.)

Bankruptcy—Costs—Taxation of trustee's costs—Member of committee of inspection employed as solicitor—Profit derived from transaction arising out of the bankruptcy—Sanction of the court—Bankruptcy Rules, 1886, *r.* 317.

By rule 317 *of the Bankruptcy Rules*, 1886, *it is provided that "no member of a committee of inspection of an estate shall, except under and with the sanction of the court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the bankruptcy, or to receive out of the estate any payment for services rendered by him in connection with the administration of the estate, or for any goods supplied by him to the trustee for or on account of the estate."*

Held, that such "sanction of the court" must be given before the transaction from which the profit is to be derived is undertaken, and cannot be given after the profit is derived.

Held also, that the "profit" derived by a solicitor is the amount of his costs less disbursements out of pocket, and no allowance can be made in respect of office expenses.

Per Lord Esher, M.R.—*It is not a proper practice for a solicitor to accept a retainer from a committee of inspection, one of whom is a clerk to his firm, to act as solicitor to the trustee in bankruptcy; and if a solicitor is so retained, the court, on application, ought to set aside such retainer.*

This was an appeal by one of the creditors in the bankruptcy of G. Gallard from a decision of Vaughan Williams, J.

In 1887 a receiving order was made against G. Gallard, and on the 6th of October, 1887, James Harris was appointed trustee in the bankruptcy by the creditors, with a committee of inspection. This committee consisted of, among others, H. M. Williams, a member of Williams & Cooper a firm of solicitors in Brighton, and E. F. Hunt, clerk to Ashurst, Morris, Crisp, & Co., solicitors in London.

It then became necessary to appoint a solicitor to the trustee, and, at the request of the committee of inspection, Messrs. Ashurst, Morris, Crisp, & Co. consented to act in that capacity.

In the course of the administration of the bankrupt's estate, it was found necessary to do certain work at Brighton, and thereupon Ashurst, Morris, Crisp, & Co. appointed H. M. Williams to act as their agent in that town and do the necessary work.

Williams carried out the work, and then sent in to Ashurst, Morris, Crisp, & Co. an agency bill of costs for £139, which they paid him. Amongst other items, the trustee claimed to have this sum of £139 reimbursed to him out of the estate.

On the bill coming before the taxing master, he disallowed the whole of it except actual out-of-pocket expenses. Thereupon the trustee appealed to the judge, Vaughan Williams, J., who ordered the certificate of the taxing master to be varied by allowing, in addition to the out-of-pocket expenses, a farther sum of £75 as representing a due proportion of office expenses, and out of the whole bill he only disallowed the sum of £40, which he took to be the actual profits made during the transaction.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

From this order Harriet Gallard, one of the creditors in the bankruptcy, now appealed.

By rule 317 of the Bankruptcy Rules, 1886, it is provided that "No member of a committee of inspection of an estate shall, except under and with the sanction of the court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the bankruptcy, or to receive out of the estate any payment for services rendered by him in connection with the administration of the estate, or for any goods supplied by him to the trustee for or on account of the estate. If it appears to the Board of Trade that any profit or payment has been made contrary to the provisions of this rule, they may disallow such payment or recover such profit, as the case may be, on the audit of the trustee's account."

Cooper Willis, Q.C., and *Æneas Mackintosh*, for the appellant.—The whole of the profits on the bill should be struck out, and no allowance made towards office expenses.

H. Reid, Q.C., and *Muir Mackenzie*, for the trustee.

Lord ESHER, M.R.—I, think notwithstanding the great experience, knowledge, and talent of the learned judge of the court below, that in this case he has done two things with which I for one cannot agree. The sanction of the court mentioned in rule 317 was not obtained. The learned judge has said when the case came before him after the whole transaction was closed, that he could then give the sanction of the court. I am of opinion that upon the true construction of the rule 317 he could not do it then, but that the sanction must be given before the things are done which are in question. The words of the rule are "except under and with the sanction of the court." Now if these particular moneys in question are profits at all, they are not profits which were earned under the sanction of the court. I think, therefore, that from beginning to end this must be taken to have been done without the sanction of the court, and the learned judge could not give that sanction on the hearing.

Then the second point is this. The rule says that no member of a committee of inspection shall directly or indirectly derive any profit. Now this applies to Mr. Williams. Messrs. Ashurst & Co., in my opinion, made a mistake in employing Mr. Williams.

The learned judge has, and I have not the least doubt perfectly rightly, held that they never intended to do anything wrong, and I will take that as being so. Therefore there is no blemish whatever upon their personal character or honour. But they have made a mistake in employing Mr. Williams to act for them whilst he was a member of the committee of inspection, without having previously obtained the sanction of the court to do so. Now comes the question whether Mr. Williams can be paid by Messrs. Ashurst & Co., or by anybody, more than his disbursements out of pocket. Can he make any profit? The learned judge held, and I think rightly, that he could not make any profit. But Mr. Williams after having been paid all disbursements and also the rest of his charges in his bill of costs, says that those charges are not all profit. It is said he keeps an expensive office with many clerks, and that a proportionate part of such expense must be deducted, and that what remains is the only profit he makes. In my opinion that is a most dangerous view to take. I think that a solicitor's profits are what he gets on his bill of costs beyond his disbursements out of pocket. Those are his profits. Therefore, what ought to have been taken off here, in the case of Mr. Williams, was not the £40, but it was the £40 and the £75. Therefore, what the master did in taxing those costs was right. We think, therefore, that this appeal must be allowed.

I wish to say that this case seems to me to raise even a larger question than that which has been brought before us. Messrs. Ashurst & Co. (I say again, without any wrong intention), did accept a retainer from a committee of inspection, one member of which was their own clerk. In my opinion that is not good practice, and I think they made a mistake in doing so. I think if one of their own clerks was on the committee of inspection they at least ought to have got the sanction of the court before they accepted the retainer at all. In my opinion, if a solicitor accepts a retainer when a member of the committee of inspection is in the same relation to him as one of the committee here was, and an application be made to the Court of Bankruptcy immediately to set aside that retainer and disallow it, the inherent power of the court ought to be exercised in setting it aside.

LOPES, L.J.—I am of the same opinion. The true construction of rule 317 is a matter of importance. I understand that rule to mean that the sanction of the court must be obtained before the work in question is done, and that it cannot be obtained afterwards. The sanction of the court is a condition precedent to the right to do the work. In this case Messrs. Ashurst & Co. employed Mr. Williams, an independent solicitor, as their agent, and we are told that he had special knowledge of the matters in respect of which he was engaged. That is where Messrs. Ashurst & Co. made a mistake (I am confident it was only a mistake), for they employed Mr. Williams while he was a member of the committee of inspection without the sanction of the court. Rule 317 would, therefore, apply, and Mr. Williams, under the exigencies of that rule, would not be entitled to derive any profit from any transactions arising out of the bankruptcy. All his out-of-pocket disbursements have been paid.

Then the question arose whether he was entitled to have a further sum of £115, which he claimed. On that point the learned judge came to the conclusion that he was entitled to the whole of that sum except £40. He thought that £40 represented the profit arising out of the transaction, and he attributed the rest, £75, to a proportionate part of the outgoings connected with the office at Brighton. I have very great difficulty in seeing how he arrived at that conclusion. As far as I can see, the outgoings of the office were in noways increased by anything that was done in connection with this bankruptcy, and it cannot possibly be said that he would be entitled to deduct anything for outgoings of the office. All that he really was entitled to was his out-of-pocket expenses. Everything else must be regarded as profit.

In the result, therefore, I come to the conclusion that the learned judge was wrong in only deducting the £40. I think he ought to have deducted the £40, plus the £75. This appeal, therefore, must be allowed.

KAY, L.J.—The duties of a committee of inspection in bankruptcy are obvious. They have to watch the administration of that bankruptcy, and to control, to any extent they think right, what is done by the trustee in bankruptcy, by the solicitor, or anyone else concerned in administering the estate.

Rule 317 provides absolutely that no member of the committee shall, except under and with the sanction of the court, derive any profit from any transaction arising out of the bankruptcy. The

words are very clear. He is not to derive any profit "except under and with the sanction of the court." That must mean at the time when the profit is derived or made. To say that the court can, afterwards, when the work has been done, say: "We sanction what has been done, although you did not choose to ask the court for its sanction beforehand," seems to me entirely contrary to both the letter and spirit of the rule. The sanction of the court ought to be obtained before the person who requires that sanction does any work which would, if it were paid for, be profitable to him. Mr. Williams, who is a member of this committee, did not apply for that sanction beforehand. He was a solicitor, and Messrs. Ashurst & Co., being employed as the solicitors for the trustee, arranged with him that he should act as their agent at Brighton, and he has been paid for acting as such agent.

Then comes the other question that arises in this case. That Mr. Williams should receive any profit at all is entirely contrary to the rule. He put himself in a position in which his duty to keep down the expenses of the administration within reasonable limits was entirely in conflict with his interest, which was to raise the expenses so as to make his profits, as agent, as large as he could. That is the very mischief which this rule was intended to prevent.

It is said that what the learned judge has done is not to allow Mr. Williams any profit. Now, how is that? All his disbursements out of pocket, have been allowed, but it is said that the rest of his charges are not all profits, because he has a large office at Brighton and employs many clerks; and in making up his yearly profits he is accustomed to attribute to each piece of work done in the office a certain proportion of those office expenses, and only the remainder is profit. Therefore he asks, in this case, that a proper proportion of those office expenses should be attributed to the sum that he received from the trustee, and that only the balance should be treated as profit. This is the first time I ever heard it argued that the profit cost of a solicitor should be ascertained in that way.

The object of rule 317, as I have already pointed out, is to prevent a member of the committee of inspection being placed in a position in which his interest and his duty would conflict. He would be paying part of his office expenses which would be just the same whether he did this business or not, out of what are ordinarily called profit costs, and to that extent, therefore, his interest would be in direct conflict with his duty, which is to keep down the costs as much as he can.

I think this case comes entirely within the mischief of the rule as regards those costs which the learned judge has allowed. They were "profit," and I think the judge has no discretion under the rule to allow them. The rule is imperative, and ought to be supported in its entirety. The £75 which the learned judge has allowed was, with deference to him, I think, improperly allowed, and ought to be struck out from the allowance made to the trustee in bankruptcy, who has paid that sum to Mr. Williams.

Appeal allowed.

Solicitors, *H. Sowton*, for *J. C. Buckwell*, Brighton; *Ashurst, Morris, Crisp, & Co.*

High Court of Justice.

Chan. Div. }
Chitty, J. } Nov. 29.

VAWDREY *v.* SIMPSON. (*a.*)

Partnership—Arbitration clause—Action for dissolution—Application to stay — Jurisdiction — Arbitration Act, 1889 (52 *& 53 Vict. c.* 49), *s.* 4.

Where articles of partnership contain an arbitration clause providing in effect for the reference of all matters in difference between the parties, such a clause covers a claim for dissolution of the partnership, and the arbitrators can, if they think fit, award a dissolution.

Where, therefore, in such a case, an action is brought by one of the partners for dissolution of the partnership, the judge may, in the exercise of his judicial discretion, order a stay under section 4 *of the Arbitration Act*, 1889.

Walmsley *v.* White, 40 *W. R.* 675, *followed.*

Motion.

This was a motion on behalf of the defendant, that all matters in difference in the above action, which was for dissolution of the partnership between the plaintiff and defendant, as surgeons and physicians, might be referred to arbitration, pursuant to the Arbitration Act, 1889, and in accordance with the partnership agreement.

By such agreement the partnership was to run as from July, 1892, during the joint lives of the partners, unless previously determined under the provisions thereof, and it was provided that if any dispute, misconception or misconstruction should arise between the partners touching the terms, stipulations, and conditions of the agreement, or the construction thereof, or any matters in any way connected with the agreement, or the operation thereof, or the rights, duties, or liabilities of either partner in connection therewith, the matters in difference should be referred to arbitration under the provisions of the Arbitration Act, 1889.

It was alleged that the defendant had absented himself from his practice for long periods at a time, had engaged assistants without the plaintiff's assent, and had in divers other ways acted in breach of the partnership articles, and contrary to the proper conduct of the professional business of the partnership.

Butcher, for the applicant.—This is a proper case for the court in the exercise of its discretion to order a stay of proceedings under section 4 of the Arbitration Act, 1889, notwithstanding that the action is for dissolution of the partnership: *Walmsley* v. *White*, 40 W. R. 675; *Russell* v. *Russell*, 14 Ch. D. 471, 28 W. R. Dig. 154.

Macaskie, for the plaintiff.—Arbitrators have no power to award a dissolution. At any rate the court is the proper tribunal for the purpose: *Joplin* v. *Postlethwaite*, 61 L. T. N. S. 629, 38 W. R. Dig. 10; *Turnell* v. *Sanderson*, 64 L. T. N. S. 654, 39 W. R. Dig. 145.

Butcher, replied. The case of *Belfield* v. *Bourne*, 42 W. R. 189, [1894] 1 Ch. 521, and p. 163 of the Ann. Practice for 1896 were also referred to.

CHITTY, J.—*Walmesley* v. *White* has settled the question whether arbitrators can award a dissolution of partnership. In that case, which was an action for dissolution, the judge ordered a stay under section 4 of the Arbitration Act, 1889, and the Court of Appeal declined to alter his order. I, therefore,

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

regard it as unnecessary to travel back over earlier authorities. In *Joplin* v. *Postlethwaite*, the judge having a discretion, to be exercised judicially on the ordinary principles, and having exercised his discretion, the Court of Appeal declined to interfere. Kay, J., in that case, did, I think, mainly decide on the circumstance that dissolution was asked for.

The language of section 4 is very wide, embracing any legal proceedings between any parties to the submission "in respect of any matter agreed to be referred," and the judge, if satisfied that there is no sufficient reason why the matter should not be referred may make the order to stay. The submission here is large enough to include dissolution. That is not denied at the bar. The burden of showing that the action should go on is, therefore, thrown on the party who sues. There is no charge here of fraud or misappropriation, or any criminal offence that ought to be tried in public. There is nothing in dispute requiring a judge's experience and knowledge of law. I see no reason why an arbitrator should not dispose of the matter with justice, and I, therefore, order a stay of the proceedings.

Application allowed.

Solicitors, *Gustavus Thompson & Sons*, for *Eve & Clinton*, Aldershot; *T. Blanco White.*

Chan. Div. } Nov. 18.
North, J. }

CHOLDITCH *v.* JONES. (*a.*)

Solicitor — Costs — Conducting sale — Solicitors' Remuneration Act, 1881.

A solicitor who pays the auctioneer's fees on a sale by auction may be entitled to the scale fee for conducting the sale. Where the auctioneer's fees are paid by the purchaser, the solicitor of the vendor is not entitled to a scale fee.

The conducting fee must be arrived at by adding together the value of the lots sold and the reserve price of the unsold lots, and not by making a minimum charge of £5 in respect of each lot.

Summons to review taxation.

At a sale by auction four lots were put up for sale by order of the mortgagees, and three lots were sold for £12 10s., £80, and £320 respectively, the reserve price of £500 for the other lot not being reached. Messrs. Wintle & Sons, the solicitors of the mortgagees, claimed £11 5s. for deducing title, and £20 scale fees for conducting the sale, being a minimum charge of £5 in respect of each sale made and in respect of the lot unsold. The scale fees for conducting the sale were disallowed by the taxing master, but he allowed a *quantum meruit*, as he held that Rule 11, Schedule I., Part I., of the rules under the Solicitors' Remuneration Act, applied.

The conditions of sale provided that the respective purchasers should pay the auctioneer's fee of £1 1s. in respect of the first two lots, £5 5s. in respect of the third lot, and £3 3s. in respect of the fourth lot. The taxing master, however, held that the vendor had paid a commission within the meaning of the rule.

Norton, for Messrs. Wintle & Sons—We are entitled to the scale fee, for commission was paid by the purchaser and not by the vendor. And in respect of the unsold lot we must be entitled to be paid for conducting the sale, and can get payment in no other way.

He cited the cases referred to in the judgment.

The respondents did not appear.

NORTH, J., said that the taxing master disallowed the £20 for conducting fees, but allowed £3 3s. to the solicitors as a *quantum meruit* for what they had done, and it was not disputed that that sum was sufficient, unless the scale fee was payable. But, even if the scale fee applied, the charge of £20 for conducting fees was excessive. The proper mode of ascertaining the conducting fee would have been to add together the purchase-money of the three lots sold, making £412 10s., the scale percentage on which would, having regard to rule 7, have been £4 10s., and to add also the scale percentage of £2 15s. on the reserve price of the unsold lot. That would have brought the conducting fee up to £7 5s. instead of £20, and as that sum was more than £5 no question as to a minimum charge would have arisen. To treat the sale of each lot as a separate sale, and charge a separate minimum fee in each case, was wholly unjustifiable, and not authorized by the rules or in accordance with the decision in *In re Onward Building Society*, 41 W. R. 107, [1893] 1 Q. B. 16. I do not agree with the taxing master, however, that it was necessary for a solicitor to do all the work. The rule seems to recognize a case where the scale fee was applicable, although commission was paid to an auctioneer, provided that the client did not pay such commission. *In re Faulkner*, 36 W. R. 59, 36 Ch. D. 566; *In re Peace and Ellis*, 36 W. R. 61; and *Drielsma* v. *Manifold*, 42 W. R. 578, [1894] 3 Ch. 100, show this.

The second ground, however, taken by the taxing-master was that the scale could not be resorted to because the auctioneer's commission was paid by the client. That was a question of fact, and I agree with the taxing master. No doubt the client was not directly charged with such commission, but if the burden ultimately fell upon him it was paid by him within the meaning of the rule. In my opinion a vendor's solicitor at a sale by auction who did not himself do the auctioneer's work, or pay the fees of the person who did it, could not justify the charge of the scale fee for conducting. To justify such a charge the auctioneer's commission must not be paid by the client either in meal or malt, the burden must not fall upon him either directly or indirectly. The taxing master had said that such cases were not uncommon; but they appeared to fall within the letter as well as the spirit of the rule, which could not be evaded by the device of inserting a condition of sale throwing the auctioneer's remuneration upon the purchaser. Where that was done, the scale conducting fee could not be charged.

Summons dismissed without costs, as no one appeared upon the other side. Applicants ordered to pay their own costs, and not to add them to their security.

Solicitors, *Field, Roscoe, & Co.*

Chan. Div. } July 26.
North, J. }

LORD BATTERSEA *v.* COMMISSIONERS OF SEWERS FOR THE CITY OF LONDON. (*a.*)

Light—Ancient lights—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4—*Interruption.*

An action cannot be brought in respect of a prescriptive

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

right to light unless the access and use of the light has, at the time of action brought, been actually enjoyed for the full period of twenty years without interruption; the fact that, by reason of enjoyment of access of light for more than nineteen, but under twenty years, effectual interruption has become impossible before the completion of the full period, does not make any difference.

At the beginning of 1875 the plaintiff occupied, for a long term of years, a building known as Weaver's Hall, in Basinghall-street, in the City of London, and the defendants were the owners of the houses, Nos. 72, 73, 74, and 75, Basinghall-street, which were about forty-five feet high, and opposite Weavers' Hall. No. 75 was pulled down in June, and Nos. 72, 73, and 74 in October, 1875.

The plaintiff, hearing that the defendant intended to erect buildings of the height of over sixty feet on the site of the houses pulled down in 1875, brought this action on the 16th of July, 1895, and moved for an interlocutory injunction to restrain the defendant erecting buildings so as to interfere with his ancient lights.

The defendant admitted (apparently) the plaintiff's right of action as to No. 75, and consequently, neither the arguments nor the judgment dealt with that house.

S. Eady, Q.C., and *J. G. Wood*, for the plaintiff.—As regards Nos. 72, 73, and 74, the plaintiff admits that they have been pulled down only nineteen years and nine months, but the plaintiffs' building is an old building, and has enjoyed access and use of light for the full period within the meaning of the statute—*i.e.*, twenty years less a fraction of a year—which is immaterial. Section 4 of the Prescription Act ought to be read with section 3, and shows that an interruption is immaterial unless it continues for the space of a year. The point did not arise in *Flight* v. *Thomas*, 8 Cl. & F. 231, because there twenty years had expired before the action was commenced. [NORTH, J., referred to *The Governors of Bridewell Hospital* v. *Ward, Lock, Bowden & Co.*, 68 L. T. N. S. 212, 41 W. R. Dig. 118.] The rule laid down in that case is inconvenient; the result of following it would be that the plaintiff would be delayed three months in bringing his action.

S. Hall, Q.C., and *J. Henderson*, for the defendants.—The right claimed by the plaintiff is only inchoate, and the court will not interfere to protect it by granting an injunction until the full period of twenty years has elapsed.

They cited *The Governors of Bridewell Hospital* v. *Ward, Lock, Bowden, & Co.*, 68 L. T. N. S. 212, 62 L. J. Ch. 270, 41 W. R. 118, and *Glover* v. *Coleman*, 23 W. R. 163, L. R. 10 C. P. 108.

S. Eady, Q.C., replied.

NORTH, J.—The action is to interfere with the interruption of the access of light and air as enjoyed for twenty years past. The question is whether it has been so enjoyed. I think, under the third section of the Act, that an action cannot be brought in respect of a prescriptive right to light unless the access and use of the light has been actually enjoyed therewith for the full period of twenty years without interruption, and in that case the right is to be deemed absolute and indefeasible. The phrase is "without interruption," and the subsequent section, section 4, goes on to say what "interruption" means. That section, to my mind, strongly bears out on this point what section 3 says, because it enacts that the period of twenty years is to be "next before the suit or action wherein the claim to which such period may relate shall be brought into question; and that no act shall be deemed to be an interruption within the meaning of this statute unless the same shall be submitted to or acquiesced in, for one year." What I am asked to do now is to say that it is quite sufficient that the twenty years shall be calculated not twenty years before action, but nineteen years and rather more before, and the rest during the continuance of the action. It seems to me that that is directly contrary to the meaning of the two sections. I think, therefore, that the action can only be brought after the period of twenty years has elapsed. That view has been taken by Kekewich, J. (*Bridewell Hospital* v. *Ward & Co.*), and I know of no case which is in any way at variance with it; and although, no doubt, it does not follow that, because he refused to grant an interlocutory injunction I should necessarily do so too, yet the reason he gives seems to me to be the right reason, and, therefore, I must act upon that view. [His lordship then considered the evidence, and said that he came to the conclusion that the defendants ought not to be allowed to carry up the new buildings, on the site of Nos. 72, 73, and 74, to a greater height than that of the buildings existing on those sites in October, 1875, and then pulled down. He accordingly granted an interlocutory injunction to restrain the defendants so building.]

Solicitors, *Flower, Nussey, & Fellowes; E. A. Baylis.*

Chan. Div.
Kekewich, J. } Aug. 2, 1895.

In re WRIGHT.
KIRKE *v.* NORTH. (*a.*)

Practice—Payment into court—Trust money—Admission of misapplication by trustee—Motion by some plaintiffs only—Discretion of court as to order—R. S. C., 1883, *ord.* 32, *r.* 6.

An application under R. S. C., 1883, *ord.* 32, *r.* 6, *for an order on admissions of fact by a defendant in an action cannot be made on behalf of some only of the plaintiffs.*

There is a judicial discretion as to the making of an order upon a trustee to pay into court trust money which he admits having received and wrongfully applied.

This was an action brought by Marian Kirke and her children, as beneficiaries under her marriage settlement, against a trustee, and the executor of a deceased trustee of such settlement, to recover from the estates of the trustees the amount of a trust fund which they alleged had been misapplied by the trustees. The executor defendant, in his statement of defence, alleged that the application of the fund complained of had been made with the consent of the plaintiff, Marian Kirke, and her husband, and that the fund was represented by certain property, of which she was in possession. The said defendant had also expressly admitted the liability of the testator's estate to make good the said fund in a statement of claim delivered by him in a pending action, in which he claimed to have the amount of such fund raised out of the property of which Marian Kirke was in possession, as aforesaid, and to have her life interest under the settlement impounded, to make good any payment to be made out of the testator's estate.

This was a motion by the plaintiffs, other than Marian Kirke, that the executor defendant might be ordered to pay into court, to the credit of the present action, the amount of the said fund.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

A preliminary objection was taken on behalf of the defendant, that the application was not made by all the plaintiffs.

Renshaw, Q.C., and *Hadley*, for the defendant.—No step in an action can be taken by some of the plaintiffs only: *Brown* v. *Sawer*, 3 Beav. 598; *Butlin* v. *Arnold*, 12 W. R. 571, 1 H. & M. 715.

Marten, Q.C., and *Boome*, for the applicants.—The practice has been altered. By R. S. C., 1883, ord. 32, r. 6, "Any party may, at any stage of a cause or matter, where admissions of fact have been made, . . . apply to the court or judge for such judgment or order as, upon such admissions, he may be entitled to. . . ." This is an application on admissions of fact. The plaintiff, Marian Kirke, consents to the application, and if it is necessary to join her as an applicant, we ask for leave to do so.

Kekewich, J.—To my mind there can be no doubt that, by the former practice, an application such as this in an action could only be made with the concurrence of all the plaintiffs or defendants. It is argued, on behalf of the applicants, that by ord. 32, r. 6, an application for an order, on admissions of fact by a defendant, may now be made for some only of the plaintiffs. The expression "any party" in the rule, is alleged to mean any single plaintiff or defendant. That expression, however, must be read along with the context, and taking the rule as a whole, I think the words cannot be so construed, but must be held to signify all the plaintiffs or all the defendants together. I give the applicants leave, however, to amend their notice of motion, by joining Marian Kirke as an applicant.

The notice of motion having been duly amended, the motion then came on to be heard upon its merits.

Marten, Q.C., and *Boome*, for the applicants.—The defendant, having admitted liability, should be ordered to pay the money into court: *Neville* v. *Matthewman*, 42 W. R. 675, [1894] 3 Ch. 345; *Collis* v. *Collis*, 2 Sim. 365; *Rothwell* v. *Rothwell*, 2 Sim. & St. 217.

Renshaw, Q.C., and *Hadley*, for the defendant.—Money will not be ordered to be paid into court by trustees unless actually in their hands: *Nutter* v. *Holland*, 43 W. R. 18, [1894] 3 Ch. 408.

Kekewich, J.—It is contended on behalf of the applicants that when an executor or trustee admits that he has received trust moneys he may be ordered to pay them into court. As I understand the authorities, however, the order is not a matter of right. There is a judicial discretion, as I think it is only right there should be. The order is so framed that if it is not obeyed an attachment may be moved for. That is a serious consequence which the court ought not to disregard. I am satisfied that the court has a discretion.

It is not alleged that the defendant is not doing his duty. What he says is that, as an executor he prefers to manage his testator's estate in his own way, and not to pay into court a sum which will diminish that estate. I think I should not now order the money to be paid in.

The motion must fail; but the costs will be reserved.

Solicitors for the applicants, *Swann & Co.*, for *Tweed & Son*, Horncastle.

Solicitors for the defendant, *Oldman, Clabburn, & Co.*, for *Willders & Son*, Holbeach.

Chan. Div.
Romer, J.

Nov. 19.

Assets Realization Co. (Limited) v. Trustees, Executors, and Securities Insurance Corporation (Limited). (*a*.)

Trustee—Company undertaking the business of trustee—Remuneration—Increased Remuneration—Credit of company.

When a company which makes it its business to undertake trusts demands, in view of increased responsibilities, increased remuneration, such a demand, especially if not persisted in, is not such a breach of trust as to justify its removal from the position of trustee.

Also the mere fact of the credit of such company being impaired will not justify its removal if it cannot be shown that the interest of the cestui que trust *has suffered or is likely to suffer thereby.*

Trial of action.

This was an action in which the Assets Realization Co. (Limited), suing on behalf of themselves and all others, the holders of an issue of £400,000 Mortgage Debentures of the Chicago Breweries (Limited) (except such of them as were defendants) were plaintiffs, and the Trustees, Executors, and Securities Corporation (Limited), the Chicago Breweries Co. (Limited), and the Debenture Corporation (Limited) were defendants.

The object of the action was to remove the Trustees, Executors, and Securities Co. from their position of trustees under a certain trust deed.

Only the Trustees, Executors, and Securities Corporation (Limited) appeared as defendants.

The facts of the case were as follows:—

The plaintiff company were the holders of 200 mortgage debentures under the seal of the defendants the Chicago Breweries (Limited), each securing the sum of £100 and forming part of an issue of £400,000 Mortgage Debentures.

By each of these debentures it was declared that the debenture-holders were entitled to the benefits and subject to the provisions of a trust deed dated the 6th of June, 1889, made between the Chicago Breweries (Limited), of the one part, and the Trustees, Executors, and Securities Insurance Corporation (Limited), of the other part.

Under this deed the Chicago Breweries conveyed to the Trustees, Executors, and Securities Insurance Co., who made it a large part of their business to undertake such trusts, all their real and personal property and undertaking, upon trust, to permit the Chicago Breweries to enjoy the premises, until the security created by the trust deed should become enforceable, and thereafter to stand possessed of the same upon trust for sale on the trusts therein declared for the debenture-holders and the Chicago Breweries.

It was provided that the Trustees Co. should receive by way of remuneration £200 per annum. It was also provided that the right of appointing a new trustee should be vested in the debenture-holders in general meeting.

With the exception of a few trifling assets, the property of the Chicago Breweries consisted of the shares of two companies incorporated according to the laws of the United States.

In the year 1893 the Chicago Breweries represented to the Trustees Corporation that it was desirable that the American companies should be amalgamated and a supplemental deed was prepared to effect this purpose. The Trustees Corporation, however, refused to

(*a*.) Reported by J. Arthur Price, Esq., Barrister-at-Law.

execute this deed except on condition that their remuneration should be increased by £50 a year. A meeting of the debenture-holders was summoned, but before the meeting was held the demand was withdrawn. The meeting in question was, however, held, and resolutions were passed calling upon the Trustees Corporation to retire, and appointing the Debenture Corporation trustees in their place. At the time of the holding of this meeting two petitions were pending for the winding up of the Trustees Corporation, but these petitions were subsequently withdrawn. The plaintiffs, however, affirmed in their statement of claim that the condition and standing of the Trustees Corporation had been seriously affected by the said petitions. Nothing, however, was said by them on this subject until shortly before the commencement of this action, and there was no evidence that the value of the plaintiffs' security had been diminished thereby.

As the Trustees Corporation refused to retire from the trust, the plaintiffs, who represented a very large majority, but not the whole of the debenture-holders, commenced the present action.

Eve, Q.C., and *Clauson*, for the plaintiffs.—The conduct of the defendants in demanding an increased remuneration, a demand that was persisted in for some time before it was withdrawn, was a breach of trust. It must also be remembered that at the time when the debenture-holders passed the resolution in question, the defendants, from a financial point of view, were practically *in extremis*. It is important for the sake of the shares in which the plaintiffs are interested that their trustees' position should be above suspicion.

Swinfen Eady, Q.C., and *Macnaghten*, for the defendants, the Trustees, &c., Corporation.—The correspondence makes it clear that the objections raised to the defendants for the purpose of removing the defendants from their position of trustees was a mere after-thought on the plaintiffs' part after the dispute had arisen as to the increase in remuneration. The action of the debenture-holders with regard to the defendants was *ultrà vires*. How could a *cestui que trust* vote to himself the power to remove his trustee? Even if it could be supposed that the debenture-holders had any such power, such power would have to be exercised by the whole number. A majority is not sufficient. Then as to the position of the defendant company. Whatever may have been the case, its condition is now satisfactory. The petitions have been withdrawn. No ground exists for removing our clients from their position of trustees.

Eve, Q.C., in reply.—Whatever powers the whole body of debenture-holders may possess, the same powers pertain to the majority. The demand for increased remuneration was only withdrawn after some months had elapsed. However good the defendants' position may now be in fact, their credit with the public has been shaken, and if they are allowed to continue in possession as trustees, the value of the plaintiffs' interest may be diminished.

ROMER, J.—The very large majority, but not all, of the debenture-holders in the Chicago Breweries (Limited) ask that the Trustees, Executors, and Securities Insurance Corporation (which I will hereafter call "the corporation") should be removed from its position as trustee for the debenture-holders. It is admitted that this is not in itself sufficient to entitle them to succeed in this action, and that to justify the court in ordering the removal of the corporation some further and sufficient ground must be established. I am bound to say that in my opinion no such sufficient ground has been made out. In the first place, it is to be noted that the corporation has throughout done its duty as trustee efficiently and well, and is, in my opinion, in a position to continue to perform its duties as trustee properly and efficiently. Then on what do the plaintiffs rely as entitling them to ask for the removal of the corporation? In the first place, they say, and this is their chief ground, that when an alteration was made in the trusts, which the corporation thought would throw additional responsibility on it as trustee, it ventured to ask for an increase on the remuneration to which it was already entitled for acting as trustee. But this was only a suggestion, and, under the circumstances, not an unnatural nor an improper one, and it was not insisted on, and I cannot see that it was an act which called for or justified the strong measures taken by the majority of the debenture-holders. Certainly, in my opinion, the court would not be justified in ordering the removal of the corporation on this ground.

The only other ground urged before me was that the commercial position or reputation of the corporation was such as to render it improper or inexpedient that the corporation should be allowed to continue to act as trustee. Now, undoubtedly the corporation was at one time in trouble and petitions to wind it up were presented. But it appears on the evidence that the corporation has surmounted such difficulties as were at one time in its way and is quite solvent and able to carry on its business efficiently. And, further, it appears to me that there never has been and is not now any real ground for supposing the existence from the position of the corporation of any danger or risk to the trust property (such as it is) or of any injury to the debenture-holders. A large part of the business of the corporation consists in carrying out trusts similar to the present, and such trusts have been and are very numerous and are carried out admirably by the corporation. It was suggested on behalf of the plaintiffs that the public or financial reputation of the corporation is not so high as it used to be, and that this in itself is an injury to the debenture-holders and likely to lower the price of the debentures. But seeing what the nature of the trusts to be performed by the corporation is, I do not believe that the price of the debentures has been lowered in the slightest degree by any falling off in the general reputation of the corporation, or so far as one can see is liable to be affected by the continuation of the corporation as trustee. And I cannot forget that the ground originally put forward and which led to proceedings being taken to try and remove the corporation from its position was the request for additional remuneration, and that the ground I am now considering was apparently an afterthought or at any rate not taken or put forward until shortly before this present action was brought. Under these circumstances, I think that the court would not be justified in ordering the removal of the corporation from its position, and I accordingly dismiss the action, with costs. I make no order as to the costs of the co-defendants.

Action dismissed.

Solicitors, *Linklater & Co.; Slaughter & May.*

Q. B. Div.
Commercial Causes.
(Mathew, J.)

Nov. 14, 18.

CHIPPENDALE AND OTHERS *v.* HOLT. (*a.*)

Insurance—Marine insurance—Policy of re-insurance—Construction of policy.

A policy of re-insurance, whereby the plaintiffs re-insured with the defendant, contained a clause that the re-insurance was to be "subject to the same conditions as the original policy, and to pay as may be paid thereon, but against the risk of total or constructive loss only."

Held, that, upon the construction of this clause, the defendant was only bound to pay to the plaintiffs when the plaintiffs were themselves liable to pay in respect of the loss re-insured, and that if the plaintiffs made a bonâ fide *payment for a total loss, when there was no total loss, they could not recover from the defendant.*

Action tried by Mathew, J., in the Commercial Court.

The facts and arguments are fully set out in the written judgment of the learned judge.

Joseph Walton, Q.C., and *Scrutton*, for the plaintiffs.

H. F. Boyd, for the defendant.

Cur. adv. vult.

Nov. 18.—MATHEW, J., read the following judgment:—

The action was brought upon a policy of re-insurance on the ship *Ajimir*. The original underwriters re-insured with the plaintiffs, who, in their turn, re-insured with the defendant by a policy which contained the following clause: "Being a re-insurance subject to the same clauses and conditions as the original policy and/or policies, and to pay as may be paid thereon, but against the risk of total and/or constructive total loss only."

The vessel stranded, and the owners gave notice of abandonment, and claimed that she was a constructive total loss. Their underwriters paid, and called upon the plaintiffs to indemnify them under their policy of re-insurance. The plaintiffs paid, but the defendant refused to admit his liability, on the ground that the vessel was not shown to be a constructive total loss. The plaintiffs insisted that, whether there was a total loss or not, the defendant was bound to pay as the plaintiffs had paid. It was stated to be of importance that the clause should be construed before the question of fact was tried, and it was agreed in chambers that the argument should proceed on the assumption, on the one hand, that there had been no constructive total loss, and on the other, that the payment of a total loss had been made by the plaintiffs in good faith.

Upon the argument the plaintiffs' counsel contended that the clause should be construed literally, and that the sole condition of the defendant's liability was that the plaintiffs had been satisfied that they were liable, and had made the payment in good faith. It was argued for the defendant that he was only bound to indemnify the plaintiffs against a loss for which the plaintiffs were liable on this policy. It was said for the plaintiffs that the possibility that a fraudulent use might be made of the plaintiffs' option to pay would not enter into the contemplation of either party, and that it was not unreasonable that the re-insurers should trust to the honour and sound judgment of those whose liabilities they had taken upon themselves. But the contention of the plaintiffs would involve this result, that the clause must be read as if it ran, "to pay such an amount as the insurers might choose to pay, whether liable or not." This seems to me altogether unreasonable. Such a contract would be a wager, and not re-insurance.

It was said that unless the interpretation contended for were put upon the clause no effect would be given to the final words, "to pay as may be paid thereon"; for the identity of obligation was differently provided for by the words "subject to the same clauses and conditions as the original policy." But those words, standing alone, would not be applicable to a re-insurance policy, and might give rise to difficulties of construction, while the final words show clearly what was meant. Further, it was suggested that the words might be applicable to cases where there was a foreign adjustment or a compromise in respect of an admitted liability. I see no ground for supposing that the form of the clause was meant to create a liability outside the limits of the original policy. The words "to pay as may be paid thereon" would seem to assume the existence of liability, proved or admitted, in respect of the loss re-insured.

I give judgment for the defendant.

Judgment for the defendant.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb, & Whatton.*

Solicitor for the defendant, *C. E. Harvey.*

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Q. B. Div.
(Lord Russell of Killowen, C.J., Grantham and Vaughan Williams, JJ.)

Nov. 12.

REG. *v.* JENNINGS AND ANOTHER (JUSTICES). *Ex parte* SYMONS. (*a.*)

Justices—Jurisdiction—Child charged with larceny—Charge dismissed—Industrial Schools Act, 1866 (29 & 30 *Vict. c.* 118), *ss.* 14, 15.

Where a child has been charged before the justices, and they dismissed the charge, but evidence had been given which, in their opinion, justified them sending the child to an industrial school, they have power to make such an order forthwith, and it is not necessary that the child should be brought before the court again on a fresh summons or warrant.

In this case a rule had been obtained for a *certiorari* to bring up an order of the justices of the Stonehouse Division of Devonshire, upon the ground that it ought to be quashed as having been made without jurisdiction.

The facts were these: A boy, apparently under the age of fourteen, was summoned before the justices, charged with the larceny of a boat.

The magistrates dismissed the charge, but, on the evidence, which was to the effect that the child was unmanageable at home, would not attend school, and was known to associate with reputed thieves and bad characters, they ordered that the child should be sent to an industrial school.

The mother objected, and obtained a rule against the magistrates to show cause why the order complained of should not be quashed on the ground that they had acted *ultra vires*.

E. U. Bullen, in support of the rule, contended

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

that the magistrates had no jurisdiction to make such an order, which was, in fact, convicting the boy of a different offence from that stated in the information. The charge laid against the boy having been dismissed, a fresh summons or warrant ought to have been issued. By sending the boy to an industrial school, they, in effect, found him guilty of a different criminal offence, with which he was never charged. That had been repeatedly held to be illegal: *Martin* v. *Pridgeon*, 7 W. R. 412, 28 L. J. M. C. 179, and *Reg.* v. *Brickhall*, 12 W. R. 826, 33 L. J. M. C. 156. The justices ought not on their own initiative to proceed against the boy.

He cited Stone's Justices of the Peace, 26th ed., p. 44; *Reg.* v. *Moore*, 52 J. P. 375; and *Blake* v. *Beech*, 1 Ex. D. 320, 25 W. R. Dig. 180.

Lord RUSSELL OF KILLOWEN, C.J.—The main point argued was that the boy, having been brought before the justices charged with larceny, the justices could not proceed to make the order they did unless the boy was brought up again charged with an offence under section 14 of the Industrial Schools Act, 1866, because the charge of larceny—the only charge in the indictment—had been dismissed by them. In my opinion that contention is an erroneous one. The Act was framed, not as a code of criminal procedure, nor ought it, as it has been urged, to be treated as punitive in its character. It is a benevolent Act intended for the protection of juvenile offenders. There are, moreover, alternative provisions in it which give the justices power to deal with any case, as if the child had been convicted of a criminal offence. When, therefore, a child is charged before them, and it is a case which, in their opinion, ought to be dealt with by them under sections 14 and 15 of the Act, and if the circumstances of the case are such as reasonably to bring it within either of those sections, then the justices can deal with the case under those sections, without requiring the child to be brought again before the court, by fresh summons or otherwise.

For these reasons the rule must be discharged.

GRANTHAM, J., and VAUGHAN WILLIAM, J., concurring.

The rule was accordingly discharged.

Solicitors, *Law & Worssam*, for *Bond, Pearce, & Bickle*, Plymouth.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) [and Q. B. Div.] — July 11, 1895; Nov. 7.

CAFFIN *v.* ALDRIDGE. (*a.*)

Admiralty—Charter-party—Cargo—Liberty to call at other ports—Deviation—Damage.

The defendant agreed to carry for the plaintiff in the defendant's ship "a cargo or estimated quantity of 470 quarters of wheat" from R. to G. The charter-party was headed, "Dead weight capacity 125 tons," and contained the usual clause excepting sea perils, and a clause giving the ship liberty to call at any ports. The 470 quarters of wheat weighed 102 tons. The defendant shipped other goods besides the wheat for delivery at P. After discharging these goods at P., and while proceeding to G., the plaintiff's wheat was injured.

Held, that the plaintiff had not hired the full carrying capacity of the ship, and that the defendant was at liberty to call at other ports for the purpose of loading and discharging other cargo; that in going to P. he had not deviated from the chartered voyage, and was, therefore, not liable for the injury to the wheat.

Appeal of the plaintiff from the judgment of Lord Russells of Killowen, C.J., at the trial of the action without a jury.

By a charter-party dated the 23rd of June, 1894, the plaintiff chartered the defendant's sailing barge, *The Alice Little*, to carry wheat from Rotherhithe to Gosport.

The charter-party was headed "Dead weight capacity 125 tons," and provided that the ship should "proceed to Groves & Sons' Platform Wharf, Rotherhithe, . . . and there load . . . a cargo or estimated quantity of 470 quarters wheat in sacks, and/or other lawful merchandise, . . . and being so loaded shall therewith proceed to Gosport (Royal Clarence-yard) . . . and there deliver the same . . . on being paid freight as follows:—1s. per quarter of 496 lbs. delivered. The ship has liberty to call at any ports in any order. . . ." The charter-party contained the usual clause excepting sea perils. The words "full and complete," which came immediately before the word "cargo," in the printed form of the charter-party had been struck out, and the words 470 quarters wheat in sacks" had been added in writing.

The Alice Little loaded at Rotherhithe 467 quarters wheat in sacks. The wheat weighed about 102 tons. The carrying capacity of the vessel was 125 tons. In addition to the wheat she took on board from another shipper about 10 tons of wire torpedo netting, which was to be delivered in Portsmouth Dockyard. *The Alice Little*, on arriving at Portsmouth, first delivered the wire netting in Portsmouth Dockyard; she was then proceeding to the Royal Clarence-yard, Gosport, when she ran into a pile and sprang a leak, whereby the plaintiff's wheat was damaged.

The plaintiff brought this action to recover damages for the injury sustained by the cargo of wheat, on the ground that the ship deviated from her chartered course, and that the wheat was damaged in the course of such deviation.

The amount of the damages was agreed.

Cohen, Q.C., and *Scrutton*, for the plaintiff.

Sir Walter Phillimore, Raikes, Q.C., and *Butler Aspinall* for the defendant.

Lord RUSSELL OF KILLOWEN, C.J., after stating the facts said: The question at issue is, was the proceeding of the vessel to Portsmouth Dockyard, and the delivery there of the wire netting a deviation? If it was, inasmuch as the loss occurred after that deviation had taken place, the authorities are clear that the defendant would be liable. The question depends upon the construction of the charter-party. In my judgment the statement at the top of the charter-party that the dead-weight capacity of the vessel was 125 tons, coupled with the statement that only 470 quarters of wheat, properly described as a cargo, were to be shipped, satisfies me that the true construction of the contract is, that it was not a hiring of the full capacity of the barge to the exclusion of other goods, but that it was really a shipment of the quantity named. I therefore think that it was contemplated that the owner of the barge might take on board other lawful merchandise if the character, destination, or manner of stowing such merchandise would not be inconsistent with the performance of

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

the contract for the carriage of the plaintiff's wheat. Then it was argued that there was a deviation, because the charter-party provides that the wheat is to be carried from Rotherhithe to the Clarence-yard, Gosport, and that, it was said, involved the operation of the going with the cargo direct from Rotherhithe to Gosport. There is, however, a clause in this charter-party giving liberty to call at any ports in any order, and if I am right in saying that the owner of the sailing barge had, subject to the limitations I have mentioned, the right to put on board further cargo, then this clause supplements and gives effect to that right, and entitled the barge to call at any ports to discharge cargo.

I hold, therefore, what the defendant did was in accordance with the terms of the charter-party, and that there was no deviation. Judgment for the defendant. . . .

The plaintiff appealed.

Scrutton, in support of the appeal.—In construing this charter-party, the nature of the cargo must be taken into consideration. This was a cargo of wheat, and therefore very likely to suffer damage if other goods were taken on board. From this fact and from the use of the word "cargo" the conclusion to be drawn is that the plaintiff intended to hire the full carrying capacity of the ship: *Borrowman* v. *Drayton*, 25 W. R. 194, 2 Ex. D. 15; *Glynn* v. *Margetson* [1893] A. C. 381. There was no power to call at other ports for the purpose of loading or discharging cargo, and the defendant is liable for the damage which occurred during the deviation.

Raikes, *Q.C.*, and *Kilburn* (*Butler Aspinall* with them), for the defendant, were not called upon.

LORD ESHER, M.R.—I am of opinion that the construction put upon this charter-party by the Lord Chief Justice was obviously right and cannot be questioned. We have been asked to construe it differently because some other charter-party, which was not in the same language, was construed differently in another case. We have to consider the meaning of this charter-party and of this one only. Now, the word "cargo" may mean the entire cargo carried by a ship, or it may mean only that which is to be carried for a particular shipper. In the present case it was agreed that 470 quarters of wheat were to be carried for the plaintiff. That may be called his cargo. But when the charter-party is looked at it is obvious that these 470 quarters of wheat did not constitute a full and complete cargo, particularly when one finds that the words "full and complete" were in the charter-party as printed and were then struck out. Mr. Scrutton argues that by a necessary implication we must put these words in again. I do not agree with that argument. I think that the Lord Chief Justice rightly construed this charter-party and I agree with his decision for the reasons which he has given.

LOPES, L.J.—I am of the same opinion. I think the words "full and complete" were erased from the charter-party because it never was the intention of the parties, that the plaintiff's wheat should constitute a full and complete cargo, and it is quite clear that the cargo of wheat did not exhaust the full carrying capacity of the vessel. That is to my mind a very good reason why liberty was given to the vessel to call at other ports.

KAY, L.J.—The only question we have to consider in this case is the meaning of this charter-party. It is headed "Deadweight capacity 125 tons" and is for the carriage of 470 quarters of wheat in sacks from Rotherhithe to Gosport, and "there deliver the same on being paid freight as follows: 1s. per quarter of 496 lbs." A very simple arithmetical calculation shows that the wheat came to about 102 tons and, therefore, on the face of the charter-party it was at least doubtful whether that cargo exhausted the full carrying capacity of the ship. But when the charter-party is further looked at, it is quite plain that it did not do so, because there is a clause giving the ship "liberty to call at any ports." That must mean that the parties knowing that the ship was not full, therefore gave her liberty to call at other ports and obtain more cargo. The ship in proceeding to Portsmouth Dockyard was, in my opinion, only doing that which was within the powers conferred upon her owner by the charter-party. I therefore agree that this appeal must be dismissed.

Appeal allowed.

Solicitors for the plaintiff, *J. & H. Farnfield.*

Solicitors for the defendant, *Farlow & Jackson.*

From Q. B. Div.
Lord Esher, M.R., and Lopes and Kay, L.JJ. [and Q. B. D. (Mathew, J.)]

May 29, 1895; Nov. 7, 8.

ASFAR & CO. *v.* BLUNDELL AND OTHERS. (*a.*)

Ship—Freight—Damage to goods—Loss of merchantable character—Insurance—Profit on chartered freight—Warranted free from all average—Concealment of material fact.

The plaintiffs, who were merchants, chartered a ship, the freight being a lump sum of £3,900, *upon the terms that all freight earned by the ship should be for the plaintiffs. They insured with the defendants, who were underwriters, "profit on charter for* £2,000 . . . *warranted free from all average." The ship took a cargo on board, in respect of which the bills of lading freights amounted to* £4,690. *While the ship was proceeding to the port of discharge she was run into by another vessel and sunk. The cargo was subsequently got up, and it was found that one part, consisting of dates, was so damaged as to be unmerchantable as dates. In consequence, no freight was earned on the dates, and the bills of lading freights actually received by the plaintiffs came to less than the chartered freight.*

Held, that the subject-matter of the insurance was the anticipated profit on the charter; that there had been a total loss of the profit; and that the plaintiffs were entitled to recover from the defendants the difference between £3,900, *the chartered freight, and* £4,690, *the total amount of the bills of lading freights.*

At the time the insurance was effected the defendants were not told whether the chartered freight was a lump freight or a tonnage freight.

Held, that there had been no concealment of material facts by the plaintiffs, for the defendants knew that there was a charter-party in the usual form, and the plaintiffs were not bound to give information as to the freight unless the defendants asked for it.

Action tried without pleadings before Mathew, J., without a jury.

The plaintiffs were merchants at Bussorah, and they were the charterers of a ship called *The Govino*. The charter was for a lump sum of £3,900, and the ship was to go to ports of loading in the Persian Gulf and there take on board a general cargo and bring that cargo to London. The charterers anticipated in the employment of the vessel a profit

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

upon the lump sum which they had agreed to pay the shipowners, and that profit they insured with the defendants, who were underwriters, in the sum of £2,000. In the slip and in the formal policy the subject-matter of the insurance was described as "£2,000 profit in charter . . . warranted free from all average."

The total of the bills of lading freights amounted to £4,690, as against £3,900 lump freight payable by the plaintiffs under the charter, showing, in the event of the whole bills of lading freight being earned, a profit to the charterer of £790. When the insurance was effected the defendants did not know whether the chartered freight was a lump freight or a tonnage freight.

The ship took her cargo on board and sailed for the discharging dock in the Thames, but before she reached it, she come into collision with another vessel and was sunk and the cargo remained under water for three days. A large part of the cargo, about 700 tons, consisted of dates. When the vessel had been raised and taken into dock the dates were found to be saturated with sewage, and were in a state of fermentation and putrefaction and were unmerchantable as dates, and were condemned by the officer of health as being unfit for human food, but it was stated by the officer of health who was called as a witness, that a large quantity of the dates still retained the shape and outward appearance of dates.

The dates were sold for the purpose of distillation with spirit, and transhipped and exported.

The rest of the cargo was landed and delivered, and the total of the bills of lading freights realized thereon, amounted to less than the chartered freight of £3,900.

The plaintiffs brought this action as for a total loss of profit on the charter, claiming £2,000, as on a valued policy or in the alternative £790, being the difference between freight payable under the charter-party and the total amount of the bills of lading freights.

Joseph Walton, Q.C., for the plaintiffs.

Carver for the defendants.

Cur. adv. vult.

May 29.—MATHEW, J., after stating the facts, proceeded:—The first important question is one of fact, whether any freight was payable in respect of the dates. If freight was payable there was a profit on the charter-party; if it was not payable there was none; and whether freight was payable or not depends on the condition in which the dates were landed.

I am satisfied, from the evidence, that the goods did not arrive in specie within the true meaning of the expression, or in such a condition as to entitle the carriers to freight. In my opinion the dates were lost. They were not merchantable, or capable of being used as dates. They had become a mass of vegetable matter in a state of decomposition. Their nature had been wholly changed. The suggestion of the defendants that total destruction of the dates was necessary to disentitle the charterers to freight may derive some support from *Cocking* v. *Fraser* (reported in Park on Insurance, 8th ed., vol. 1, p. 247), but it is clearly not the law. The destruction of the merchantable character of the goods to the extent disclosed by the evidence is sufficient to take away the right to freight in accordance with the principle of the decisions in *Dakin* v. *Oxley*, 12 W. R. 557, 15 C. B. N. S. 646; *Roux* v. *Salvador*, 3 Bing. N. C. 266; and *Duthie* v. *Hilton*, 17 W. R. 55, L. R. 4 C. P. 138. I am, therefore, of opinion that the plaintiffs were not entitled to receive freight in respect of these dates.

The next point is this; the policy of insurance is described as a policy for "£2,000 on profit on charter" and it contains the clause "warranted free from all average." It was contended on behalf of the defendants that the policy was in reality a policy on freight, and that the subject-matter of the insurance was a part of the freight payable on the bills o lading, and, therefore, if, say, 50 per cent. of the goods were lost and 50 per cent. arrived, then as 50 per cent. of the bills of lading freight would be earned, there would only be a particular average loss on the policy, and the warranty "free from all average" would protect the underwriters. If that contention were correct the policy would be a protection only against the loss of the whole cargo and the whole freight. I do not think that was the intention of the parties. I am satisfied that what was intended to be the subject-matter of the insurance was the charterer's profit on the adventure, that is to say, the excess of the total bill of lading freights over and above the lump freight of £3,900, and the intention was that in the event of a total loss of that profit the assured would be entitled to recover.

Then, as to the amount which the plaintiffs are entitled to recover. It was contended for the plaintiffs that this was a valued policy, and that the interest was valued at £2,000. I am of opinion that this was not a valued policy, and that the plaintiffs are only entitled to recover £790, that being the actual amount of the profit in charter.

Finally it was argued that the policy was rendered void by reason of the concealment of a material fact—viz., that the charter was for a lump sum and was not at a tonnage rate. I am not satisfied that there was any concealment of any material fact. But even if there had been no disclosure, the point would be disposed of by reference to the principle that underwriters need not be given information as to matters concerning which they waive all enquiry. In this case if the defendants had wanted to know the provisions of the charter-party, they should have asked. In accordance with the judgments in *Haywood* v. *Rodgers*, 4 East., 590, and *Inman Steamship Co.* v. *Bischoff*, 31 W. R. 141, 7 App. Cas. 670, I hold that that contention fails. Judgment for plaintiffs for £790.

The defendants appealed.

Carver, in support of the appeal, contended first, that there had not been a total loss under the policy, because the dates though damaged, had not wholly lost their merchantable quality, and they still retained the shape and substance of dates: *Duthie* v. *Hilton*, *Roux* v. *Salvador*, *Dakin* v. *Oxley*, and *Cocking* v. *Fraser* (reported in Park on Insurance, 8th ed., vol. 1, p. 247). Secondly, even if freight was not payable upon the dates, they were protected by the warranty against average: Phillips on Insurance, s. 1,503: *Hodgson* v. *Glover*, 6 East. 316. Thirdly, the plaintiffs concealed from the underwriters a material fact—viz., that the charter was not at a tonnage rate but was for a lump sum: *The Bedouin*, 42 W. R. 299, [1894] P. 1; *Haywood* v. *Rodgers*; *Tate* v. *Hyslop*, 15 Q. B. D. 368, 34 W. R. Dig. 116; *Mercantile Steamship Co.* v. *Tyser*, 29 W. R. 790, 7 Q. B. D. 73.

Joseph Walton, Q.C., for the plaintiffs, was only heard upon the last point. He contended that there had been no concealment of a material fact. The charter-party was in the usual and customary form, and if the underwriters desired to know how the chartered freight was payable it was their duty to make enquiry. The charterer was not bound to volunteer information on such a point as that.

He referred to *Inman Steamship Co.* v. *Bischoff*.

Lord ESHER, M.R.—This is an action by an assured against underwriters. The latter have, as they are entitled to do, taken every possible point open to them in order to avoid paying the amount of the policy, and their case has been argued with great ingenuity.

The first point is that there has not been a total loss of the dates. It is said that, although these dates were under water for three days, and were, when brought up, in a state of pulp, fermented, and full of sewage, there has not been a change in their nature, and they are still dates. The test which has been applied in such cases for many years is whether the nature of the thing for the purposes of mercantile dealing has been altered. Damage does not necessarily alter the nature of goods. They may still remain the same thing, although damaged. But if their whole nature is altered, and they become a different article, so that no one would deal in them as an article of their original nature, and if in that state the goods are unmerchantable as between honest men of business, then there is a total loss. Mathew, J., has found as a fact in this case that the nature of these dates was so deteriorated that they had ceased to be dates, and were unmerchantable. That being so, they could not be delivered as dates to the consignee, and no freight became due in respect of them from the consignee to the charterer. Therefore, there was a total loss of the bill of lading freight upon the dates.

Now, what was the subject-matter of the insurance in this case? The plaintiffs had chartered a ship in such way that they were to have the whole carrying capacity of the ship, and for that they agreed to pay to the owners a certain lump sum by way of chartered freight. The plaintiffs intended to collect cargo and to give bills of lading in respect of it, and if they got more from the bills of lading freight than they had to pay for the chartered freight, the plaintiffs would make a profit from their use of the ship. That was their speculation. If, by reason of the perils of the sea, the plaintiffs were prevented from earning bills of lading freights to a greater amount than the chartered freight, then they would lose their profit. The chartered freight was not a tonnage freight but a lump freight, and the subject-matter of this insurance was the difference between that lump freight and the amount to be earned from the bills of lading freights; in other words, the profit which the plaintiffs anticipated from the use of the ship. The bills of lading freights upon the dates were lost, and so no profit was made, and the plaintiffs have, therefore, lost that which was the subject-matter of the insurance. Mr. Carver argued the case as if the subject-matter of the insurance had been the freight itself or the goods, and he contended that as there had not been a total loss of the freight or goods, the defendants were protected by the warranty against average. That was not the case with which he had to deal, and his argument did not apply to this case, which was an insurance of profit or the difference between two freights.

The third point was, that the plaintiffs when effecting the insurance concealed a material fact from the defendants. The rule applicable to concealment is well known, and is one about which I have no doubt whatever. The assured is bound to disclose to the insurer every material fact which is within his knowledge and not within the knowledge of the insurer. If he fails to do so, although there may be no fraud on his part, he is guilty of what in insurance law is called concealment. But it is not necessary for him to disclose minutely every material fact. It is enough if he discloses sufficient to call the attention of the underwriter to the matter, so that he can ask for more information if he requires it. In this case the plaintiffs disclosed the fact that they had entered into a charter-party, and that the subject-matter of the insurance was the difference between the two freights. But the plaintiffs did not say whether the chartered freight was a lump freight or a tonnage freight. As a matter of fact it was almost certain that the chartered freight must have been a lump freight, but the underwriters could have had immediate knowledge on the point by asking for further information. Therefore the plaintiffs made a sufficient disclosure of material facts to satisfy the rule, and I have not the slightest doubt that Mathew, J., was justified in holding that there had been a disclosure sufficient to enable the underwriters to ask for more information if they wanted it. The case does not, to my mind, raise any new points of law; it has to be determined on the well-known rules applicable to marine insurance. The appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. With regard to the first point it is clear that after a submersion for three days the dates had completely lost their merchantable character. Then it was said that although there might have been a total loss of the freight on the dates, there was nevertheless a profit in the other parts of the cargo. In this connection it is important to consider what was the subject-matter of the insurance and I agree with Mathew, J., that it was the anticipated profit—*i.e.*, the difference between the chartered freight and the bills of lading freights. If that is so, can it be said that, the profit having been entirely lost, the assured is not entitled to recover. I think not; I think that the decision of Mathew, J., on this point was right. Thirdly, it is said that the plaintiffs have concealed material facts because they did not tell the underwriters that the freight was a chartered freight and not a tonnage freight. I think the plaintiffs disclosed all that was necessary. No doubt their duty was to disclose every material fact within their knowledge, but it is not immaterial to recollect that it was highly probable that the chartered freight would be a lump sum. It cannot be denied that that is usually so in cases of this kind. The underwriters were distinctly informed as to the subject-matter of the insurance, and if that intimation was not sufficient they could have made any inquiries they deemed necessary.

KAY, L.J., after stating the facts, proceeded: It has been contended that there not a total loss of the dates; because, although the dates were saturated with sewage and were in a state of fermentation, and were unmerchantable as dates, yet the whole substance, the skin, stones, and whatever goes to make up a date, still remained. I agree that there was the substance of the dates still in existence, but I do not think that in order to render an article unmerchantable the law requires so great a change as has been suggested. I think Mathew, J., correctly stated the law on that point when he says that "the distruction of the merchantable character of the goods to the extent disclosed by the evidence is sufficient to take away the right to freight." The result was that the assured made no profit out of the bills of lading freights.

The argument on the second point turned on the clause in the policy "warranted free from all average," and it was said that admitting there was no profit on the dates, still there was a profit on the remainder of the cargo. But that argument omits to notice the subject-matter of the insurance, which was the difference between the lump freight and the total bills of lading freights, and that has been totally lost. On this point I also agree with Mathew, J., when he says that the intention was that in the event of a

total loss of the profit, the assured should be entitled to recover.

I have had more difficulty in coming to a conclusion on the third point, which is, that there was a material concealment by the plaintiffs because they did not tell the underwriters that the charter-party was not at a tonnage rate but for a lump sum. It is beyond all question that that was a material fact, because if it was a tonnage rate the underwriters would not be liable in so large a sum. But the question is, was the fact concealed? I agree that concealment is something more than non-disclosure. It is the keeping something back which it is the duty of the assured to bring specifically to the notice of underwriters. Now was that the case with this charter-party? If a charter-party contains unusual clauses it would not be enough simply to state that there was a charter-party. The assured is bound to go further and to state that it was unusual. If he does not, the concealment of that fact will vitiate the policy. The charter-party in this case was of the common kind, there was nothing unusual in it, and the underwriters were told that the policy was in respect of profit on chartered freight. Adopting the principle laid down by Lords Blackburn and Watson in *Inman Steamship Co.* v. *Bischoff* and by Barnes, J., in *The Bedouin*, I come to the conclusion that the assured were not bound under the circumstances to tell the underwriters that the chartered freight was a lump sum. It was for the underwriters to ask for further information if they required it. I therefore think that in this case the underwriters have not brought the case within the particular doctrine; although the fact said to have been concealed was material, I think there was sufficient disclosure on the part of the assured by the reference to the charter-party, there being nothing unusual in its clauses.

Appeal dismissed.

Solicitors for the plaintiff, *Ince, Colt, & Ince.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) Aug. 6, 7, 1895.

MIDLAND RAILWAY CO. *v.* GRIBBLE. (*a.*)

Railway company—Severed land—Communication by level crossing—Severance of ownership—Easement—Abandonment—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 68.

A railway company in 1855 *constructed their line through the lands of R., and made a level crossing between the severed parts. In* 1885 *R. sold the land on the one side to P., and reserved no right to cross the line himself, and gave P. no right to cross. In* 1888 *R. sold the land on the other side of the line to T., the predecessor in title of G. The railway company removed the gates and erected fences on their own land where the gates had been. G. claimed the right to use the level crossing, and removed the fences.*

Held, that the conveyance of 1885 *was a final abandonment by R. of his right to use the level crossing. The obligation on the railway company, by virtue of section* 68 *of the Railways Clauses Act*, 1845, *to maintain the accommodation work at all times, ceased when the ownership of the adjoining lands was severed, and was a duty which the company owed to the private individual as owner, and not a public duty.*

Appeal from a decision of Wright, J., sitting as an additional judge of the Chancery Division.

The railway company in 1855 constructed their line through lands belonging to one Rainsford, and became bound under the Railways Clauses Consolidation Act, 1845, to maintain communication between the severed parts.

A level crossing was agreed "to be made and for ever maintained by and at the expense of the company, their successors and assigns."

The accommodation work, in the nature of a level crossing, consisted of a gap in the hedge on either side of the line, with a protecting gate to each gap.

Section 68 of the Railways Clauses Consolidation Act, 1845, enacts that "the company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway—that is to say, such convenient gates and passages over the railway as shall be necessary for the purpose of making good any interruption caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the railway passing over such lands shall have been laid out or during the formation thereof."

In 1885 Rainsford put up for sale by auction in lots all his lands, and those on the west side of the railway were sold to one Plowman. No reference was made to the level crossing either in the contract for sale or in the conveyance.

In 1888 the lands on the east side of the railway were sold to one Thompson, through whom the defendant Gribble claimed.

In 1893 Plowman released to the railway company all his right to the use or maintenance of the level crossing in consideration of the company allowing him to make a siding, whereupon the railway company proceeded to remove the gates and erect fences on their own land where the gates had been. The defendant claimed a right to the level crossing, and removed the fences.

The railway company then brought their action to restrain the defendant from removing the fences and from trespassing on their line.

At the trial Wright, J., granted the injunction asked for, and gave nominal damages.

The defendant appealed.

Hopkinson, Q.C., and *C. G. O. Bridgman*, for the appellant.—There has been no abandonment of the right of way. Abandonment is purely a question of intention. The right is one for all purposes, subject to not interfering with the railway company and the accommodation works.

Birrell, Q.C., and *Sargant*, for the railway company.

LINDLEY, L.J.—This case has raised a point which is new—it has never arisen before that I know of; but I think it is not difficult, although it is new.

It is an appeal by the defendant from an order made by Wright, J., declaring that the defendant is not entitled now to any right of way over the level crossing in question—that is, over the railway—and has not any right to cause any obstruction; and granting an injunction to restrain the defendant from using that crossing. [His lordship considered the facts, read section 68 of the Railways Clauses Consolidation Act, 1845, and continued:—] It is obvious that that is to be done for the accommodation of the person through whose lands the railway passes. Let us now consider the stress of the words "shall at all

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

times maintain." That does not mean that they must maintain it at all times if he does not want it. Having asked for this accommodation and got it, he could, if he chose, release it, and if he chose to release it, there would be an end of the statutory obligation about its being at all times thereafter maintained. It is not a public duty; it is a duty to him privately, and, of course, to those claiming under him.

Now the conveyance in 1885 of the land on one side of the railway to Plowman by Rainsford appears to me to be a clear and distinct abandonment of Rainsford's right of way over that railway. It was of no use to him any longer, and, having severed the land without any reservation of the right, there was an end of the right of way over the railway. It was an abandonment of his easement. It was perfectly competent to him to do so in point of law. It was not an abandonment for a month or a year, but a distinct final abandonment without any intention to reserve this right of way. To my mind, upon the conveyance to Mr. Plowman made at that time and under those circumstances without any express reservation, there was an end of the statutory right.

Now Wright, J., has put into this order words which in my opinion ought to be struck out, and it is our duty under sections 4 and 5 of the Act to make such order as we think the judge in the court below ought to have made. It appears to me he has, by overcaution, put into this judgment words which may perhaps give rise to some expectation or some hope on the part of the defendant, that he has still got, or may get, some right of way. I think in mercy to the defendant, and in justice to both parties, the order appealed from ought to be varied by striking out the word "now" in the declaration, and the whole of the clause stating that the injunction ought to be without prejudice. With that variation in the order, therefore, the appeal will be dismissed, and dismissed with costs.

LOPES, L.J.—I entirely agree. For what reason Mr. Gribble wants to preserve this passage or right of way I cannot understand. If he wants to have the privilege of walking backwards and forwards across the line he will do it at imminent risk from the trains passing by, and if he wants it for the purpose of going across to look over and see how the crops on the other side are growing, I can only say that that was not the object originally contemplated.

Now what is this passage-way? It is an accommodation work. It has its origin in that, and all the incidents of an accommodation work belong to it. It had its existence under the 68th section of the Railways Clauses Consolidation Act of 1845. What is an accommodation work of this kind? An accommodation work like this passage-way is a work necessary for the purpose of making good any interruption of lands by the railway, the lands on either side being in the occupation of the same owner. That accommodation work is made by the railway company for a special purpose, that special purpose being to maintain a communication between the lands of the same owner or occupier which have been intersected by the railway, and, in my judgment, directly that special purpose is at an end, and when, as Mr. Bridgman has admitted, it is practically impossible now to use it for that purpose, the accommodation being no longer required, the obligation to afford it also ceases.

I think the order ought to be varied as the Lord Justice has suggested, and that this appeal fails.

RIGBY, L.J.—I am of the same opinion. I do not mean to say that there could not be such a right as Mr. Bridgman has been insisting upon—a right to go over another man's piece of land which still exists, although it might be of no possible use to the grantee. Suppose, for instance, I want to get a right of way over two estates to a point on the land to which it is convenient for me to go. I can bargain with the man on one side for the right to go over his land, and he can grant it to me if he chooses free, but that is quite irrespective of the question of right to go over the other estate. If you get a right of way over the one estate, and merely that, and you cannot go any further without bargaining with the other owner, it is of no importance to you that you have that right now.

The question is whether there was a right here, and I am clear there was no longer a right to use this level crossing as an independent right. It was to be used as a crossing or as a passage simply, and it is clear that, if at any time before the severance they had used the passage-way, not for the purpose of crossing, but for the purpose, we will say, of carting goods there without the consent of the railway company, not crossing merely, and passing over the railway, that would have been a trespass. It is only when you go over for the purpose of crossing, in other words, for the purpose of passing over the railway to the land on the other side, that you have a right to go there at all; consequently there is no easement to grant, and no right under the Act to an accommodation work, except for the purpose of passing from one side of the line to the land on the other. When that is made, in point of law, an impossibility, all practical right to use the crossing or the passage at all, is gone.

Now in 1885 there was the conveyance to Mr. Plowman. Whether, because of its absolute uselessness—and, looking at the map, I should be disposed to think it was so, because the land on the other side has a perfectly good access to a good road—or from forgetfulness, I do not care which, at any rate there was then a deliberate act done, by which the whole of the land on the opposite side of the railway was sold without the reservation of any right over it, or the grant of any corresponding right to Mr. Plowman of passing over the railway to come on to this land. Now I consider that an absolute abandonment.

The law does not look to possibilities which have not been bargained for. No doubt the next day the man might have bought that land back again, or might do so at any future time—he has not done so in fact; but that would not have given him a new right of way. He had abandoned in 1885 what he got under the Act, under the award or under the conveyance, whatever it was, from the railway company, and he had no right from that moment to let a cart or horse go on the level crossing at all.

I think it would be impossible to raise from the release of 1893 any contention whatever with regard to that abandonment. Mr. Bridgman argued that this must obviously involve intention. That may be true or not; there may be an intention in a man's mind to do something which is inconsistent with his act, but if he does anything of that kind, his act and not his intention must govern the matter.

I quite agree with the variation in the order as suggested by Lindley, L.J., and the result will be that with that variation, the appeal is dismissed.

Order varied, and appeal dismissed.

Solicitors for the appellant, *Gosling, Ingleby, Royds, & Rawstorne.*

Solicitors for the respondents, *Beale & Co.*

High Court of Justice.

Chan. Div.
Stirling, J. Aug. 6, 10, 1895.

FARNHAM v. MILWARD. (a.)

Lunatic—Action by committee—Subsequent bankruptcy of lunatic—Trustee in bankruptcy added as defendant—Application by trustee to stay proceedings granted—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 132—*Lunacy Act*, 1890 (53 *Vict. c.* 5), *ss.* 117, 120—*R. S. C.*, 1883, *ord.* 16, *r.* 17.

A., the committee of B., a lunatic, commenced an action against C. B. was subsequently adjudicated a bankrupt, whereupon, at the instance of C., the writ was amended by adding B.'s trustee in bankruptcy as a defendant to the action. On an application by the trustee that the action might be stayed as against him on the ground that it was vexatious,

Held, that the right of action vested in the trustee on the bankruptcy of the lunatic; that the trustee could not be added as a defendant to the action against his will; and that he was entitled to have the action stayed as against him.

This was a summons taken out by the defendant Norris, the trustee in bankruptcy of the plaintiff William Farnham, asking for a stay of proceedings as against him on the ground that they were vexatious.

The plaintiff W. Farnham was found a lunatic in 1893, and his wife Catherine Farnham was appointed committee of his property.

On the 7th of September, 1893, she commenced this action, in her own name and that of her husband, against the defendants Milward & Co., the confidential solicitors and agents of W. Farnham, for an account of all moneys passing through the hands of Milward & Co. for or on his account. The writ also asked for a receiver, damages, and costs. In due course the account was ordered to be taken, the order being made upon motion in November, 1893.

On the 19th of May, 1894, W. Farnham was adjudicated a bankrupt, and on the 26th of May following the defendant Norris was appointed his trustee in the bankruptcy. Nothing further was done in the action until the 23rd of April, 1895, when an order was made in chambers on a summons taken out by Milward & Co., whereby leave was given to amend the writ by adding Norris as a defendant in the action, and it was ordered that the taking of accounts should be proceeded with.

The writ was not finally amended until the 2nd of May; and on the 15th of June, 1895, Norris took out this summons. In the meantime, however, Norris had attended proceedings in chambers in connection with the taking of the account.

R. J. Parker, for the summons.—Your lordship made the order in chambers on the authority of *In re Whatman*, W. N., 1889, p. 213. In that case the official receiver allowed his name to be used. A bankrupt cannot proceed with an action when the cause of action has passed to his trustee: *Jackson* v. *North-Eastern Railway Co.*, 25 W. R. 518, 5 Ch. D. 844; *Warder* v. *Saunders*, 10 Q. B. D. 114, 31 W. R. Dig. 154; *Selig* v. *Lion*, 39 W. R. 254, [1891] 1 Q. B. 513; *Kellaway* v. *Bury*, 66 L. T. N. S. 599, 40 W. R. Dig. 190; *Rochfort* v. *Battersby*, 2 H. L. Cas. 388.

Willis Bund, for the defendants.—The trustee was properly made a party to this action.

Hastings, Q.C., and *Church*, for the plaintiffs.—The trustee has already done so much in the action that he cannot now object, even if he is right on the cases, which, however, do not apply to the case of a lunatic plaintiff. The jurisdiction in lunacy is paramount to that in bankruptcy: *In re Farnham*, [1895] 2 Ch. 799. [STIRLING, J.—That case is different to the present one, for there the court refused to give up property in the custody of the court, on the ground that it might be required for the maintenance of the lunatic, whilst here, if the bankruptcy is valid, the trustee has a right to bring this action.] Possibly leave ought to be first obtained from the lunacy jurisdiction. The question is whether the inferior jurisdiction in bankruptcy can stay the proceedings already commenced in a paramount jurisdiction.

R. J. Parker, in reply.—There has been no delay sufficient to preclude relief. The case of *In re Farnham* does not apply here, as the property was in court, and the trustee coming to the judge in lunacy could only get it on terms. Here the trustee is not proceeding in lunacy or interfering with the jurisdiction thereof. He only asks your lordship for a stay of proceedings, and that a plaintiff who is bankrupt be not allowed to carry on an action and make his trustee in bankruptcy a party thereto.

Cur. adv. vult.

August 10.—STIRLING, J. [after stating the facts, continued:—] On the taking of accounts in chambers, Messrs. Millward & Co. raised the objection that they were liable to be sued both in this action and in the bankruptcy, and that, therefore, the trustee in bankruptcy should be made a party to the action. The trustee declined to prosecute the action and the matter came before me in chambers, when, acting on the authority of *In re Whatman*, I thought myself justified in allowing the amendment of the writ by making Mr. Norris a defendant.

I am perfectly satisfied I was wrong in giving that leave. In truth I misread the account of the case given in the *Weekly Notes*. I think I ought to have inferred from that report, which, however, is not very clear, that the order made in that case did not authorize proceedings such as I was asked to permit in the present case. Having since seen the registrar's book I am satisfied that, in fact, no such order was made. But for the authority of that case, which I thought I was bound to follow, I should not have allowed the amendment. The trustee being duly added as a defendant, there followed some correspondence between the solicitors of the plaintiffs and the solicitors of Mr. Norris, and I think it is clear from that correspondence that Mr. Norris' solicitors were seeking to discover on what grounds he had been added as a defendant. They pointed out that he ought to be sued as trustee in bankruptcy, and that the writ ought to be amended by showing what relief was asked for as against him. The writ was finally amended on the 2nd of May, and then the correspondence closes. It appears that subsequently the trustee was present at some proceedings in chambers, but ultimately on the 10th of June he took out the present summons, and the question is whether he is entitled to the order for which he asks.

It was admitted by counsel for the plaintiffs that in the case of a sane bankrupt plaintiff the plaintiff would not be entitled to have his trustee in bankruptcy made (against the will of the trustee) a party to the action. That is undoubtedly so, but two objections were raised. First, it is said that the law laid

(a.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

down in *Jackson* v. *North-Eastern Railway Co.* as applicable to the case of a sane bankrupt, does not apply in the case of a lunatic; and, secondly, it is said that by reason of delay the trustee is precluded from relief.

First of all, I must consider the position of a lunatic when he sues in this court. By ord. 16, r. 17, it is prescribed that "where lunatics and persons of unsound mind not so found by inquisition might respectively, before the passing of the principal Act, have sued as plaintiffs, or would have been liable to be sued as defendants, in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose." Therefore the practice now followed in the case of a lunatic plaintiff is the same as used to be followed in the Court of Chancery. The basis of that procedure, so far as it permitted a lunatic to sue by a next friend, is clearly stated by James, L.J., in the well-known case of *Beall* v. *Smith*, 9 Ch. D. 85. [His lordship read from the judgment at p. 91, "The law of the Court of Chancery . . . any person as his next friend," and at p. 92, "It is to be borne in mind . . . person himself, if of unsound mind," and continued:—] That is a clear statement of the jurisdiction exercised by the court in a case where a lunatic is plaintiff, and, though in that case the lunatic was suing by a next friend, the remarks are equally applicable to a case where he is suing by a committee. There is a difference in the practice in these two cases, however, for it has long been held that in the case of a lunatic suing by his committee the proper course is to add the committee as a co-plaintiff. That was laid down in *Fuller* v. *Lance*, 1 Ch. Cas. 18, in the reign of Charles II. The reason for that is, I think, that a committee, being entrusted by law, under the authority of the Crown, with the care, management, and disposition of the lunatic's effects, is in a position to receive and give a good discharge for all property which may be recovered in an action brought in the name of the lunatic, whereas a next friend, who simply intervenes and invokes the jurisdiction of the court, would not be able to do so. Otherwise, however, I think the principles which govern the procedure in actions by lunatics are the same in both cases. It follows from that that the lunatic having been adjudicated a bankrupt, and that adjudication being binding upon me, the right of action which at the beginning of these proceedings existed in the plaintiff is now vested in his trustee in bankruptcy, and though the committee may sue in the name of the lunatic, and in his own name enforce rights of action which are vested in the lunatic, I cannot find any authority, and it seems to me to be wrong on principle, that he should be allowed to enforce a right of action which, by due process of law, I assume has become vested in someone else, and has ceased to be the right of the lunatic.

In support of the view, urged on behalf of the plaintiffs, the case of *In re Farnham* was cited. I have read and studied to the best of my ability a shorthand note of the judgment given in that case in the Court of Appeal. The case was a remarkable one. Part of the lunatic's property was some valuable plate which had been deposited in court in the lunacy prior to the application which I am now about to mention. The trustee in bankruptcy sought to have it delivered out of court to him, on the ground that the legal title was vested in him. The question was raised and left open whether a lunatic could be adjudicated a bankrupt, the Lords Justices, though somewhat doubtful on the subject, assuming that he could be so adjudicated. Lindley, L.J., in his judgment, says: "Assuming that, Mr. Swinfen Eady says that everything follows in his favour and that the court ought to direct this plate to be handed over to the trustee, but it has been pointed out, and I think very properly, that inasmuch as this lunatic was adjudicated a bankrupt some time after he was found a lunatic by inquisition, the trustee in bankruptcy must take subject to the powers of the judge in lunacy conferred by the Lunacy Act, 1890; and the Lunacy Act, 1890, in sections 117, 120, vests in or confers upon the judge in lunacy various powers, and, amongst others, the power to apply the estate of the lunatic in discharge of his debts; and, although I believe it is perfectly well settled that a lunatic can be adjudicated a bankrupt under the direction of the committee acting under direction of the judge in lunacy, there is a question whether he can be validly adjudicated apart from that. Now, supposing that the trustee takes subject to the statutory powers, the main point in Mr. Eady's argument is answered, and I think Mr. Warrington was quite right in saying that, whatever may be true of the actual vesting of the property in the trustee, it does not follow that the trustee may take the property which is so vested in him, except subject always to the jurisdiction which has accrued before the bankruptcy to the judge in lunacy under the inquisition. I think that is a good answer to his argument as far as that goes."

The Lords Justices did not dispute that the property, and the legal right thereof, was vested in the trustee in bankruptcy, but they asserted that they had a higher power, and could direct the application of the property. How far that may apply here it is not for me to say; but I have read the sections of the Lunacy Act, 1890, which were referred to in the judgments, and the judgments themselves, with very great care, and they do not, in my opinion, go to this—*i.e.*, that the committee can bring an action to assert a right which is vested in the lunatic's trustee in bankruptcy. Hence it follows, I think, that the defendant Norris is, on principle, entitled to the order that he asks for.

It now remains for me to deal with the question of delay. It must be borne in mind that the amendment was sanctioned by me in chambers, and that the proceedings in the action had been sanctioned by the Master in Lunacy. The question is one of some novelty; but I think that, under the circumstances, the trustee has not come too late to obtain relief, and I do not think that the fact that he attended the proceedings to settle accounts should prejudice him so far as obtaining relief is concerned. It may be that he would be precluded from raising his objection if it did not go directly to the root of the proceedings. These proceedings, however, are, I think, entirely wrong, and can only be set right by making the trustee a co-plaintiff. The trustee will not allow that to be done, and I think that, under the circumstances, he is not too late, and that his application should be acceded to, and the action stayed as against him. At the same time I do not think that this is a case for giving any costs.

Solicitors, *Field, Roscoe, & Co.*, for *Deane & Hands*, Loughborough; *Spencer Whitehead; Prior, Church, & Adams.*

Chan. Div. } June 22, 29;
Stirling, J. } July 2, 23, 1895.

In re LONDON AND NEW YORK INVESTMENT CORPORATION. (a.)

Company—Reduction of capital—Founders' shares—Extinguishment—Companies Act, 1867 (30 & 31 *Vict.* c. 131), *s.* 9.

The shares in a company were divided into ordinary, preference, and founders' shares. Under the memorandum and articles of association the ordinary and founders' shares ranked equally for dividend, but the founders' shares entitled the holders thereof only to such capital as should be paid up on them, except in the event of the winding up of the company, in which event the holders of founders' shares were to be entitled to one moiety of any surplus assets remaining after discharging all liabilities. The memorandum of association authorized the issue of preference shares upon such terms as the company should by special resolution determine. The directors issued and allotted shares preferred both as to capital and dividend, without any special resolution having been passed; but at general meetings afterwards held of all classes of shareholders resolutions adopting the terms under which the preference shares had been issued were adopted.

A large loss of capital had been sustained by the depreciation of investments, and there was no reasonable prospect of anything going to the holders of founders' shares in respect of dividend or capital. The company presented a petition for the confirmation of resolutions for reduction of capital involving the extinction of the founders' shares and throwing the rest of the loss upon the ordinary shares.

Held (1), *that the issue of preference shares without the passing of a special resolution was capable of ratification by the company, and had been ratified.*

Held, further, that the loss should, in the first instance, be thrown on the holders of founders' shares.

This was a petition presented by the company with the object of obtaining the sanction of the court to a resolution which had been passed for the reduction of the capital on the ground that paid up capital to the amount of £251,000 had been lost.

The company was registered under the Companies Acts on the 11th of October, 1889. The objects of the company as set out in the memorandum of association were numerous, but the main object was to raise money by issuing share capital and investing it in various securities.

The nominal capital of the company fixed by the memorandum of association was £1,000,000 divided into 100,000 shares of £10 each, of which 200 were to be founders shares, 50,000 preferred shares and the remaining 49,800 ordinary shares. All this capital was issued and fully paid up. The founders shares and ordinary shares were issued at once under a prospectus which stated that "it is proposed hereafter to issue 50,000 preferred shares of £10 each (preferred both as to capital and dividend) carrying such rate of interest not exceeding five per cent. as the directors may determine."

In June, 1890, the directors passed a resolution for the issue of these preferred shares and a second prospectus was circulated with that view stating that "these shares are preferred as to capital and are entitled to a cumulative dividend of five per cent. per annum in advance of the ordinary shares."

These preferred shares were all taken up, but no special resolutions authorising the preference were passed before their allotment.

Subsequently the holders of these preferred shares learned that no special resolutions had actually been passed to give them their promised preference as to capital and they demanded that this should be done. The directors accordingly convened extraordinary general meetings of the company to put the matter right, and by special resolutions passed and confirmed by the requisite statutory majorities it was resolved:

(1) "That the cumulative preferential dividend, not exceeding £5 per cent. per annum, payable under the memorandum of association of the corporation to the holders of the 50,000 preferred shares be at the rate of £5 per cent. per annum.

(2) "That as against both the founders' shares and the ordinary shares of the corporation such preferred shares shall confer a right to priority in the return of capital upon a winding up of the corporation or otherwise, but such preferred shares shall not confer or have any other right or interest in the distribution of the surplus assets of the corporation."

At these meetings, held on the 27th of April and 15th of May, 1893, holders of ordinary, preferred, and founders' shares were present in person or by proxy, and the resolutions were carried unanimously on both occasions.

The rights of shareholders to dividend were as follows: Under the terms of the prospectus relating to the issue of preferred shares, the preferred shares were to carry a cumulative dividend of 5 per cent. per annum on the amount paid up; next after them, the ordinary shares were to carry a dividend of 7 per cent. per annum, and any surplus net profits were to be divided equally between ordinary and founders' shares.

From the commencement of the company down to 1894 dividends had been paid regularly on the preferred shares at 5 per cent. per annum. The ordinary shares received in 1890 8 per cent., in 1891 7 per cent., in 1892 5 per cent., and in the first half of 1893 5 per cent. Since that date the ordinary shares had received no dividend.

On the founders' shares nothing had been paid by way of dividend since the first year, when a sum equal to the amount of dividend at the rate of 1 per cent. upon the ordinary shares was paid as dividend upon the founders' shares.

In October, 1894, the directors caused a general valuation of the securities and investments held by the company to be made. These consisted of two classes: (1) those in North America, and (2) those in this country and elsewhere. The securities were accordingly valued; as to those in North America by two brokers on the New York Stock Exchange, who valued as of the 31st of October, 1894, according to the market price of that day; as to the other securities, by the board of the company in England, who, in the case of securities quoted in the official list of the London Stock Exchange, took the selling quotation on the 31st of October, 1894, and, in the case of securities not so quoted, made inquiries in each case, and fixed what they thought to be the fair value.

The result of this valuation was to bring out a loss of £251,000. Further, it appeared that there had been an actual loss on sales to the amount of £73,397 6s. 4d., which was included in the £251,000.

A second valuation was made as of the 28th of February, 1895; as to the North American securities in the same way as before; as to the others by Messrs. Deloitte, Dever, Griffiths, & Co., who prepared a balance-sheet as of that date.

The result showed no substantial difference in the position of the company.

In consequence of the result of the said first valuation the company duly passed two special resolutions

(a.) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

to which the sanction of the court was now sought to be obtained.

By the first of such special resolutions the company took power to reduce its capital.

The second of such special resolutions (passed at meetings held on the 14th of November and the 23rd of December, 1894) to the following effect:—

"That the capital of the London and New York Investment Corporation be, and the same is hereby reduced, from £1,000,000 divided into 100,000 shares of £10 each, of which 200 are founders' shares, 50,000 preferred shares, and the remainder are ordinary shares, to £749,000 divided in 50,000 preferred shares of £10, and 49,800 ordinary shares of £5 each, and that such reduction be effected by cancelling as capital which has been lost or is unrepresented by available assets the following paid-up capital, that is to say (1) the whole of the £10 per share paid-up on the 200 founders' shares; and (2) £5 of the £10 per share paid-up on each of the ordinary shares."

A petition was accordingly presented for the sanction of the court to the reduction of capital in accordance with these resolutions.

The articles which referred to the founders' shares were:

(7) The founders' shares shall entitle the holders thereof to such dividends and other interest in the profits of the company as is defined by the memorandum and articles of association, but except in the case of liquidation, they shall not entitle the holders thereof to any share in the capital of the company, beyond the actual amount paid up, or duly accredited as paid up upon them.

(169) In any winding up of the company the holders of founders' shares shall be entitled (as between themselves and the holders of the preferred and ordinary shares) to one moiety of any assets of the company remaining after the payment and discharge of the debts and liabilities, and the repayment to the holders of preferred and ordinary shares of the amount paid up, or credited as paid-up, on such shares, together with the costs of winding up. Provided always that in the division of any reserve fund under this clause, the founders' shares shall be entitled to one moiety of any portion of such reserve fund arising from the issue of any shares in the company at a premium, but as to any other reserve fund, shall be entitled to one moiety of such reserve fund, up to twenty per cent. of the subscribed capital, and no more.

The following are the material clauses of the memorandum and articles of association with reference to the preferred shares.

(7*b*) There shall first be paid out of the net profits of the company, in each year to the holders of the preferred shares, a cumulative preferential dividend at a rate not exceeding £5 per cent. per annum on the amount paid up thereon for the time being.

(*f*) Any of the original shares, and any new shares from time to time to be created may (but subject always, and without prejudice to the rights of the holders of the founders's shares, who shall in each and every year receive their interest or dividends as herein expressed), from time to time be issued with any such guarantee or any such right of preference, whether in respect of dividends or repayment of capital, or both, or any such other special privilege or advantage over any shares previously issued, or then about to be issued, or at such a premium, or with such deferred rights as compared with any shares previously issued, or then about to be issued, or subject to any such conditions or provisions, and with any special right, or without any right of voting, and generally on such terms as the company may from time to time, by special resolution, determine. Provided always that any premium to be received from the issue of any shares shall be carried under the provisions of sub-section (*d*) hereof to the reserve fund.

Article 10. Subject to the memorandum of association, the shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons, on such terms and conditions, and at such times as the directors think fit.

Article 107. The business of the company shall be managed by the directors, as herein provided, and all such powers of the company as are not by statute or by these presents required to be exercised by the company in general meeting, are hereby vested in the directors, pursuant to these articles, subject, nevertheless, to such regulations as may be from time to time duly prescribed by the company, but no regulation of the company shall invalidate any prior act of the directors, which would have been valid if such regulation had not been made.

Buckley, Q.C., and *Sargant*, for the petitioners, cited *In re Floating Dock of St. Thomas* (*Limited*), 43 W. R. 344, [1895] 1 Ch. 691.

Graham Hastings, Q.C., and *Macnaghten*, for a holder of ordinary shares, opposed the application.—They argued that *In re Floating Dock of St. Thomas* (*Limited*) did not apply to the present case, that the special resolution was invalid, and that the proposed reduction was unfair and inequitable. That any priority, if given on the creation of new capital, must according to the memorandum of association be conferred by a special resolution duly passed before such new capital was issued.

They cited *Ashbury* v. *Watson*, 33 W. R. 882, 30 Ch. D. 376; *British and American, &c.*, v. *Couper*, 42 W. R. 652, [1894] A. C. 399.

Rowden, for the holder of a founder's share, opposed the application.

G. P. C. Lawrence, for other holders of founders' shares, asked that the founders' shares should not be cancelled.

G. Purcell, for other holders of founders' shares.

Buckley, Q.C., in reply referred to *In re Union Plate Glass Co.*, 37 W. R. 792, 42 Ch. D. 513; *In re Gatling Gun Co.* (*Limited*), 38 W. R. 317; 43 Ch. D. 628; *Bannatyne* v. *Direct Spanish Telegraph Co.*, 35 W. R. 125, 34 Ch. D. 287; and *Eichbaum* v. *City of Chicago Grain Elevators Co.*, 40 W. R. 153, [1891] 3 Ch. 459.

STIRLING, J., stated the facts, and continued:—The first question to be considered is whether it is established that the alleged loss of capital has actually occurred. I have already stated the effect of the evidence in support of the petition. The detailed valuations have at my request been produced to me. Although several shareholders appear in opposition, not one of them has thought fit to adduce any evidence to the contrary, or even to pledge his own belief that the loss has not occurred; nor have the witnesses in support of the petition been cross-examined. The matter is eminently one for decision by commercial men, who have given their judgment on it, and the shareholders of all classes have by large majorities accepted the views put forward by the directors. I hold, then, that the allegations of the petition are sufficiently proved.

The next question is whether the loss ought (as proposed by the resolutions) to be thrown primarily on the founders' shares (which are proposed to be wiped out altogether) and next on the ordinary shares. The case of *British and American Trustee and Finance Co.* v. *Couper*, 42 W. R. 652, [1894] A. C. 399, shows that it is the duty of the court to be satisfied before confirm-

ing the resolutions that there is nothing unjust in the proposed reduction. Now it appears from what was laid down by Cotton, L.J., in *Bannatyne* v. *Direct Spanish Telegraph Co.*, 34 Ch. D. 287, see pp. 299, 300, and by Chitty, J., in *In re Floating Dock Co. of St. Thomas* (*Limited*), [1895] 1 Ch. 691, see p. 699, that where there are different classes of shares the loss on a reduction ought to fall on those who would have to bear it if there was a winding up; and taking this to be the rule, I have to see how it is to be applied in the present case.

As regards the founders' shares, 200 in number, they represent a capital of £2,000. The holders take no share of the profits until a dividend of 5 per cent. has been paid on the preference shares, and of 7 per cent. on the ordinary shares. After these dividends are paid, and the directors have been remunerated, the remaining profits are to be paid (according to the memorandum of association) as to one moiety to the holders of the founders' shares and the residue to the holders of the ordinary shares. Upon a winding up the holders of founders' shares are, by article 169, to be entitled to one moiety of any assets of the company remaining after the discharge of the debts and liabilities of the company, and the repayment to the holders of preferred and ordinary shares of the amount paid up on those shares.

Now it appears, from an examination of the balance-sheet prepared by Messrs. Deloitte & Co., that there is required for payment of the above-mentioned dividends to the preference and ordinary shareholders a sum of (in round figures) £56,500, while the present investments after deducting interest on debentures, &c., yield a net annual income of about £16,000, leaving a deficiency of about £40,000 to be made up before any dividend can be received by the holders of founders' shares. Further, if all the existing investments were realized at their par value there would be an existing loss of over £73,000.

In my judgment there is no reasonable prospect of anything ever coming to the holders of founders' shares, either in respect of dividend or capital, and consequently I cannot consider it unfair to throw on them in the first instance the loss which has actually occurred. The case of the ordinary shareholders raises a different and more difficult question. It is contended on their behalf that regard being had to the circumstances under which the preference shares were issued, the latter do not carry with them any preference as regards distribution of capital on a winding up. [His lordship referred to clause 7 (*b*) (*f*) of the memorandum of association and to clauses 10 and 107 of the articles, and proceeded:—] Having regard to these provisions I think it was competent to the directors to fix the rate of preferential dividend so long as it did not exceed five per cent., but it was not competent for them without the sanction of a special resolution to confer any other preferential rights.

On the 12th of October, 1889, a prospectus for ordinary shares was issued, which is important with regard to the statement contained on the first page, that "It is proposed hereafter to issue 50,000 preferred shares of £10 each, preferred both as to capital and dividend, carrying such rate of interest not exceeding five per cent. as the directors may determine." It is distinctly stated there that the preference shares to be issued were to be preferred both in capital and interest.

On the 11th of June, 1890, the directors passed a resolution for the issue of preference shares at five per cent., and on the 20th of June, 1890, a prospectus for the preference shares was issued, which stated that "these shares are preferred as to capital, and are entitled to a cumulative dividend of five per cent. per annum, in advance of the ordinary shares." No special resolution sanctioning the issue was passed previously to the allotment of the preference shares. Difficulties subsequently arose as to enforcing calls, and some of the shares were surrendered and cancelled. On the 27th of April and the 15th of May, 1893, special resolutions were passed and confirmed. [His lordship read them, and continued:—]

It is said that the memorandum of association, according to its true construction, requires that the special resolution defining the preference should be passed previously to the issue of the shares, and that a resolution passed subsequently to the issue of the shares cannot set the matter right, because it is passed by a body of shareholders different from that which would be called upon to sanction the preference before the issue. In the present case, for example, the holders of ordinary and founders' shares were the persons by whom the special resolution ought to have been passed, while the resolutions of 1893 were passed by the whole body of shareholders, including the holders of preference shares, as well as ordinary and founders' shares.

On this, two questions seem to arise: (1) Was the issue of preference shares absolutely incapable of ratification by the company? and (2) if not, has it been duly ratified?

As to (1), if the issue was absolutely beyond the powers of the company, as defined by the memorandum, then it was no doubt incapable of ratification. The vice of the transaction lay in this, that the directors took upon themselves to issue the shares without obtaining the sanction of a special resolution. There is nothing, however, in the memorandum to prevent the company from passing a special resolution, to the effect that it should be left to the directors to determine what rights of preference should be given to the preferred shareholders. It is said that the special resolution ought to be passed before the issue of the shares: but the memorandum does not say so, and I do not think it ought to be construed so as to prevent the company ratifying a slip such as has occurred in the present case, if that can be done consistently with justice. This being so, it seems to me that it cannot be said that the acts of the directors, as regards the issue, were incapable of ratification.

How, then, is such rectification to be given? It ought, I think, to proceed from the holders of founders and ordinary shares with whom it lay in the first instance to determine what rights of preference shares should be given.

Now the preference shares were plainly offered on the terms that the holders should have a right of preference as regards distribution of capital as well as dividend, and those who applied for shares on the faith of the prospectus would (supposing there are no special circumstances in the case to which I shall say a word in a moment) be entitled to demand either that shares conferring such right should be given them or that the transaction should be set aside and all payments made in expectation of the issue of such shares should be returned, supposing this attitude to be taken up by the preference shareholders. I conceive that it should be competent to the holder of ordinary and preferred shares to say which alternative should be adopted. It would be right to summon to such a meeting the preference shareholders so that they might express their views, but their votes could not be counted.

At the meetings held on the 27th of April and 15th of May, 1893, holders of preference shares voted as well as holders of ordinary and founders' shares. If the resolutions then passed had been carried by the votes of preference shareholders I should have thought that they could not be relied on, but the meetings

were attended by substantial numbers of holders of ordinary and founders' shares, and the resolutions were unanimous.

I cannot see any reason why these resolutions passed by the requisite majority independently of the preference shareholders should not be treated as good, and, in my judgment (subject to what I am about to say), these resolutions constituted a sufficient ratification of the acts of the directors.

It is contended, however, that in April, 1893, it was too late for the preferred shareholders to claim the rights to which originally they might have been entitled. It is said that they must be taken to have had, from the first, notice that the issue of preference shares had not received the sanction of a special resolution, because such resolution, if passed, ought, in accordance with section 53 of the Companies Act, to have been found in the office of the registrar of joint stock companies; and such a view of the legal position appears to be sanctioned by what is laid down in *Irvine* v. *Union Bank of Australia*, 25 W. R. 682, 2 App. Cas. 379. It is further pointed out that some of the shares were surrendered, and it is suggested that the surrender was made in consequence of the discovery of the defect in the original issue. Again, it is said that the preference shareholders accepted dividends in the interval between the issue of the shares of the 27th of April, 1893.

Notwithstanding these circumstances, I am not persuaded that the rights of the preference shareholders were affected thereby. Such notice as they had of the absence of a special resolution was constructive only. If in point of fact the preference shareholders were ignorant of it, and such ignorance is attributable (as I think it is) to the frame of the prospectus, I think mere constructive notice could not prejudice their rights against the company, whatever might be the effect of such notice as against third parties. There is no evidence to show that the defect had become known to the preference shareholders before April, 1893. The solitary holder of ordinary shares who opposes the petition has not pledged her own belief that this is the fact, or cross-examined the witnesses who have made affidavits in support of the petition. However this may be I think it lay with the holders of founders' and ordinary shares to determine whether the acts of the directors shall be ratified or not. The prospectus in which the ordinary shares were issued warned the holders of those shares that shares to be preferred both as to capital and dividend were afterwards to be issued. The prospectus of the preferred shares plainly states that those shares were to have a preference as to capital. Under these circumstances it well may have been that the holders of ordinary and founders' shares considered in April and May, 1893, that it was not otherwise than in accordance with honesty and justice that the right of preference as regards capital should be sanctioned by them if this could lawfully be done. In my opinion such sanction was within their legal powers and has been legally given. I come to the conclusion, therefore, that there is nothing in the proposed reduction which is unjust or inequitable or requires the court to abstain from confirming it. I therefore make an order in accordance with the petition.

Solicitors for the petitioners, *Pains, Blyth, & Huxtable.*

Solicitors for the ordinary shareholder, *Cowdell & Son.*

Solicitors for holders of founders' shares, *W. A. Crump & Son; H. C. Godfray*, and *Slaughter & May.*

Chan. Div.
Kekewich, J. } June 18, 21; July 5, 1895.

In re MORLEY.
MORLEY *v.* HAIG. (*a*.)

Will—Tenant for life and remainderman—Policy of insurance—Mortgage—Liability for premiums and mortgage interest—Apportionment of policy moneys.

A testator gave the residue of his estate to trustees on trust for a tenant for life and remaindermen. Such residue consisted in part of a policy of insurance on the life of another person, which policy was subject to a mortgage securing a debt owing by the testator. The trustees paid the premiums and the interest on the mortgage accruing since the death of the testator out of the income of such residue. The person insured having died, and the policy moneys been paid to the trustees,

Held, that, as between the tenant for life and the remaindermen, the former was entitled to be repaid thereout the amount, not only of such premiums, but also of such interest; and that the residue of such moneys should be apportioned according to the rule in In re Chesterfield's (Earl) Trusts, 32 *W. R.* 361, 24 *Ch. D.* 643.

Summons.

Robert George Morley, by his will dated the 7th of August, 1885, appointed executors and trustees, and devised and bequeathed to them all his residuary real and personal estate on trust to sell and convert, with power to postpone the sale and conversion, and pending such sale and conversion, to expend out of the income or capital of such estate such moneys as they might think fit for premiums on policies or otherwise in respect of such estate; and he declared that his trustees should stand possessed of the moneys arising from the sale and conversion thereinbefore directed of his residuary real and personal estate or otherwise forming part of his estate, upon trust, after making the payments therein mentioned, to invest the same and pay four equal twelfth parts of the net income thereof to his wife during her widowhood, and subject thereto, and as therein provided, he directed that his trustees should stand possessed of the said trust premises and the net income thereof on trust for all his children in the shares and subject to the conditions therein expressed.

The testator duly made a codicil to his will, dated the 1st of August, 1889, whereby he declared that one moiety of the income of his residuary estate should be payable to his wife during her widowhood in lieu of the proportion mentioned in his will, and that, subject thereto and as therein further provided, the trust premises and the income thereof should be divisible among his children in certain shares and proportions differing from, and in lieu of, those mentioned in his will.

He also made two other codicils, the effect of which it is unnecessary to mention.

The testator died on the 20th of June, 1890, survived by his wife, two sons, and two daughters; and his will and codicils were proved on the 15th of September, 1890.

At his death he was absolutely entitled to three policies of assurance on the life of Henry Ridley Ellington, effected in the Equitable Assurance Office—viz.: two policies for £500, and a third for £2,500, the last-mentioned policy being subject to a mortgage to the said office for securing repayment of a sum of £3,000, with interest thereon, at five per cent. The surrender value of the said policies at the testator's

(*a*.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

death, less the mortgage debt and interest, amounted to £3,773 1s. 8d.

On the testator's death the defendant, who was the sole proving executor and accepting trustee, with the concurrence of the testator's widow and children, retained the policies until the death of the said Henry Ridley Ellington on the 14th of March, 1895. From the death of the testator down to the death of the said Henry Ridley Ellington the premiums on the policies and the interest on the mortgage debt were paid by the said trustee out of the income of the testator's estate.

On the death of the said Henry Ridley Ellington a sum of £9,093 15s. became payable on the said policies, subject to the said mortgage and interest to the date of payment of the policies.

On the 10th of May, 1895, the sum of £6,015 17s. 6d. was paid to the said trustee in respect of the policies, being the above-mentioned sum of £9,093 15s., less the amount of principal and interest on the mortgage.

This was an originating summons by the widow, the two daughters, and one of the sons of the testator to have it determined what were the respective rights and interests of the several persons who, since the death of the testator, had been and were then entitled to the income of the testator's residuary estate, and of the persons entitled to the said residuary estate or any share therein in remainder expectant upon the interest of those entitled as aforesaid to and in the above-mentioned sum of £6,015 17s. 9d.; and in particular whether the respective tenants for life under the said will and codicils were entitled to be recouped out of the said surplus policy moneys the amount applied out of income in payment of the said premiums and mortgage interest; and whether they or any of them were entitled to any and what compensation or equivalent for the income which they would have derived from the proceeds of the sale or conversion of the testator's interest in the said policies had the same been sold or converted immediately after his death.

Renshaw, Q.C., and *Dauney*, for the plaintiffs.—Since the testator's death the premiums and interest have been paid out of income. The tenants for life should, therefore, have the amount made good out of the policy moneys. There should be an apportionment of the policy-moneys as between the tenants for life and remaindermen according to the following rule. Find the sum which, if put out at interest at the testator's death and accumulated at interest at four per cent., would amount to the policy-moneys, and apply that sum as capital and the remainder as income: *In re Chesterfield's (Earl) Trusts*, 32 W. R. 361, 24 Ch. D. 643; *Beavan* v. *Beavan*, 32 W. R. 363n, 24 Ch. D. 649n; *In re Flower, Matheson* v. *Goodwyn*, 62 L. T. N. S. 216, 38 W. R. Dig. 184, 63 L. T. N. S. 201, 39 W. R. Dig. 9; *In re Hobson*, 34 W. R. 70; *Wright* v. *Lambert*, 26 W. R. 206, 6 Ch. D. 649; *In re Hengler, Frowde* v. *Hengler*, 41 W. R. 491, [1893] 1 Ch. 586.

Warrington, Q.C., and *Lavington*, for the defendants. We do not dispute that the amount of the premiums should be made good to the plaintiffs. They are not, however, entitled to the amount of the interest on the mortgage, because, as the mortgage debt was not paid off at the testator's death, when it should have been paid off, they have received an excess of income, precisely equal to the interest they now claim. We admit that the sum which has fallen in should be apportioned according to the principle of *In re Chesterfield's (Earl) Trusts*.

Cur. adv. vult.

KEKEWICH, J.—It is reasonably clear and was conceded in argument that the relative rights of the tenant for life and remaindermen must be adjusted according to the rule in *In re Chesterfield's (Earl) Trusts*. If, apart from the decision in *In re Hobson*, there remained any doubt respecting the applicability of that rule in a case like the present, that decision would wholly remove it. The rule is applicable to circumstances of considerable variety as is illustrated by *In re Hengler, Frowde* v. *Hengler*, the real question in each case must be how to make it work justly between the parties interested according to the special facts. Here the special facts are that the reversionary interest in question was a policy subject to a mortgage, and that the interest on that mortgage as well as the premiums on the policy were from time to time paid out of the income to which the tenant for life would otherwise have been entitled. The mortgage itself has now been paid off out of the money received under the policy together with a small amount of interest which may be ignored, and we are dealing with the balance of the policy monies remaining after discharge of the mortgage and no more. But for the necessity of making some special provision in respect of interest and premiums, the application of the rule would be easy. One would calculate what sum, if invested at four per cent. interest at the date of the testator's death, would produce the amount of this balance, and that sum would be capital to be invested for the benefit of the estate, and the rest would belong to the tenant for life.

The tenant for life has, however, in fact, received year by year less than she was entitled to by reason of part of the income having been taken to keep down the interest and premiums. Adjustment must now be made on the footing that these yearly sums ought to be recouped to her out of the money preserved by such expenditure—that is, the policy moneys. Of course, they ought to be recouped with interest, and I think that interest ought to be calculated at 4 per cent. I hesitate about the figure, but it is to be observed that I am here dealing, not with the rate which trustees with restricted powers of investment might have earned, but the rate which an absolute owner, free to deal as she pleased, might have obtained for her money. These sums, therefore, will have to be deducted in her favour from the net policy moneys, and the balance must be apportioned between capital and income on the principle above explained. Except for the necessary subtraction in the first instance of the costs of these proceedings, the arithmetic might all be worked out in a schedule to the order; but, as it is, the order can only direct how the rule shall be applied to the yet unascertained sum which will remain after subtraction of the taxed costs from the existing balance, less the sums—which can easily be calculated—payable to the tenant for life on adjustment of capital and income accounts.

Solicitor, *C. W. Dommett.*

Chan. Div.
Vaughan Williams, J. } Nov. 6, 7.

THE AMBITION INVESTMENT BUILDING SOCIETY. (*a*.)

Building society — Investing member — Withdrawal — Priorities—Notice of withdrawal—Surplus funds of society.

In a building society, the rules of which provide that investing members may withdraw their shares upon giving a month's notice to the society, the stopping of the

(*a*.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

society's business, or the recognition of the necessity of stoppage by the officers of the society, and not the insolvency of the society, is the proper point at which to draw the line in determining the question whether a notice to withdraw operates so as to give the member giving such notice priority over other members.

Summons.

The above-named society was incorporated in the year 1882 under the Building Societies Act, 1874, for the purpose of raising a fund for making advances to members upon the security of freehold, leasehold, and copyhold property by way of mortgage, pursuant to 37 & 38 Vict. c. 42.

The rules provided as follows:—

"ANNUAL GENERAL MEETING."

3. "An annual general meeting of the members shall be held in the month of February in every year, at which meeting a balance-sheet of the accounts, regularly audited, together with a report from the directors of the state of the affairs of the society, shall be laid before the members."

"MEMBERS."

"MEMBER DEFINED."

16. "The holder of a share, upon which not less than six months' subscription have been paid, and in respect of which no advance has been made, shall be deemed an investing member as to such share, and shall be entitled to vote in respect of such share, and the holder of any share upon which an advance has been made shall be deemed a borrowing member, and shall be entitled to vote."

"WITHDRAWAL."

21. "Any member may withdraw all or any of his shares upon giving one month's notice in writing to the secretary, when such member shall be entitled to receive back his net monthly subscriptions, with such portion of the profits realized as may have been posted to his credit, together with such interest as the directors, in their opinion, consider the state of the society's business will allow, such interest to be calculated up to the end of the month preceding the date of the notice. If more than one member shall give notice to withdraw, they shall be paid in rotation according to priority of notice: provided always that widows and children of deceased members shall have preference."

Rule 39 provides that the society should be dissolved if the dissolution thereof should be resolved upon by the vote of three-fourths of the members present at a special general meeting of the society, convened for that purpose.

The society commenced to carry on business in April, 1883. After 1890 the society had practically no new business, and there were numerous withdrawals of depositors and shareholders. The accounts of the society were made up and audited yearly up to the 31st of December in each year. The accounts were duly audited up to the 31st of December, 1890, and a balance-sheet for the year ending at that date was prepared, together with a report by the directors, in which they said that during the past year the society had practically had no new business, a state of affairs which "at present shews no sign of improvement; this, in conjunction with the fact that the capital of the society during the same period has been considerably decreased by withdrawals, has caused them [*i.e.*, the directors] to arrive at the conclusion that, in the interests of the shareholders, the society should be dissolved. They have, therefore, called a special general meeting to be held directly after the annual meeting, at which a resolution to that effect will be moved, and the directors will be prepared fully to discuss matters with the members, who will then be in a position to act as they may think best. The directors are of opinion that if the members decide at the present time to dissolve the society, and the same be done in an economical manner, the capital will be returned in full." It appeared that in the year 1890 the society was commercially insolvent. On the 5th of February, 1891, a notice was duly sent to the members, together with the director's report and the balance-sheet, convening a meeting for the 12th of February to be held immediately after the close of the annual meeting, for the consideration of resolutions to dissolve the society, and to appoint liquidadators. On the 12th of February the annual general meeting and the special meeting were held, and a resolution was duly passed that the society should be dissolved, and liquidators were appointed.

Prior to the 12th of February the following letters of withdrawal had been received. One from Miss Amelia Annie Lark, dated and received on the 20th of January, 1891. One from another lady dated and received the 5th of February. There was some others dated the 6th of February and the 10th of February, and received on those dates or on the day after the date of the notices.

The society was in course of liquidation, and had paid its outside creditors and there were surplus assets to be distributed, and questions had arisen as to the priorities of the various persons who had given notices of withdrawal as above stated, and a summons was taken out for directions to determine whether any and which of the shareholders who had so given notices ot withdrawal were entitled to priority over the other holders of investment shares in the society. The summons had been referred to the judge from the registrar for argument.

Fawcus, for the liquidators and the members who had given no notice of withdrawal.

John Henderson, for Miss Lark.—Miss Lark is entitled in priority to all other members to receive back her net monthly subscriptions, and any portion of profits realized and posted to her credit under rule 21. She gave notice of withdrawal before the notice convening the general meeting and of the proposed resolution to wind up were sent out. There was no question of insolvency so far as she knew at the time she gave her notice. To affect the validity of a notice of withdrawal there must be "notorious" insolvency which was not the case here as far as Miss Lark was concerned. Mathew, J., in *In re Sunderland 36th Universal Building Society*, 38 W. R. 509, 24 Q. B. D. 394, speaks of a rule of withdrawal not being applicable in cases where it has become "notorious" that a building society cannot meet its liabilities. But no such case is made here. [VAUGHAN WILLIAMS, J.—It appears from Mathew, J.'s, judgment that he, in drawing the line at which the rule ceases to be operative, considers not the knowledge of the person giving the notice of withdrawal, but the state of the society's affairs.] When the notice was given Miss Lark knew nothing of the state of the society's affairs at all, and is entitled to priority: *Carrick* v. *North British Building Society*, 22 Sc. L. Rep. 833.

Chester Jones and *Hansell*, for the other parties who had given notices of withdrawal.—We do not claim priority but only equality in sharing in the surplus assets. The word "notorious" used by Mathew, J., in *In re Sunderland 36th Universal Building Society* means notorious to those persons whose duty it is to carry on the business of the society. The rule giving priority ceased to apply when it became notorious to the officers of the society that the society could not

meet its liabilities and was commercially insolvent. That was in 1890.

They referred to *Carrick* v. *North British Building Society*; *Walton* v. *Edge*, 33 W. R. 417, 10 App. Cas. 33; and *In re Mutual Society*, 24 Ch. D. (n) 425.

Fawcus, in reply, cited *Barnard* v. *Tomson*, [1894] 1 Ch. 374.

VAUGHAN WILLIAMS, J.—This is a case which gives rise to questions as to the priorities of non-borrowing members of a building society. The case is one in which the society has been dissolved and has paid its outside creditors in full, and these questions arise as to the priorities of non-borrowing members *inter se*. The first material date is the 5th of February, 1891, when the report and balance-sheet were sent out. The next material date is the 12th of February, 1891, when the resolution was passed that the society should be dissolved. At that time a number of non-borrowing members had given notices of withdrawal, and they assert that they are entitled under the rules to priority *inter se* in the distribution of the assets of the society after payment of outside creditors. One of these claimants is Miss Lark. She gave a notice of withdrawal, which matured on the 7th or 10th of February, 1891—*i.e.*, at some time between the date of the notice convening the meeting and the holding of the meeting. In the case of all the other claimants, their notices did not mature until after the 12th of February, and in their case it is immaterial for me to consider the particular dates. It is only in the case of Miss Lark that the particular date of the notice of withdrawal is material in determining the question of priority.

Sometimes it is not an assistance to have a number of cases cited, because it is often difficult to reconcile them. But in the present instance that is not so. It seems to me that the cases which have been cited form a continuous current of authority, and are consistent and do not contradict one another in any way. The last case is the case of *Barnard* v. *Tomson*, [1894] 1 Ch. 374. I do not propose to go into the facts of that case at length, because if you only look at the judgment of North, J., you will see that he is simply carrying out and recognizing the principles laid down by Mathew, J., in *In re Sunderland, &c., case*. When North, J.'s judgment is looked at, it will be seen that the view he takes is that the line ought to be drawn at the time when it is recognized that there has been a stoppage of business, or it has been recognized by those competent to form an opinion that the business must be stopped. [His lordship stated the main facts in *Barnard* v. *Tomson*, and went on.] North, J., said in *Barnard* v. *Tomson*: "The result is that I can find nothing whatever prior to the instrument of dissolution to indicate such a state of things as could put an end to the operation of the existing rules upon the principles laid down in the cases. I have no materials for drawing a line earlier than the date of the instrument of dissolution. It seems to me, therefore, that all the notices to withdraw are good down to that time." What were the "materials" for which North, J., looked and which he was unable to find? He clearly means that there had not been a stoppage of business in fact or a recognition by the officers of the society that there must be a stoppage of business. He does not ask the question, Aye or No, Was the society solvent or insolvent when the notices to withdraw were given? The question, therefore, is, Has there in fact been a stoppage of business or a recognition by the officers of the society that there must be such a stoppage? North, J., follows the judgment of Mathew, J., in *Sunderland, &c., case*. Let us see, therefore, what Mathew, J., really says. Mathew, J., says: "The contention on this point" [*i.e.*, of the members giving notices to withdraw] "was that, until the winding-up order had been actually made, they were entitled to withdraw, and so to constitute themselves creditors of the societies. The liquidator insisted that the societies were known to be insolvent on the 17th of February, 1887, and that the right which members would otherwise have had of quitting the societies was then at an end." That is the way Mathew, J., puts the question, and that is the contention he says was raised by the liquidator. His judgment is: "We are of opinion that this rule" [the rule as to withdrawing members] "was not intended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities. It would be altogether unreasonable to suppose that it was intended, in the event of insolvency, to permit one set of members to escape from liability at the expense of others. There would seem to be no adequate consideration or motive for such an arrangement. The rule seems to us not to contemplate any such contingency as a suspension of business, and, therefore, only to provide for a withdrawal from the society while it was, or was believed to be, still solvent." There has been a good deal of argument as to the meaning of Mathew, J.'s judgment. In particular, a question has been raised as to what he meant when he spoke of the society being known to be insolvent, and when it had become "notorious" that the society could not meet its liabilities. Mathew, J., had not the slightest intention of defining the conditions under which the right of withdrawal would be brought to an end, but simply to say that in the case before him there was a society which was insolvent, and could not meet its liabilities. He laid down no such general rule as that the right to withdraw was dependent on the knowledge of the person giving the notice or the officers of the society. He only says these conditions were present in that particular case. That is my understanding of what Mathew, J., means. If I look at the case of *Walton* v. *Edge* and *Carrick* v. *North British Building Society*, I see that the real question propounded by the judges to themselves was, Has there been a stoppage of business, or anything equivalent to a stoppage of business? The judges there held that where there had been a stoppage of business or anything equivalent to a stoppage of business, the right to withdraw was determined. Lord Shand says, in *Carrick* v. *North British Building Society*, "In the case of *Tennant* v. *The City of Glasgow Bank*, 6 Court of Sess. Cas., 4th ser., H. L. 69, in which a number of authorities were cited and considered as to the effect of the stoppage of a business on the declared insolvency of the company, it was held that no change could thereafter be made in reference to the rights or *status* of the members of the company, so that at least the rights of creditors might be preserved." Lord Shand recognized that the condition determining the right to withdraw was the stoppage of business.

When one comes to consider for whom rule 21 was passed, it will appear that stoppage of business is the point at which the line is to be drawn in a case like this, and not insolvency. People have put their money into a concern, and there is a provision for withdrawal. The moment the venture comes to an end, or it is recognized by those competent to judge that the venture must come to an end, every principle of justice requires that those who joined the common venture should bear the losses. That is the moment at which the rule should cease to apply. In the present case that time was arrived at on the 12th of February when the resolution for dissolution was passed. That point had not been arrived at before

the 12th. There was no recognition in the directors report of the necessity to stop the business.

There will, therefore, be a declaration that Miss Lark is entitled in priority to all other members, and the liquidator will be directed to pay her in full. The remaining shareholders are entitled *pari passu*. Costs of all parties to be paid out of the residue of funds.

Solicitors, *Philip J Rutland; Lewis & Sons.*

Q. B. Div. (Grantham and Lawrance, JJ.) Aug. 6, 1895.

WOOD (*Appellant*) *v.* THE LONDON COUNTY COUNCIL (*Respondents*). (*a.*)

Local government—Metropolis—Erection of buildings with quadrangle in centre—Quadrangle for use of tenants only—Sanction of London County Council—"Laying out street for carriage traffic"—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 7.

The appellant, who was the owner of a site where formerly a brewery business had been carried on by him, resolved to use the ground for building, and he accordingly erected, fronting on the public street, a building with shops on the ground floor and flats above, and with an archway through the middle of the ground floor. He afterwards proposed to build round the other three sides of the quadrangle formed by clearing away the old houses, and when the buildings would be completed there would be forty-two flats with a quadrangle or courtyard in the centre from which there would be two staircases to the flats. There would be no exit or entrance to or from the quadrangle except by the archway, which was closed by an iron gate, and the quadrangle would be for the use only of the tenants of the flats and those visiting them, and the public would be entirely excluded from it.

Held, that this quadrangle was not a "street" within the meaning of section 7 of the London Building Act, 1894, *and that the appellant, in commencing to lay out the quadrangle, had not "commenced to form or lay out a street for carriage traffic" within the meaning of that section, and did not, therefore require the previous sanction of the London County Council.*

Case stated by Mr. De Rutzen, metropolitan police magistrate, sitting at Westminster Police Court.

A summons was taken out upon complaint made on behalf of the London County Council (the respondents) against the appellant, that the appellant did unlawfully commence to form and lay out a certain street for carriage traffic without having first made an application in writing to the London County Council for and obtained their sanction to the formation and laying out of such street for carriage traffic, contrary to the provisions of section 7 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii), which provides that "before any person commences to form or lay out any street, whether intended to be used for carriage traffic or for foot traffic only, such person shall make an application in writing to the Council for their sanction to the formation or laying out of such street either for carriage traffic or for foot traffic (as the case may be) . . . and no person shall commence to form or lay out any street or carriage traffic or for foot traffic without having obtained the sanction of the council"; and section 8 provides that "a person shall be deemed to commence to form or lay out a street if he erect a fence or other boundary or lay down lines of kerbing or level the surface of the ground so as to define the course or direction of a street, or if he form the foundation of a house in such manner and in such a position as that such house will or may become one of three or more houses abutting on or erected beside land on which a street is intended to be or may be thereafter laid out or formed: Provided that no person shall be deemed to commence to form or lay out a street if he do any of the acts in this section mentioned for some purpose other than that of forming or laying out a street."

The site in question in this case, until recently, formed part of the site of an old brewery belonging to the appellant, and of a private house connected therewith.

At the time when the brewery existed there was a covered entrance or footway about six feet wide by the side of the private house from Victoria-street into a square yard on the site, and from the square yard there were two other entrances to other places, but such entrances and footway were not used by the public, and no right of way existed over the same.

About 1891 the appellant sold the brewery business, and the brewery ceased to be used, and in 1894 the appellant resolved to utilize the site for building, and he accordingly erected, fronting or abutting on Victoria-street, a building comprising shops on the ground floor with flats above, and an archway through the middle of the ground floor of the building.

Such buildings were erected in accordance with the statutes applicable thereto prior to the passing of the London Building Act, 1894, and the south-west wall of such building was left unfinished with a view to the subsequent extension of the buildings.

Shortly after the passing of the Act of 1894 the appellant decided to extend the building fronting on Victoria-street by building round the other three sides of the quadrangle formed by clearing away the brewery buildings, and on the 18th of April, 1895, he gave notice to the district surveyor in compliance with the said Act, of his intention so to do, but he made no application to the county council for their sanction to the formation and laying out of a street in connection therewith.

When the buildings would be completed by extending them round the other three sides of the quadrangle there would be in all about forty-two flats, and there would be two entrances and staircases leading from the quadrangle to the flats. There would also be a one-storied building to be used as an estate office.

There would be no exit or entrance to or from the quadrangle, except by the archway in Victoria-street, which was closed by lofty iron gates, and this archway and the quadrangle would be for the use of the tenants of the flats in the proposed new buildings, and of the tradesmen and others visiting them with or without carriages, and the public at large would be entirely excluded from them.

On the 3rd of April, 1895, the appellant's solicitors wrote to the respondents' solicitors, stating that the appellant had done enough to bring himself within section 8 of the Act if his proposed scheme were in contravention of the Act, and requesting the respondents to take the necessary steps to have the question determined, and on the 24th of April the above summons was issued on the application of the county council.

The respondents contended, and the appellants denied, that the appellants had commenced to form and lay out a street for carriage or foot traffic within the meaning of section 7.

The magistrate found, as a fact, that the place in question was a street, and held that the appellant

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

had, under the circumstances, commenced to form and lay out a street for carriage traffic within the meaning of section 7 of the London Building Act, 1894, and he accordingly convicted the appellant, and ordered him to pay a nominal fine, and £5 5s. costs.

The question now was whether the decision of the magistrate was right.

For the appellant, it was contended that this quadrangle was really only a courtyard belonging to the block of buildings, and was, in fact, part of the curtilage of the buildings; that it was a courtyard laid out solely for the convenience of the tenants, and that the case found that it could not be used by the public at large, and, therefore, did not come within section 7: *The London County Council* v. *Davis*, 43 W. R. 574; *Pilbrow* v. *Vestry of St. Leonard, Shoreditch*, 43 W. R. 342, [1895] 1 Q. B. 433.

For the county council it was contended that it was a pure question of fact whether this was a street or not within the meaning of the section, and that the magistrate had found as a fact that it was a street, and that his decision was final.

Lawson Walton, *Q.C.*, and *E. Morten*, for the appellant.

Cripps, *Q.C.*, and *Avory*, for the respondents.

Grantham, J.—In this case we are asked by the learned magistrate to say whether or not his decision was right in holding that this was a street, and that the appellant had, under the circumstances, commenced to form and lay out a street for carriage traffic within the meaning of section 7 of the London Building Act, 1894. In answer to that question we both think, without any hesitation that he was wrong, and that he decided wrongly. It was contended very strongly for the county council that we ought not to interfere in this case because the learned magistrate had found as a fact that it was a street and that the appellant was commencing to lay it out; and it was said that in a case of this kind it was essentially a question of fact for the magistrate, and although other magistrates had all of them come to a contrary view, yet it was not a question of law in any way, and it must be, as a question of fact, left to the decision of each magistrate hearing the case. If that were so, the result would be that you would have as many different decisions as there were magistrates sitting in London. Therefore, we do not think that each particular magistrate can decide this according to his own particular view; we think he must decide it according to what are the legal definitions of the words used, or at any rate he is not to find as a fact that which the law would not allow to be the fact in the particular case. He has found this as a fact, because the owner of the property proposes to deal with it in a particular view. He says that dealing with it in that way brings it within the section. That is a matter of law, and we hold that it does not bring the owner within that section, which is only intended to apply to a different set of circumstances from those which we have to deal with here. The owner of the property had used it for a great number of years for a particular purpose. It was a large space, and there were ways through it which were used by the owner for his horses, carts, and drays, and they were used, probably, far more than they will be now. The owner proposes to pull down the stables, waggon sheds, brew houses and various places, and build mansions in the place of those buildings which were there before. He proposes to improve the centre of this place, pulling down the brewery, and making a garden round it, leaving a sufficient space for the cabs or the carriages of people who will live in this place, or who are desirous of coming to call upon those who are there. The whole place, from beginning to end, is as private as it can possibly be. It is true that the owner proposes to let it out in flats, but he reserves to himself the absolute right over the whole of this piece of land, and people simply have the rights which he chooses to give them. That being so, can this quadrangle or courtyard of these houses be called a street, or said to be laid out for carriage traffic? The 7th section says that before any person commences to form or lay out any street, whether intended to be used for carriage traffic or for foot traffic, he must make an application to the county council. Now, if the argument for the county council were correct, the footway up to the house seems to me to come within the definition of street, because a portion of the ground which he has for the purpose of building a house on is used for foot traffic. It is used for people going up to the house, and I do not see where one is to draw the line if that were a street. If the owner is not to be allowed to keep private a courtyard, as has been done in this case, I cannot see how he can deal with any portion of his land which is devoted to the passing to and fro of people going to the house, or can reserve to himself the right of making that roadway or footway which he thinks most suitable for communication. In this particular case the claim is made under a section which would make it necessary for the owners to devote 40 feet of this road to a carriage-way, or where there was no roadway, 20 feet of this space to a footway, absolutely useless, and absolutely inconsistent with the rights of private owners. I quite agree that we are not justified in considering ourselves bound by the case of the *London County Council* v. *Davis*, because that was the converse of this case, and the magistrate found the other way, and the court held that the magistrate was justified in finding as he did, at any rate that they could not hold that he was wrong. Although we cannot say that that is a direct authority by which we are bound in this case, where the magistrate has found the other way, we are entitled to say this, that not only in that case, but in almost all the cases in which this question has been argued, the learned judges used such an example as this to show that it would not be a street if the owner proposed to deal with it as he proposed to deal with it in this case. Therefore, we are entitled to call in aid the arguments used, and the statements of the judges of what their views would be in a case similar to the case now before us. It is true, as stated for the county council, that the word "street" has never been absolutely defined, but there are many cases in which it has been held that that which has been done here is not a "street." We are not called upon here to lay down a definition of what is a street, but we are entitled to say whether or not this is a street within the meaning of this particular section. We have both come to the conclusion that it is not a street within that section, and that, therefore, the conviction must be quashed.

Lawrance, J., concurred.

Appeal allowed with costs, and conviction quashed.

Solicitors for the appellant, *Godden, Son, & Holme.*

Solicitor for the respondents, *W. A. Blaxland.*

Lunacy.

(A. L. Smith and Rigby, L.JJ.) Nov. 27; Dec. 5.

In re CATHERINE SALT. (*a.*)

Lunatic — Person lawfully detained — Settled land — Tenant for life—Power of leasing—Exercise of power by receiver duly constituted—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 62—*Lunacy Act*, 1890 (53 *Vict. c.* 5), *s.* 116, *sub-sections* 1 (c), 2; *s.* 120 (h).

The court has power, under sections 116 *and* 120 *of the Lunacy Act*, 1890, *to authorize the committee of the estate of a lunatic, lawfully detained but not so found by inquisition, to exercise the powers of leasing given to the lunatic as tenant for life of settled land.*

In re Baggs (*a note to the case of* In re X.), 42 *W. R.* 657, [1894] 2 *Ch.* 415, *distinguished.*

The official solicitor having been duly appointed receiver, under section 116 of the Lunacy Act, 1890, of the estate of Catherine Salt, a lunatic lawfully detained, but not so found by inquisition, applied to the court for an order, under section 120 of the same Act, that he might be at liberty to execute the powers of leasing vested in the lunatic as tenant for life of certain property under the will of her late husband. The receiver desired to execute the lease of a public-house, known as the Forge Inn, Cardiff, to an intending lessee, and the master had found that the proposed lease would be beneficial to the estate of the tenant for life and remainderman.

When the application went before Kay, L.J., in chambers it was supposed to be determined, or at any rate prejudiced, by *In re Baggs*, a note to the case of *In re X.*, 42 W. R. 657, [1894] 2 Ch. 415.

Kay, L.J., referred the matter to the court.

Ingle Joyce, for the application.—I submit that full power is given to the judge to make the order under section 120 (*h*) of the Lunacy Act, 1890, and that then the power will fall within section 6 of the Settled Land Act, 1882, and not within section 62 of that Act, which has no application to the present case. If *In re Baggs* has the effect which it was supposed to have, the result will be that in every case where a power of leasing is required to be exercised, the expense of the inquisition and the appointment of a committee must be incurred, even in small estates.

Cur. adv. vult.

Dec. 5.—A. L. SMITH, L.J., read the following judgment:—This is an application by the official solicitor who has been appointed under section 116 of the Lunacy Act, 1890, to exercise the powers of a committee of the estate of Catherine Salt, a person lawfully detained as a lunatic though not so found by inquisition, for an order under section 120 of that Act, that he may be at liberty to execute the powers of leasing vested in Catherine Salt, as tenant for life in the property in question under the will of her late husband, and in particular to execute a lease of a public house called the Forge Inn, Cardiff, to an intending lessee, and the question is whether such an order can be made.

The proposed lease has been found by the master to be a beneficial lease to the estate of Catherine Salt and the persons entitled in remainder.

It is not a lease within the powers of leasing contained in the will, and the leasing powers in part 4, s. 6, of the Settled Land Act, 1882, will have to be resorted to.

By section 120 of the Lunacy Act, 1890, it is enacted: "The judge may by order authorize and direct the committee of the estate of a lunatic" (in which position the present applicant stands by virtue of section 116 (2)) to (*h*) "execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends."

If the lease proposed to be executed had been a lease within the power contained in the will it would clearly have been within the express terms of this section, for Catherine Salt had a limited estate only in the property in question, she being tenant for life thereof.

By section 6 of the Settled Land Act, 1882, it is enacted that "a tenant for life may lease the settled land or any part thereof," to state it shortly, in the way proposed to be done in the present case.

Rebus hic stantibus (where is the difficulty)? It appears to me that there is no difficulty whatever, for the case falls within the express terms of the two Acts.

But it is suggested that there is a decision in this court of *In re Martha Baggs* (a widow), reported in the note to *In re X.*, which stands in the way.

In my judgment it does nothing of the kind. In that case an application was made under section 116, sub-section 2 of the Lunacy Act, 1890, not for an order to lease, but for an order to "sell property 'belonging' to the lunatic," she having only a life estate therein, and this court held that the applicant could not bring that case within that sub-section, because the property did not 'belong' to the lunatic, she having only a life interest therein, and that he could not bring the case within the provisions of section 62 of the Settled Land Act, 1882, because that section only applied to a tenant for life, who was a lunatic so found by inquisition, which Martha Baggs was not; and this court therefore held that it was a case not provided for by either the Lunacy Act, 1890, or the Settled Land Act, 1882.

But in my judgment the present case is expressly in terms provided for by section 120 of the Lunacy Act, 1890.

We are not, therefore, fettered by this case, for it does not apply to the present case, and in my judgment an order giving power to execute the proposed lease can be legally made, and we make such order accordingly.

RIGBY, L.J., gave judgment to the same effect.

Application allowed.

Solicitor, *The Official Solicitor.*

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) Dec. 4, 5.

In re J. H. JONES. (*a.*)

Solicitor and client—Costs—Business in magistrates court and court of quarter sessions—Agreement as to costs—Jurisdiction of High Court to set aside—Attorneys and Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 8, 10, 15.

A documnt signed by a client alone relating to the

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

payment of costs may be "an agreement in writing" within section 4 of the Attorneys and Solicitors Act, 1870.

Such an agreement relating to business done by a solicitor in a police-court or in a court of quarter sessions is subject to taxation in the usual way, and may be examined, and, if necessary, set aside by a judge of the High Court.

The expressions "the court" or "a judge" in the Act of 1870 are inapplicable to a police magistrate or a court of quarter sessions, and are only applicable to a court of law or equity having in the ordinary exercise of its jurisdiction power to set aside such agreements.

So held, affirming Stirling, J. (ante, *p.* 10).

Appeal from a decision of Stirling, J., reported *ante*, p. 10.

A client took out a summons against his solicitor, J. H. Jones, asking for the delivery and taxation of a bill of costs under the following circumstances:—The client was, in October, 1893, committed for trial to the Cardiff Quarter Sessions on a criminal charge. The solicitor was retained by him to defend him. The client thereupon paid the solicitor £25 on account of costs, and two days later signed a document agreeing to pay a lump sum of £75 in satisfaction of all the costs, the solicitor threatening that unless such agreement were signed he would withdraw from the defence of the client. The client was tried at sessions and acquitted. He subsequently paid the balance of the £75 and took out the summons as above.

At the hearing of the summons a preliminary objection was taken that the document, not being signed by the solicitor, was not an agreement within the Attorneys and Solicitors Act, 1870; that it related to business done, and could not be set aside. A further objection was taken that even if the agreement came within the provisions of the Act, the High Court had no jurisdiction under section 8 of the Act to set aside the agreement, the proper tribunal to deal with the matter being either the magistrates' court or the court of quarter sessions.

Stirling, J., overruled the objections, and ordered delivery of a bill of costs and taxation, and restored the summons to the paper.

The solicitor appealed.

Section 4 of the Attorneys and Solicitors Act, 1870, is as follows:—"An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements, in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum or by commission or percentage, or by a salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained."

Section 8:—"No action or suit shall be brought or instituted upon any such agreement, but every question respecting the validity or effect of any such agreement may be enforced or set aside without suit or action on motion or petition of any person or the representative of any person a party to such agreement, or being or alleged to be liable to pay or being or claiming to be entitled to be paid the costs, fees, charges, or disbursements in respect of which the agreement is made by the court in which the business, or any part thereof, was done, or a judge thereof; or if the business was not done in any court, then where the amount payable under the agreement exceeds £50 by any superior court of law or equity or a judge thereof, and where such amount does not exceed £50, by the judge of the county court which would have jurisdiction in an action upon the agreement."

Section 10:—"When the amount agreed for under any such agreement has been paid by or on behalf of the client, or by any person chargeable with or entitled to pay the same, any court or judge having jurisdiction to examine and enforce such an agreement may, upon application by the person who has paid such amount, within twelve months after the payment thereof, if it appears to such court or judge that the special circumstances of the case require the agreement to be reopened, reopen the same, and order the costs, fees, charges, and disbursements to be taxed, and the whole or any portion of the amount received by the attorney or solicitor to be repaid by him, on such terms and conditions as to the court or judge may seem just."

Section 15:—"Except as in this part of this Act provided, the bill of an attorney or solicitor for the amount due under an agreement made in pursuance of the provisions of this Act shall not be subject to any taxation nor to the provisions of the Act of 6 & 7 Vict. c. 73 and the Acts amending the same respecting the signing and delivery of the bill of an attorney or solicitor."

Dunham, for the appellant.—I submit that the High Court has no jurisdiction on account of the Solicitors Act. Until the passing of that Act there was no power whatever for a client to agree to pay a lump sum for costs; the client, having once agreed to pay a lump sum, cannot reopen the question afterwards.

Ashton-Cross, for the respondent, was not called upon.

LINDLEY, L.J.—This is an appeal from an order of Stirling, J., setting aside an agreement between a solicitor and a client as to the payment of costs. The point raised by Mr. Dunham is that the application to set aside this agreement was made to the wrong court. The costs in question were incurred in relation to defending the client in a criminal proceeding before a magistrate and before the court of quarter sessions. The client was committed for trial by the magistrate, but at the quarter sessions he was acquitted. Mr. Dunham contends that in order to set aside this agreement the proper course is to take it either to the magistrate's court or to the court of quarter sessions. He relies upon the provisions of the Attorneys and Solicitors Act, 1870, and says that, according to the language of that Act these costs have been incurred in a proceeding in a court, and that the court having jurisdiction to set aside the agreement is the court in which the proceeding took place.

Now, that contention strikes an English lawyer as rather startling, because until 1870 nobody ever imagined that either a magistrate or justices at quarter sessions had jurisdiction to set aside an agreement.

It would be strange if the Legislature, in dealing with agreements between solicitors and their clients and in providing machinery for setting aside such agreements, had made such a very large alteration in the law without there being any sign of an intention to alter the law with regard to magistrates and quarter sessions in other respects. It must be admitted that the Act is awkwardly drawn. The material sections are 4, 8, 10, and 15. The Act contains no definition of a "court," and it is an Act to amend the law relating to the remuneration of attorneys and solicitors, not an Act to extend the jurisdiction of magistrates or quarter sessions. Section 4, which in effect enables a solicitor to make an

agreement with his client as to his remuneration for work done without the necessity of taxation, says this: [His lordship read the section, and continued:—] That is to say, the section renders lawful that which was previously considered illegal—namely, an agreement by a solicitor with his client for a lump sum. There can be no question that the expression "whole or any part of any past or future services," and so on, includes business done in all courts and everywhere else.

Then follows this proviso: [His lordship read the proviso, and continued:—] That does not look as if any court like a criminal court were intended. Then the section goes on: [His lordship read the remainder of the section, and continued:—] That is the first time that the expression "court or a judge" is used in this Act of Parliament. That must mean a court or a judge qualified to try an action at law or hear a suit in equity.

Then section 8 provides that any such agreement may be enforced or set aside "by the court in which the business or any part thereof was done, or a judge thereof, or if the business was not done in any court, then where the amount payable under the agreement exceeds £50 by any superior court of law or equity or a judge thereof, and where such amount does not exceed £50 by the judge of a county court which would have jurisdiction in an action upon the agreement."

Mr. Dunham says that the work done by the solicitor in this case was work done in a court, and that the court which alone has jurisdiction to set aside this agreement is the court in which the business was done. But it is to be observed that the expression used is "by the court or a judge thereof." That language appears to be inapplicable to a police magistrate and to the court of quarter sessions. Obviously the term "court or a judge" means a court of law or equity which in the exercise of its ordinary jurisdiction has power to set aside agreements of this kind.

The other sections do not throw any light on the matter or carry it any further. No doubt the language of the sections which Mr. Dunham has picked out is, to some extent, in favour of his contention; but when I ask myself, Is this language so plain as to give magistrates or justices sitting at quarter sessions a new jurisdiction? my answer is that it is not. It is also to be observed that under the previous Act these costs would have been taxed by the Court of Queen's Bench, and it is absurd to say that Parliament intended to transfer the jurisdiction from the Court of Queen's Bench to the court of quarter sessions. The appeal must be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. This is a proceeding taken by a client who was tried at Cardiff for receiving stolen goods with the knowledge that they were stolen. He retained Mr. Jones as his solicitor first before the magistrate and afterwards before the court of quarter sessions. Jones took £25 for his expenses before the magistrate. I see no objection to that. But after Mordecai had been committed, and when the day of the trial was drawing nigh, Jones said to him, "If you don't agree to pay me £75 for my costs, I withdraw from the case"; and under this pressure Mordecai acceded to his request and gave a charge on his property for the amount, and he afterwards paid the balance of the £75. So that Jones has in his pocket £75 for defending his client before the magistrate and at quarter sessions. Mordecai was acquitted and is at large, and he refuses to be bound by this agreement. In these circumstances the case came on before Stirling, J., for the purpose of having the agreement set aside and getting an order for taxation of these costs. Mr. Dunham took this point. He said: "Stirling, J., had no jurisdiction to set aside this agreement or to make an order to tax because of section 8 of the Attorneys and Solicitors Act, 1870, which gives the court jurisdiction to enforce or set aside agreements for costs. Under that section the proper court to set aside this agreement is not the Court of Chancery, but is either the court of the magistrate or the court of quarter sessions." If it can be made out that these courts have jurisdiction, we must give effect to that argument. But if not, the point is a bad one. I agree that section 8 is not artificially drawn, but looking at it as a whole it is obvious what the Legislature intended. Section 4 enables a solicitor to enter into a bargain with his client for a lump sum. Section 8 commences: "No action or suit shall be brought or instituted upon any such agreement." Now what does that mean? Did anybody ever hear of bringing an action or instituting a suit before justices either at petty sessions or quarter sessions? The section then proceeds:—[His lordship read on, and continued:—] The words "action," "suit," "motion," "petition," are all applicable to proceedings in the superior courts, or possibly also to proceedings in the county courts. Then what is the meaning of the words "the court or a judge thereof"? Who ever heard of a magistrate being described as a judge of a court. They are justices of petty sessions. And the same observation applies to the Court of Quarter Sessions. They are all justices. The language of the section is inapplicable to them. The section then provides a remedy in the case of "business not done in any court"—*i.e.*, any court having jurisdiction to enforce or set aside the agreement. [His lordship read the concluding part of the section, and continued:—] It is suggested that in the present case the effect of this section is to transfer the jurisdiction to set aside the agreement from the courts which have heretofore exercised it to the magistrate or the justices at quarter sessions. In my judgment this contention cannot prevail. Sections 10 and 15 neither add to nor detract from section 8. The technical objection therefore fails, and, there being ample evidence of pressure, I think that this agreement ought to be set aside and an order to tax made.

RIGBY, L.J.—I am of the same opinion. I agree with the reasons already given, and especially the reasons with respect to the words "the court or a judge thereof." So far as I know it is neither the legal practice nor the common practice to speak of magistrates or justices as judges. No doubt they have important judicial functions to perform, but they have been called justices for centuries, and *primâ facie* when the Legislature uses the words "a court or a judge thereof" it is intended to exclude courts in which justices sit. Then you find the functions imposed by the statute are functions of a character which never have been imposed upon justices. So there can be no doubt that "business not done in any court" in section 8 means business not done in any court having a judge who has jurisdiction to set aside agreements. As soon as the technical difficulties are out of the way this is clearly a proper case for an order to be made. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Riddell, Vaizey, & Smith*, for *J. H. Jones*, Cardiff; *Vallance & Vallance*, for *Hervey E. Murly*, Bristol.

From Chan. Div. (Lord Herschell; and A. L. Smith and Rigby, L.JJ.) Nov. 19, 21.

SIMPSON v. MAYOR, &c., OF GODMANCHESTER. (a.)

Easement—Prescription—User—Presumption in law of lost grant.

S. was the owner and occupier of three locks on a certain river, and certain navigation and other rights on the same river. The G. Corporation had for many years exercised the right to open the lock-gates in all times of flood, without opposition from S.'s predecessors in title. S. brought an action to restrain the defendants from exercising any such right. The G. Corporation, as owners of the adjoining lands at this part of the river, claimed an easement to open the gates, or, alternatively, the presumption of a lost grant.

Held, that a valid easement had been created in favour of the G. Corporation, and that such could be supported by the presumption of a lost grant.

Appeal from a decision of Wright, J., sitting as an additional judge of the Chancery Division.

The plaintiff was the owner and occupier of three locks on the river Ouse, known as Godmanchester, Houghton, and Hemingford locks, and also held certain navigation and other rights over that part of the river Ouse where the locks were situate.

The defendants claimed the right to open the lock-gates at all times when the river was in flood, and alleged that they had exercised this right from time immemorial.

In 1689 one moiety of the navigation and all rights under various charters and Acts had become vested in one Henry Ashley. In the same year, by an indenture made between the bailiffs, assistants, and commonalty of Godmanchester of the one part, and Henry Ashley, of the other part, it was agreed (*inter alia*), that it should be lawful to and for the miller of the said Godmanchester mills for the time being, and in his default or omission for such person or persons, officer or officers, as should be thereupon appointed by the bailiffs of Godmanchester for the time being, for ever thereafter, upon every likelihood and appearance of any flood or outrage of water, to set open, and keep open, or else to take off the gates of the aforesaid sluices, and also all the gates of the sluices in or near Houghton, and also the gates of the sluices in or near the Milnes at or near Hemingford Grey in the said county of Huntingdon, and lay them upon the land by the side of the said sluices until the waters should be fallen and the floods well abated."

The defendants based their right on an easement to cause the waters of the river Ouse to pass through the sluices or locks in time of flood for the benefit of the borough of Godmanchester, and as a protection for the lands and the occupiers thereof. The easement was claimed under 2 & 3 Will. 4, c. 71, and under the deed of 1689, or under some lost grant. The plaintiff denied the existence of any right, said that the sluice gates had only been opened by permission of the lock-owners, and claimed an injunction to restrain the defendants from interfering with the locks. Wright, J., refused the injunction. The plaintiff appealed.

E. R. Simpson, for the appellant.—Nothing short of the grant of an easement would be binding on the plaintiff, and this claim is not an easement; it is too indefinite and uncertain, is destructive of the servient tenement, and differs in important respects from all known easements. [Lord HERSCHELL referred to the definition of an easement in Gale on Easements, and applied it to the present case.] An easement cannot be legally vested in anyone but the owner of the dominant tenement: Gale on Easements, 4th ed., at pp. 8, 9; Bro. Abr. Graunt, pl. 130, cited in *Ackroyd* v. *Smith*, 10 C. B. 164, at p. 188. [*Crackanthorpe, Q.C.*, referred to *Goodman* v. *Corporation of Saltash*, 31 W. R. 293, 7 App. Cas. 633.] That case has no application to easements, and was a case between trustee and *cestui que trust*, and not between the corporation and a third party as here. Secondly, a lost grant cannot be presumed, because the user is accounted for by the deed of 1689, on which the defendants rely: *Attorney-General* v. *Horner*, 33 W. R. 93, 14 Q. B. D. 245. The defendants have not proved that the exercise of the right claimed is beneficial to any of the alleged dominant tenements, and the plaintiff has proved that it is actually prejudicial to some of them.

Crackanthorpe, Q.C., and *T. T. Methold*, for the respondents, were stopped by the court.

Lord HERSCHELL.—I am of opinion that the decision of the learned judge ought to be affirmed. So far back as living memory goes—and there is ground for inferring that for a period anterior to living memory—the Corporation of Godmanchester have exercised the right in times of flood of raising certain sluices or locks which now belong to the plaintiff, who has recently become owner of the navigation upon which the locks or sluices are situate. The plaintiff comes into court for an injunction to restrain the corporation from exercising this alleged right, and he asserts that the defendants have no such right. The law on this subject has been laid down in *Philipps* v. *Halliday*, [1891] A. C. 228, at p. 231, 39 W. R. Dig. 81, in terms which were concurred in by the House of Lords as follows: "Where there has been a long continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin, if such a legal origin was possible, and that the courts will presume that those acts were done, and those circumstances existed which were necessary to the creation of a valid title."

The question, therefore, is, Can the corporation have acquired the right to open the sluice gates in any valid, lawful manner? That question admits of only one answer. Mr. Simpson says they can not, because this is not an easement and is not a right which the law can recognize as having a legal origin. But in my opinion it is an easement within the definition contained in the first chapter of "Gale on Easements," which is a perfectly correct definition. Easements are of various characters, and it is a fallacy to suppose that in order to establish the existence of an easement it must be brought within some particular class of easements which have been previously recognized. Where a landowner grants to another the right to do something on his land for the benefit of the land of the grantee, that, *primâ facie*, is an easement; and the right here claimed by the corporation falls within that general principle. It is said that there is here no evidence to show how the right came into existence, but if the corporation are the owners and occupiers of lands which can be affected by the fact of the sluices being open or shut, then those lands may be regarded as the dominant tenements in respect to which that easement is granted by the owner of the servient tenement, and it will be presumed that the grant was made in respect of such tenements as would be affected by the exercise of the right claimed. Then it is objected that in some cases

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

the corporation are the owners but not the occupiers of the land. But that is not material, as there is no difficulty in supposing that the corporation could exercise the right for the benefit of their tenants; the tenement is benefited by the act done, whether the owner does it or the occupier does it. Therefore, apart from any deed or grant, on the clearest principles of law, this alleged right is capable of a legal origin, and must be presumed to have had a legal origin. But, further, I am not satisfied that the right cannot be rested upon the grant of 1689, coupled with a lost grant which there seems to be every reason for presuming. [His lordship referred to the deed, and continued:—] Upon the true construction of this deed it amounts to the grant of an easement to the corporation as owners of the Godmanchester Mills. There is no difficulty in granting to the owners of the mills the right to open the sluices or locks now in question. But it is said that at the date of the grant Ashley was owner only of an undivided moiety of the two sluices, other than Godmanchester, but, assuming that the right cannot be rested on this deed alone, the owners of the other undivided moiety insist that the purchase of the Godmanchester sluices is to be taken to have been made on their behalf as well as on behalf of Ashley, and the court so holds. Obviously, therefore, they cannot take the benefit of this deed without also submitting to the burdens; and, if a grant is necessary to complete the defendant's title, a grant ought to be presumed, having regard to the lengthened period of the user. Therefore, it is immaterial to consider whether the user is referable to the deed of 1689 or not, since in either case there is a legal foundation upon which the claim can be rested, and to which effect ought to be given in accordance with well-established principles. The appeal ought to be dismissed.

A. L. SMITH and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Batten, Proffitt, & Scott.*

Solicitors for the respondents, *Grubbe & Co.*, for *Hunnybun & Sons*, Huntingdon.

High Court of Justice.

Chan. Div. } Nov. 27.
Chitty, J. }

BATES v. KESTERTON. (*a.*)

Married woman—Separate use—Restraint on anticipation—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* (1); *s.* 61 *sub-sections* (2).(6); *s.* 58, *sub-section* (1) *viii.—Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 8—"*Settlement*"—"*Tenant for life.*"

A married woman entitled in possession under a will to the equitable fee of a share of realty for her separate use without power of anticipation is not a tenant for life, and has not the powers of a tenant for life under the Settled Land Act, 1882, *of the share, there being no "settlement" of such share within the definition in section* 2, *sub-section* (1), *of the Act.*

Section 8 *of the Settled Land Act*, 1884, *enacting that, for the purposes of the Act of* 1882, *the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife, refers to a tenant by the curtesy in possession only.*

Action.

Solomon Hilbert, by his will dated in 1863, directed that his debts, funeral and testamentary expenses should be paid, and after making certain bequests he bequeathed to his sons his leasehold messuages or tenements and premises known as Nos. 1 and 2, Cottage-road, Pimlico, upon trust to pay the net yearly rents and profits of the said premises (after payment of the ground rent and other outgoings) to the testator's daughter, Mary Bates, wife of Joseph Bates, during her life, and after her decease unto and amongst all and every the child or children of the said Mary Bates in equal shares as tenants in common. The testator appointed his said sons executors of his will, and the testator declared that the leasehold premises so bequeathed to each of his said granddaughters should be for her sole and separate use, and free from the debts, control, or engagements of any husband, and that their receipts respectively, notwithstanding coverture, should be a sufficient discharge for any moneys payable to them respectively, and that neither of the testator's said granddaughters should have power to anticipate the same in any manner whatever.

The testator died in 1866, and his daughter Mary Bates died in 1893. In 1890 Nos. 1 and 2, Cottage-road aforesaid were purchased by the receiver for the metropolitan police district under his statutory powers, and the purchase-money was paid into court. The court in 1891 sanctioned the investment of part in the purchase of freehold hereditaments known as No. 87, South End, Croydon, and the same were conveyed to the trustees of the above will in fee simple upon the trusts therein expressed concerning the said leasehold premises so far as the same were applicable to freeholds.

The plaintiffs, who were the four surviving children of Mary Bates, in April, 1895, had agreed to sell to the defendant, and the defendant had agreed to purchase, the fee simple of No. 87, South End, but a difficulty arose in regard to the conveyance of the shares of the plaintiffs Ada Mary, wife of Henry Farthing, and Edith Ann, wife of Nicholas Giles, owing to the restraint on anticipation under the above will. They were both born in the testator's lifetime, and married after 1882, and it was admitted at the bar that they both had issue heritable. The above action was for specific performance by the purchase of the agreement, but now came on upon notice of motion for judgment upon admissions; and the only point that the court had to decide was whether Mrs. Farthing and Mrs. Giles were or had the powers of tenants for life of their shares within the meaning of the Settled Land Act, 1882.

Byrne, Q.C., Macmorran, and *Low*, for the plaintiffs.—The shares of the two married women being subject to restraint against anticipation, are settled land within the Settled Land Acts, and the married women have the powers of tenants for life under those Acts. The share of each is held in trust for her separate use for life, and afterwards for her husband, if he survives her, for his life as tenant by the curtesy. The wife here cannot (except by will) defeat her husband's curtesy: *Cooper* v. *Macdonald*, 26 W. R. 377, 7 Ch. D. 288. [CHITTY, J., referred to *Taylor* v. *Meads*, 13 W. R. 394, 4 De G. J. & S. 597.] The land, therefore, is settled on persons in succession within section 2, sub-section (1), of the Settled Land Act, 1882. See also sections 61, 58, sub-section (1) viii. and the note thereon in Wolstenholme's Conveyancing Acts, 7th ed., p. 373, and the Settled Land Act, 1884, s. 8, which support our contention.

Hewitt, for the defendant.—There is no such settlement as is contended for here. The husband has no present estate, only a *spes successionis* at most, and his

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

curtesy, if it arises, will arise by operation of law, and not under or by virtue of the testator's will. Section 61 does not apply to a case like this, and section 58, sub-section (1) viii., and the 8th section of the Act of 1884 contemplate a tenant by the curtesy in possession.

He also referred to *In re Tippetts' and Newbould's Contract*, 36 W. R. 597, 37 Ch. D. 444, and *In re Currey*, 35 W. R. 326.

The two married women can only make a title by getting an order under section 39 of the Conveyancing Act, 1881, removing the restraint on anticipation to which their shares are subject.

Byrne, Q.C., in reply, referred to Co. Litt, 67a, and Hood and Challis on the Conveyancing and Settled Land Acts, 4th ed., p. 300.

CHITTY, J.—This is a question between vendor and purchaser. The vendors contend that the two married women, each of whom is plainly entitled to a share under the will, are or have the powers of tenants for life within the meaning of the Settled Land Act, 1882, by virtue of the Act of 1884. The vendors' argument results in this, that because the married women are restrained from anticipation, therefore they can dispose of their shares in the land under the Settled Land Act. The property is now freehold, and I must treat the property as freehold. [His lordship here read the will and stated the facts as far as material.] The two married women were living at the death of the testator, and the limitations and restrictions of the will as to the granddaughters, though addressed to a class, are, for the reasons stated by me and the Court of Appeal in *In re Russell, Dorrell* v. *Dorrell*, *ante*, p. 100, [1895] 2 Ch. 698, good, and not void for remoteness.

It is said for the vendors that there is a settlement within the meaning of the Settled Land Acts, and the married women have the powers of, or actually are, tenants for life thereunder. It was admitted at the bar that they had issue, and the issue was capable of inheriting; and it is said that the husbands are entitled to an estate by the curtesy, and that, therefore, not by the words but by the effect of the will there was a settlement.

This is plain, there is only one estate created by the will, and that is limited to the married woman. In *Taylor* v. *Meads*, where property was vested in trust for a married woman, her heirs and assigns, with a declaration that she should, notwithstanding coverture, stand possessed for her separate use, Lord Westbury said, "The estate given to Elizabeth Meads," the married woman, "is one and entire, being the equitable estate in fee, with a declaration, the effect of which is that her husband shall have no interest in the estate so devised, nor shall the wife be under any disability with respect to such estate by reason of her existing coverture, but shall have the same rights of enjoyment and disposition as if she were a single and not a married woman" (4 De J. & S., at p. 607). There was no restraint on anticipation there. That the estate was one and entire was made a ground of Lord Westbury's decision. In *Cooper* v. *Macdonald*, where the married woman was entitled for her separate use, and also restrained from alienation of the rents and profits, she died having by her will devised the estate for her children, but the husband's assignees claimed his curtesy, and the Master of the Rolls held that there was none, because of the will and disposition of the estate by the wife, but the restraint did not prevent the wife barring the entail and acquiring the fee, and the wife, having thereby acquired an equitable fee to her separate use, had power to defeat her husband's right to curtesy by devising the estate. The Master of the Rolls quoted the above passage from Lord Westbury's judgment in *Taylor* v. *Meads* with approbation, 7 Ch. D., at p. 293.

I think on the construction of this will that there is separate use annexed to the married women's equitable estate in fee, and they have power, as against their husbands and heirs, of disposition of their shares by will, but not by deed, because of the restraint on anticipation. If their husbands should die, the separate use will be free from the restraint, and they will be able to dispose of their interests. In my opinion there is by this will one estate vested in the married women subject to the restraint against anticipation.

I now come to the Act of 1882. Section 2, sub-section (1), enacts that any instrument under or by virtue of which land stands limited to or in trust for any persons by way of succession creates a settlement. It is said for the vendors that the effect of the restraint is to bring the case within the section, and, therefore, the land now stands limited for persons by way of succession. That argument is incorrect.

It is not under or by virtue of the will that the husband, if he survives his wife and she leaves no will, takes curtesy, but by virtue of the general law as an incident of the wife's estate in fee, just as in the converse case the wife would take dower. But the case does not stand on this section alone. There is section 61 of the Act. There is nothing in the foregoing provisions of the Act which makes a married woman entitled in fee in possession either a tenant for life or a person having the powers of a tenant for life. There was no need for it. There is also nothing which would apply to the case of a married woman in the position of the married woman in *Taylor* v. *Meads*, entitled, that is, in possession to the fee simple of lands settled for her separate use with the right of immediate disposition of the fee. Sub-section (1) runs thus: "The foregoing provisions of this Act do not apply to the case of a married woman." Sub-section (2) deals with the case of a married woman entitled for her separate use, who, if she had not been a married woman, would have been a tenant for life or have had the powers of a tenant for life under the Act, and a married woman entitled in fee simple for her separate use is not within it. Sub-sections (3), (4), and (5) are not material. Sub-section (6) says that a restraint on anticipation shall not prevent the exercise by a married woman of any power under the Act, so that where she is or has the powers of a tenant for life a mere restraint is not to prevent the exercise of her powers; and this provision is in conformity with the general scheme of the Act. But the section does not say because a married woman is restrained from anticipation therefore she has the powers of a tenant for life under the Act.

But it is said that as the husband may take curtesy he may be said to be initiate tenant by the curtesy. The Act of 1882 enumerates among the persons having the powers of a tenant for life under the Act a tenant by the curtesy (section 58, sub-section (1) viii.), but the section expressly says when his estate or interest is in possession. The tenant by the curtesy referred to in the section means, therefore, a tenant by the curtesy in possession. Then the Act of 1884, s. 8, enacts that, for the purposes of the Act of 1882, the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife. That was passed to remove some difficulty of construction in regard to the estate of a tenant by the curtesy under the Act of 1882, and again means a tenant by the curtesy in possession. These references to the estates by the curtesy do not assist the vendors for the reasons stated by me.

There is, I repeat, but one estate in the wives, and no limitation to the husbands by virtue of any settlement, but the husbands, if they survive their wives, will take by the general equitable doctrine, which, in this respect, follows the common law. Putting the whole case together, I am of opinion that the vendors have not succeeded in establishing that because the married women are restrained from anticipation, therefore they are or have the powers of tenants for life within the meaning of the Settled Land Act, 1882.

The court made an order binding the interest of the married women under section 39 of the Conveyancing and Law of Property Act, 1881.

Solicitors for the plaintiffs, *Mead & Sons.*

Solicitors for the defendant, *Preston, Stow, & Preston.*

Chan. Div.
Kekewich, J. } Oct. 26, 31.

In re ANGERSTEIN.
ANGERSTEIN *v.* ANGESTEIN. (*a.*)

Will — Heirlooms — Actual possession — Chattels bequeathed in trust for person for time being entitled to "actual possession" of real estate.

Where real estate was limited to a person for life and to his son in tail, and chattels were bequeathed as heirlooms in trust to go along with and to be enjoyed by the person for the time being entitled to "actual possession" of the real estate,

Held, that the tenant in tail, who, having previously barred the entail, died during the lifetime of the tenant for life, had no such right in the heirlooms annexed to the hereditaments as to enable him to transfer them.

Summons.

John Julius Angerstein, by his will dated the 16th of January, 1823, gave his real estates in the counties of Norfolk, Suffolk, Kent, and Lincoln, to his son John Angerstein for life, with remainder to the issue of his said son in such part and shares and in such manner as his said son John Angerstein and his said son's then wife Amelia Angerstein should jointly, or as the survivor of them should, appoint, with remainder over in strict settlement. And the testator gave his leasehold estates, including his house "Woodlands" at Blackheath, on trusts corresponding to the uses of his freehold estate (subject to a certain restriction), and gave and bequeathed the contents of the said house (save and except pictures, plate, and books) upon trust to permit and suffer the same to go along with and be considered as heirlooms in his said house, so far as the rules of law and equity would permit; and as to certain plate, books, and pictures, the testator gave them to his trustees upon trust "to permit his said son to use and enjoy the same during his natural life, and after his said son's decease upon trust to permit and suffer the same to go along with and to be used and enjoyed by the person or persons who should for the time being, by virtue of the limitations thereinbefore contained, be entitled to the actual possession of the said freehold estates in the county of Norfolk, as or in the nature of heirlooms to the same estates, so far as the rules of law and equity will permit."

The testator John Julius Angerstein died on the 29th of January, 1823.

By three indentures of settlement, dated respectively the 5th, 6th, and 7th of August, 1852, executed by John Angerstein under the powers given him by his father's will, the said freehold estates under the events which happened became vested in William Angerstein for life, with remainder to W. J. N. Angerstein in tail.

John Angerstein, by his will dated the 4th of November, 1854, bequeathed certain pictures and jewels and other chattels "to such person or persons and so and in such manner as that the same shall, so long as the rules of law and equity permit, go along with and be held and enjoyed by the person or persons who, under the said indenture of the 5th of August, 1852, and this my will, shall for the time being be entitled in possession to my mansion-house at Westing, . . . but so nevertheless that the same, or any part or parts thereof, shall not for the purpose of transmission vest absolutely in any tenant in tail by purchase of the said mansion-house, who shall not attain the age of twenty-one years," but that the issue inheritable under the limitations of the said indentures to the estate in tail of the person so dying should take the same premises "absolutely according to the order of limitation."

John Angerstein died on the 8th of April, 1858, and the whole of the said real estates became vested in possession in his son William Angerstein for life, with remainder to W. J. N. Angerstein in tail.

W. J. N. Angerstein attained twenty-one years of age on the 19th of September, 1864, and in 1866, with the concurrence of his father William Angerstein, barred his reversionary estate tail, and they shortly afterwards resettled the same real estates, subject to incumbrances, and by such resettlement the life estate of William Angerstein was restored—W. J. N. Angerstein became the next tenant for life, with remainder to his first and other sons successively in tail male.

In 1874 W. J. N. Angerstein became a bankrupt, but his bankruptcy was shortly afterwards annulled and his affairs liquidated by arrangement, the trustee in liquidation selling all the assets to William Angerstein, to whom they were conveyed, and assigned by an indenture dated the 13th of May, 1876.

W. J. N. Angerstein died on the 17th of February, 1892, and his only son J. H. W. Angerstein became tenant in tail male of the estates, subject to the prior life interest of William Angerstein.

This was an originating summons by William Angerstein claiming to be entitled to the said heirlooms under R. S. C., 1883, ord. 55, rr. 3, 4, and ord. 54a, against the said J. H. W. Angerstein (who claimed to be interested in the said heirlooms), the trustees of the will of John Angerstein, and the legal personal representative of the last surviving trustee of the will of John Julius Angerstein.

Vaughan Hawkins, for the plaintiff J. William Angerstein.—By the principle decided in *Foley* v. *Burnell*, 1 Bro. C. C. 274, 4 Bro. P. C. 319, and *Martelli* v. *Holloway*, L. R. 5 H. L. 532, 21 W. R. Dig. 278, it is clear that the chattels bequeathed in these wills become vested in W. J. N. Angerstein. As to the words "actual possession," there can be no difference between entitled to possession and entitled to actual possession. *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40, 8 W. R. Ch. Dig. 73, was decided on the special words used there.

R. Younger, for J. H. W. Angerstein.—W. J. N. Angerstein never came into possession, and consequently W. Angerstein has only a life interest. [KEKEWICH, J.—*Foley* v. *Burnell* clearly applies to the gift in the will of J. Angerstein.] *Lord Scarsdale* v. *Curzon* establishes the proposition that "where

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

there are clear words referring to 'actual possession' a tenant in tail who dies before coming into possession is excluded."

F. E. Farrer and *Reginald Hughes*, for the trustees.

Vaughan Hawkins in reply.—Even if "actual possession" means physical possession the absolute disentailment put an end to the existing limitations, and the restriction came to an end. In both *Foley* v. *Burnell* and *Lord Scarsdale* v. *Curzon* there were persons who might have become entitled afterwards by the force of the restriction there. Here the complete disentailment has removed that possibility, and it cannot be that the heirlooms were tied up for a longer period than the real estate.

KEKEWICH, J.—The plaintiff claims to be entitled to the heirlooms through the tenant in tail in remainder of the real estate, and if that tenant in tail in remainder of the real estate was entitled to the heirlooms, so as to be able to transfer them, it is clear that the plaintiff must succeed.

Dealing, first, with the will of John Angerstein, the clause relating to the heirlooms is one familiar to conveyancers, and is within the principle of the code of law as stated in *Lord Scarsdale* v. *Curzon* as being established by *Foley* v. *Burnell* and other cases, the effect of which is accurately stated by Mr. Theobald at page 592 of the 4th edition of his book on Wills: "A gift of personalty as heirlooms to the persons for the time being entitled to real estate, so far as the rules of law and equity permit, vests absolutely, not in a tenant for life of the real estate, but in the first tenant in tail at birth, whether he comes into possession or not."

I hold, therefore, that the plaintiff is absolutely entitled to the chattels settled by the second will—*i.e.*, the will of John Angerstein. The words of the will of John Julius Angerstein present more difficulty. [His lordship read the clause as to the heirlooms.] The form is somewhat different to the clause in the other will, but the real difference consists in the insertion of the word "actual" before the word "possession." I cannot treat this as a mere elaboration by the person instructed to prepare the will. What I have to do is to say what is the proper legal meaning of the words before me. Here the testator has said that the heirlooms are to go to the person or persons for the time being entitled to the "actual" possession of the testator's freehold estate in Norfolk. Does the introduction of the word "actual" have any effect? If it were not there the first tenant in tail would take in accordance with the principle of *Foley* v. *Burnell* and other cases. Everything turns, therefore, on this word "actual," and, reading with the greatest attention the judgment in *Lord Scarsdale* v. *Curzon*, where the subject was fully considered, I come to the conclusion that the introduction of this word does make a large and important difference to the substance of this clause. The gift there was to the persons seised of or entitled to the "actual freehold," and not to persons entitled to the "actual possession"; but is there any difference in substance between these phrases? To my mind they really mean the same thing, and I see in the report of the case it is stated that the deed contained several clauses, in which the words "actual freehold" were so used that they could only be construed as meaning "freehold in possession": the argument was conducted on that footing, and the Vice-Chancellor came to that decision. In that case the Vice-Chancellor says (at pp. 65-67): "Heirlooms are given to be enjoyed, so far as the rules of law and equity will permit, by the person who shall be in the actual possession, or in the receipt of the rents and profits, but so as not to vest absolutely in any person thereby made tenant in tail by purchase, unless such person shall attain the age of twenty-one years; but on the death of such tenant in tail by purchase, the same shall go in the same manner as if they had been freeholds of inheritance, and had been thereby devised and settled accordingly," and "that is framed in order to tie up chattels to the person in possession." And later on he says: "In order to determine the construction of these clauses I must first settle the meaning of the phrase, 'The person seised of or entitled to the actual freehold.' In my opinion this can have no other meaning than the person in possession." And again he says, "I think it impossible to give to the words 'the person seized of or entitled to the actual freehold' any other meaning than the person in possession. I am far from saying that the words 'actual freehold' have any such technical sense; nor do I rest my opinion on the phraseology pointed out in some passages of Coke upon Littleton; but on the whole of this settlement I have no doubt about the meaning of these words." And again at p. 67 he says, "'Actual' must, therefore, mean in possession, or the clause would have no meaning." I dwell upon that because I am bound not to construe the words of this will in any manner contradictory to the rule of law laid down in the cases, whatever might be my opinion as to the grammatical meaning of the words themselves. Now I have here a clear authority—the authority of so eminent a judge as Wood, V.C.—that the words "actual freehold" and "actual possession" have the same meaning, and that the expression "actual possession" does take the words out of the rule established by *Foley* v. *Burnell* and other cases. The argument of counsel (probably Mr. Rolt) is thus set out in the report of *Lord Scarsdale* v. *Curzon*: "If, therefore, it is competent to limit chattels, so that the absolute interest shall go to the first person who shall become entitled to settled estates (within the limits allowed by the rule against perpetuities) in possession in inheritance, so as to exclude intervening remaindermen, this deed does so. It is competent to do so." Those were the two points to which the Vice-Chancellor directed his discussion of the authorities, and he comes to the conclusion that it is competent in law so to do, and was in fact in that case done. That it is possible in law so to do has not been denied in the present case, and that it has been done in this case seems to follow both from the decision of the Vice-Chancellor and also from the grammatical meaning of the words. The rule enunciated in *Lord Scarsdale* v. *Curzon* is thus set out by Mr. Theobald at p. 595 of the 4th edition of his book on Wills: "If the gift of chattels is to the person actually seised at the death of tenants for life, or to the person seised of the actual freehold, which is defined as freehold in possession, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded." This seems to me to be perfectly correct, and the result is that W. J. N. Angerstein, a tenant in tail who did not come into actual possession of the hereditaments devised by the will of John Julius Angerstein, had no right to transfer the chattels annexed to those hereditaments. Consequently I must hold that the plaintiff is not entitled to the heirlooms passing under the will of John Julius Angerstein.

Solicitors, *Farrer & Co.; Warren, Murton, & Miller; Stuart & Tull.*

under contract to purchase, see them. He subsequently received them back, and redelivered them to Thorne. It is said that in this way he did become acquainted with the fact of this second mortgage whilst acting as solicitor in this transaction for the respondents.

Considering that the solicitor knew *aliunde* of the existence of this mortgage, that it was not necessary in any way to communicate its existence to the first mortgagees in regard to their sale under the powers given by that mortgage, and seeing that all he did was to make use of the knowledge he had previously acquired to ask for the deeds in the way I have described, I think it may be a matter open to question whether that would be knowledge by their solicitor which could be imputed to the respondents so that it must be regarded as their knowledge. It is quite unnecessary to express an opinion upon or to determine that point. I have only made these observations in order that I may not be supposed to assent without further consideration to the proposition contended for on behalf of the appellant.

Now the question arises whether the Statute of Limitations can be pleaded. First, it is said that the right did not arise until 1892 when the fraud was discovered—that there was here a concealed fraud, and that although there was no fraud on the part of the respondents (that is not alleged) nor any concealment on their part, yet that there was fraud on the part of a person acting as their agent (namely Searle) —a concealment by Searle, who was the agent for the respondents, and that consequently it was not until the discovery that any cause of action arose.

I am entirely unable to give any countenance to such an argument. It appears to me perfectly clear that in order to charge any person with a fraud which has not been personally committed by him, the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something and purporting to do something on behalf of the principal. If the person is doing something within the scope of his authority, and purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. But if the person, although he has been employed as agent, is not in the transaction which is the wrongful act acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal. Now in this case there is no pretence for saying that in what he did that was fraudulent, or what he improperly concealed, Searle was acting for the respondents. It appears to me that as soon as they had received that £1,000, leaving Searle in possession of the remainder in which they claimed no right or title, to which they believed either Searle or somebody for whom he was acting was entitled, all agency on their behalf by Searle in relation to that surplus was absolutely at an end. From that moment he held it not as their agent at all; it was not intended that he should hold it for them, they did not contemplate that he was holding it for them, nor did he intend to hold it for them. To suppose that, in defiance of the intentions of both the parties to such a transaction, nevertheless there was the relation of agency, would, it seems to me, be a somewhat extravagant conclusion. I therefore can entertain no doubt that in the present case there has been no such fraud or concealed fraud shown as to prevent the statute running, if the statute applies, from the year 1878.

I ought to notice one point which was pressed—or rather two points—that it was the duty of the respondents to find out Mr. Thorne, and to see that he was paid, that that was a continuing duty which they have violated. If such a doctrine as that were to be given assent to in a case such as this, the value of the statute of 1888 would be practically at an end. It is said that here the respondents gave back to Searle the appellant's deeds, and so enabled him to commit the fraud. They only had those deeds in their possession by an accident. There was nothing to call their attention to the fact that they were Thorne's deeds. They received them after the sale was completed, at a time when they did not believe they had any further interest in the transaction at all. They were asked to look in a bundle of deeds to see if they had two deeds described in a particular way. They found those deeds and returned them. There was no obligation upon them to see what the contents were, and there is no reason to suppose that they ever did know the contents. To say that under those circumstances the Act imposes any liability upon them seems to me a hopeless contention.

The only remaining question is, Did the statute apply? It is contended that it did not because of the exception contained in the first sub-section to section 8, "except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy." It seems to me to be impossible seriously to say that the respondents were "party or privy" to the fraud in this case. The fraud was a fraud committed by Searle entirely subsequent to the transaction in which they had any interest or any concern, and they neither knew of it nor assented to it nor received any benefit from it nor took part in it in any sort of way. Under these circumstances I am at a loss to see how it can be said that they were "party or privy" to it.

But then it is said there is another exception. The claim is "to recover trust property or the proceeds thereof still retained by the trustee," "still" of course meaning at the time when the action is brought. In spite of the ingenious argument addressed to us by Mr. Cozens-Hardy upon this point, I remain unconvinced. I have a difficulty in seriously grasping the contention. To say that the leaving of this sum of money with Searle by the respondents under the belief that it was money which Searle was entitled to keep and hold and distribute, in which they had no sort of concern, with which they had nothing to do, was a retaining of the money by them so that it was in their hands at the time when this action was brought, is a proposition I can scarcely treat seriously.

For these reasons I think that the judgment of the court below is right and ought to be affirmed.

Lord ASHBOURNE.—I entirely concur. I think that section 8 of the Trustees Act of 1888 supplies a clear defence; and that is the opinion of all the learned judges before whom this case has come. Romer, J., had no doubt upon that, and the three Lords Justices of Appeal in giving reasoned judgments also came clearly to that conclusion. I really think this section might be nearly torn up if it is not to be held to apply to a case of this kind. It is difficult to imagine what case it would apply to if it does not apply to this.

It has been urged in the lengthened argument which has been addressed to your lordships that the section would not apply because some case of fraud might be imagined or imputed or suggested against the defendants. It has also been urged that it might be imputed that they still have the fund under their control. I am unable to follow either of these contentions. I am unable to see any ground on which it can be suggested that anything like fraud can be imputed to the trustees or on which anything

can be suggested bringing them within the exceptions in the clause in regard to their action. That being so, I think the appeal entirely fails.

Therefore I am clearly of opinion that the appeal should be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion. By a recent, and I think a very beneficial change of the law, a trustee who has committed a breach of trust is entitled to rely on any statute of limitations as fully as anybody may do who is not a trustee, provided his conduct has been free from any taint of fraud, and provided he has not derived, and is not in a position to derive, any personal benefit from the transaction impeached as a breach of trust. I assume that but for recent legislation the respondents would have been liable to answer the appellant's claim. But I think the Act of 1888 was intended to apply and does apply to such a case as this, and, indeed, I cannot imagine any case to which the Act could more properly or more clearly apply than the case which has been discussed before your lordships to-day.

Lord DAVEY.—I am of the same opinion. It appears to have been assumed, or it is stated in one of the judgments which have been read to us to be not in dispute, that but for the Act of 1888 the defendants would have been liable in the present case. I do not desire to dispute that, or to say that that is not so. I only desire to say that it is not by any means clear to my mind that such a consequence would have followed from the state of facts which is revealed in the evidence.

But, assuming that the constructive notice for which Mr. Phillpotts contended would have brought to the knowledge of Mr. Heard that which certainly he did not in fact know at the date of the sale, that Thorne was an encumbrancer upon this property so as to convert Mr. Heard and his co-trustee into trustees for Thorne, I am of opinion that the statute of 1888 forms a perfect answer to the claim.

Two questions have been argued—first, whether the case is not within one of the exceptions mentioned in the early part of the 8th section; and, secondly, it has also been argued that, independently of the statute, the time began to run only at a period less than six years before the commencement of this action. I do not desire to say anything more than has been already said by your lordships, or more than is contained in the judgments which have been delivered in the courts below upon this point. It appears to me to be impossible to say that the money was "still retained" by the trustees, and it must be remembered that there is no evidence of actual knowledge, or rather, I should say, that the evidence disproves actual knowledge on the part of the respondents of Mr. Thorne's position. But it is sought to say (I am not speaking of constructive notice) that they must have acquired knowledge of it through the receipt which was signed by Mr. Searle, purporting to act as Thorne's agent, and put with the respondents papers.

Now it appears to me that the appellant is in this dilemma—either the respondents read that receipt or they did not. If they did not read it, I see no evidence whatever that they acquired any knowledge of Thorne's existence or of his interest in the property. If they did read that receipt, what did it tell them? It told them that Searle was (I will assume wrongly) purporting to act as Thorne's agent, and that he had given a receipt in discharge of the respondents in that character. If they did read this receipt, why were they not at liberty to believe, erroneously as it turns out, but still to believe, that Searle was acting in that character? If so, it appears to me the case is exactly the same, in fact; the case is that they paid away upon that view the money to Searle erroneously, believing that he was Thorne's agent. If that be the state of facts, it seems to me idle to contend that money which is paid away by a trustee to another person, in the erroneous belief that he fills a particular character which it turns out he does not fill, is still retained by the trustee.

Upon the other point, which was so fully discussed before your lordships, that the statute did not begin to run till within six years of the beginning of this action, I only desire to say this: In my opinion, if fraud, or a non-discovery of fraud, is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of the person who invokes the aid of the Statute of Limitations. Now, the fraud which is imputed to Searle, and apparently justly, is that he put Thorne off his guard by continuing to pay his interest to him as if his security was still a subsisting one. It cannot be pretended for a moment that he was acting as agent for the respondents in doing that. He did not make the payments of interest in his character of agent for the respondents, he made them as agent for the mortgagor; and I see no foundation whatever upon which Searle's fraud can be attributed to the respondents, or can be said to have been committed by him while he was acting in the character of the respondents' agent.

Upon that ground, and the other grounds which have been stated in the judgments delivered in the courts below and by your lordships, I hold that there was no fraud imputable to the defendants which would prevent the running of the Statute of Limitations.

Judgments of the Court of Appeal and of Romer, J., affirmed, and appeal dismissed, with costs.

Solicitors for the appellants, *Mear & Fowler*, for *G. H. Thorne*, Nottingham.

Solicitors for the respondents, *Yarde & Loader*, for *Burd, Pearse, & Prickman*, Okehampton.

Privy Council.

(*From the Supreme Court of Queensland.*)

June 29, 1895.

BRABANT *v.* KING.
KING *v.* BRABANT. (*a.*)

Negligence—Public body—Nonfeasance—Liability to an individual under a contract—Deposit of goods for safe custody—Inspection of premises—Risk of injury to goods—Duty of bailee.

The principle of exemption from liabilities afforded to public bodies for mere nonfeasance, as enunciated in Municipality of Pictou *v.* Geldert, 42 *W. R.* 114, [1893] *A. C.* 524, *and other cases, has no application to a case in which the parties charged with the nonfeasance are under obligations to an individual member of the public to perform the duty, which they have neglected to his prejudice, in consideration of their being remunerated by him for its performance.*

A depositor of goods for safe custody, who by himself or his servants has had an opportunity of observing defects in the storehouse, incurs no obligation from this

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

circumstance, for he is entitled to rely upon the care and skill of his paid bailee.

This was an appeal from the Supreme Court of Queensland.

The facts and the whole course of the proceedings are set out in their lordships' judgment.

Sir R. Webster, Q.C., Vernon Smith, Q.C., and *Bankes*, for the appellant.

Finlay, Q.C., and *Bray*, for the respondents.

The judgment of their lordships (Lord HERSCHELL, L.C., and Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, SHAND, DAVEY, and Sir RICHARD COUCH) was delivered by

Lord WATSON.—The Queensland Navigation Act of 1876 (41 Vict. No. 3) requires that the master of every vessel arriving at a port in that colony shall land, at the Government or other authorised store, all gunpowder exceeding twenty pounds in weight, and all other explosive substances which may be on board such vessel whether as cargo or stores. On the passing of the Act, the Government of the colony established magazines at the port of Brisbane for the reception of explosives, and no other magazines have been authorised or erected there. These magazines are under the exclusive charge of Government officials, and storage rent is payable to them for all explosives deposited with them. In the event of such rent not being duly paid within a time limited, the officer in charge is authorised by the Act to sell the explosives, and with the proceeds of sale to satisfy the rent, and all other charges and expenses, accounting for the surplus, if any, to the importer or owner of the goods. Section 103 of the Queensland Customs Act of 1873 (37 Vict. No. 1) provides "that no compensation shall be made by the Government or the collector to any importer, proprietor, or consignee of any goods by reason of any damage or loss occasioned thereto in the warehouse or in any examining shed by fire or inevitable accident, or by felony."

Before the month of January, 1893, the appellant company had, in compliance with the Act of 1876, landed at the port of Brisbane 616 boxes of dynamite, 568 boxes of gelignite, 361 boxes of gelatine dynamite, and 33 cases of detonators. These goods remained in the Government stores until the month of February, 1893, when the events occurred which have given rise to the present litigation. The boxes of dynamite and other explosive substances were all stored in a wooden magazine which had been previously used as a coal shed, at Eagle Farm, below Brisbane, about 20 feet from the bank of the river. The cases of detonators were stored in a paraffin oil shed a little way farther up the river.

On two occasions in the month of February, 1893, the river Brisbane was in heavy flood, and its waters rose to an exceptional height. On the first occasion the flood attained its maximum in the afternoon of Sunday, the 5th of February, when the water rose to a point of 4 ft. 7 in. above the floor of the Eagle Farm magazine. On the second occasion, the flood water, in the morning of Sunday, the 19th of February, rose 9 inches higher or 5 ft. 4 in. above the floor of the magazine. The result was that the whole of the appellant company's goods were rendered valueless by their immersion in water.

The present proceedings were brought by the appellant company in January, 1894, for recovery of the damage which they had sustained, in pursuance of the Claims against Government Act; and the respondent, Thomas Mulhall King, was duly appointed to be nominal defendant on behalf of the Government of the colony. Shortly stated, the case made in their pleadings by the appellant company was that the Government officials had failed to take reasonable precautions against the occurrence of floods, by storing their goods at a higher level, and had also failed, when the floods came, to take reasonable and proper measures for preventing or diminishing damage, by shifting some of the cases and stacking them above the others. The repondent, besides traversing these allegations, maintained that the appellant company had accepted the risk of the condition in which the premises were, and of the locality in which they were situated at the time of storage, and also that the rapid rising of the Brisbane River to an unprecedented height, on the two occasions referred to, was an "inevitable accident," for which the Government were not responsible.

The case was tried before Harding, J., and a jury, whose verdict consisted of separate answers to the following nineteen questions which were submitted to them by the learned judge:

1. Before January, 1893, were the plaintiffs importers into the port of Brisbane of the goods?—Yes.

2. Before said date did plaintiffs deliver goods to Government in, pursuance of statutes, to be taken care of for reward?—Yes.

3. In consideration thereof did Government undertake and agree with plaintiffs to (*a*) properly store and take care of goods, and (*b*) to deliver to plaintiffs on request?—(*a*) (*b*) Yes.

4. Before said date did Nobel's Co. cause to be delivered by plaintiffs the goods to Government in pursuance of statutes to be stored and taken care of for reward?—Yes.

5. Were plaintiffs the duly constituted agents of company in that behalf?—Yes.

6. In consideration thereof did Government undertake and agree with company to (*a*) properly store and take care of goods, (*b*) re-deliver to company on order or bequest?—(*a*) (*b*) Yes.

7. Did the Government not regard its duty in that behalf?—They did not.

8. Did it not take proper care of the goods?—They did not.

9. By its negligence in not providing (*a*) proper storehouses, (*b*) a proper locality, (*c*) in not taking proper care, were the goods after that date destroyed?—(*a*) (*b*) (*c*) Yes.

10. Is the indenture of the 6th of November, 1893, proved?—Yes.

11. If loss arose was it caused by inevitable accident through the rapid rising to an unprecedented extent of the flood?—No.

12. Was such rising such that the Government could not by any amount of ability have foreseen or guarded against it?—The rising was not such that the Government could not by any amount of ability have foreseen or guarded against it.

13. Was it known at all times to plaintiffs (*a*) that such storehouses, (*b*) that such locality were unfit or improper?—Yes.

14. Did plaintiffs, with full knowledge of question 13, and of the risks attending the storage of explosives in such locality for many years prior and up to grievance continue to deliver explosives to the Government for storage by them in the said storehouse and locality?—Yes.

15. Did plaintiffs undertake and continue to undertake such risks?—Yes.

16. Thereafter and with full knowledge of questions, 13, 14, 15, did plaintiffs deliver the explosives to Government for storage in its storehouse in locality?—Yes.

17. What was the value of goods destroyed?—£7,680 8s. 4d.

18. Was that the market value? If not, what was?—Yes.

19. What damages?—£7,680 8s. 4d.

Upon these findings the learned judge directed judgment to be entered for the plaintiffs for the full amount found by the jury.

Against that judgment the present respondent appealed, and gave notice of motion (1) to have the judgment set aside, and to have judgment entered for him upon the findings as they stood; or (2) to have the judgment set aside and judgment of non-suit entered; or (3) to have the findings of the jury in answer to questions 7, 8, 9, 11, 12, 17, 18, and 19, set aside, and a new trial had; or (4) to have the findings of the jury in answer to questions 17, 18, and 19 set aside, and the amount of damages re-assessed. The appellant company lodged a counter-motion, to have the findings of the jury in answer to questions 13, 14, 15, and 16 set aside.

The appeal and cross-motion were heard before three judges of the Supreme Court who, by a majority, ordered that the judgment entered be set aside; that the findings of the jury in answer to questions 9 (*a*) (*b*), 17, 18, and 19 be set aside, and that a new trial be had between the parties to re-assess the damage. The appellant company were ordered to pay to the respondent his costs of the appeal, the payment of costs of the trial and of all other costs being reserved. The effect of that order was in substance to strike out of the verdict one finding of the jury which affirmed that the Government had been negligent in not providing a proper storehouse in a proper locality, and in not taking proper care of the goods, and also the three findings relating to the amount of damages.

Cooper, J., the dissentient judge, thought that judgment ought at once to be entered for the defendant, being of opinion that the Government was under no liability to the appellant company, upon the principle recognized by this board in *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400, 39 W. R. Dig. 233, and more recently in *Municipality of Pictou* v. *Geldert*, 42 W. R. 114; [1893] A. C. 524, and in the *Municipal Council of Sydney* v. *Bourke*, [1895] A. C 433, 43 W. R. Dig. 74. That principle has, in certain instances, been held to afford protection to commissioners or trustees representing public interests from the consequences of mere non-feasance; but it has, in the opinion of their lordships, no application to a case like the present, in which the parties charged with nonfeasance are under obligation to an individual member of the public to perform the duty which they have neglected to his prejudice, in consideration of their being remunerated by him for its performance.

In delivering judgment, the majority of the court, consisting of Chubb and Real, JJ., mainly directed their observations, in the first place, to the answer returned by the jury to question 9 (*a*) (*b*) (*c*), and, in the second place, to the answer given to question 16. They differed from the learned judge who tried the case, as to the proper legal inference to be derived from the findings implied in the answer given to question 16, taken in connection with the answers of the jury to the three preceding questions. They held that these findings necessitated the conclusion in law that the appellant company had accepted the burden of all risks, so far as arising from the condition in which the Government storehouses were at the time when their goods were landed, and from the locality in which these storehouses were situated. It is obvious that, if the appellant company had agreed to undertake such risk, the Government would have been, to that extent, relieved of the duty of taking precautions for the safe custody of the goods. Accordingly when the learned judges of the majority came to deal with the findings of the jury in answer to (*a*) and (*b*) of question 9, which affirm respectively the negligence of the Government in not providing proper storehouses, and in not placing these in a proper locality, they held that the findings were in direct conflict with the answer given by the jury to question 16. Both of the learned judges indicated their opinion that the answer to (*c*), the third branch of question 9, which affirms, in general terms, that the goods perished through neglect of the Government to take proper care of them, might cover the failure of their officials to take proper measures, when the floods came or were imminent, to prevent loss by restacking the boxes. And they held that, while the appellant company were precluded from charging the Government with negligence in respect of any alleged failure to alter the condition or site of the storehouses before the advent of the floods of February, 1893, it was still open to them to show that proper precautions had not thereafter been taken for the purpose of salving part at least of the goods stored, and to recover damages for the goods destroyed through the want of these precautions.

When the judgment of the Supreme Court is read, in the light of the opinions expressed by the majority, it becomes clear that the sole object of the court in remitting the case for new trial was to give the appellant company an opportunity of satisfying a jury that, on the arrival of the floods in question, the Government officials failed to adopt reasonable and proper means to place part, if not the whole of their goods, beyond the reach of flood-water; and, in the event of the jury finding to that effect, to have the amount of damage resulting from such failure assessed by them. Both parties have appealed against the judgment, the original appeal being at the instance of the appellant company, and the cross-appeal, which has been consolidated with it, at the instance of the respondent as representing the Government of the Colony. The arguments addressed to their lordships have been on the same lines with those indicated by the parties in their motions before the Supreme Court, which have already been noticed.

The real issues involved in the pleadings of the parties, and in the evidence which was led by them before the jury, appear to their lordships to be exceedingly simple; although they were complicated, if not obscured, by the pleas of inevitable accident, and of acceptance of risk by the company, which were advanced by the respondent, as well as by the shape in which the case for the appellant company was presented for the consideration of the jury.

Their lordships can see no reason to doubt that the relation in which the Government stood to the appellant company was simply that of bailees for hire. They were, therefore, under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled store-keeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions

to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred.

Their lordships think it right to indicate that, in their opinion, the locality of the Government stores to which the present case relates was not a matter of which reasonable complaint could be made, and that it bulked too largely in some of the questions put to the jury. It is not only convenient, but it may be highly expedient that stores for the reception of explosive substances landed from vessels before they enter the harbour should be placed near to the water-edge. But the selection of such a site, however justifiable in itself, imposes upon the storekeeper the plain duty of making arrangements within the store by which the goods are placed at such a level as will, in all probability, ensure their absolute immunity from the incursion of flood-water.

Upon the respondent's plea of inevitable accident, their lordships have only this observation to make, that it does not appear to them to be appropriate to the circumstances of the present case; and that, when stated in the form in which it was submitted to the jury by questions 11 and 12, it does not afford the true test for determining the liability or non-liability of the Government.

It admits of serious doubt, whether questions 13, 14, 15, and 16, upon the answers to which the decision of the Supreme Court is based, ought to have been sent to the jury. The answer returned to question 15 does not deal with fact; it is in reality an inference in law from the facts affirmed by the other replies to these questions; and it was, in their lordships' opinion rightly, disregarded by Harding, J., when he proceeded to apply the verdict. It would be a very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the store-house, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim, *volenti non fit injuria*, have no bearing whatever upon the point. From the very nature of the transaction, the depositor is entitled to rely upon the care and skill of his bailee. The duty is incumbent upon the latter, in the due fulfilment of his contract, of considering whether his premises can be safely used for the storage of explosives or other goods, and, if they cannot, to take immediate steps for placing the goods in a position of safety. If the defects of these Government magazines were as apparent to the servants of the appellant company as the jury have found they were, they ought to have been equally patent to the official storekeeper with whom the duty of safe custody rested.

Their lordships are accordingly of opinion that the judgment of the Supreme Court must be set aside; and they have come, not without regret, to the conclusion that no course is open to them for terminating the litigation, except sending back the case for new trial. Besides the assessment of damages, if any are found to be due, there are, in their opinion, only two questions which, in some shape or other, ought to be submitted to the jury. The first of these questions is, whether the Government officials failed to exercise due care and skill, in storing the appellant company's goods, seeing that they stored them at so low a level that they were destroyed by the floods of February, 1893; and the second, whether on the advent of the floods, these officials failed to take reasonable and proper measures for saving the whole or any, and if so what part of the goods from destruction. These issues are, in this sense, alternative, that, in the event of the jury affirming the first, it will be unnecessary for them to take the second into consideration.

Seeing that there must be a new trial, it is unfortunate that an opinion should have been expressed by one of the learned judges of the majority of the Supreme Court, tending to the inference that the first of these issues is only susceptible of one answer. Chubb, J., said:—"I see nothing in the evidence to show that the abnormal flood of 1893 could have been or was foreseen by anybody." In the view of the case which was taken by the learned judge those observations might be legitimate, and it is obvious that they were not meant to trench upon the province of the jury at the second trial. Real, J., with commendable caution, observed that he felt "bound to hold that the evidence given entitled the jury to find that a reasonable man ought to have anticipated a flood higher than that of 1890, and as high as that of 1893; ought to have known that goods placed in a magazine or store at a height less than the level of the floods of 1893 were in danger of being injured by flood waters." The evidence, shortly stated, shows that about the year 1886 there was a flood higher than any of its predecessors; that, in 1890, there was another flood still higher; and that, after its occurrence, the platform upon which explosives were stored was raised by about an inch. Whether, in view of the possibility of natural causes, and of the probability of artificial causes tending to raise still higher the level of the river floods, an increase in the elevation of the platform to that limited extent was consistent with either skill or prudence, appears to their lordships to be a substantial question, well fitted for the consideration of a jury.

Their lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, except in so far as it directs that the judgment entered for the plaintiffs be set aside; to set aside the findings of the jury in answer to questions 7 to 19 inclusive submitted to them at the trial; to direct that a new trial be had; and to reserve for the decision of the judge who tries the cause all questions of costs incurred in both courts below, until the result of such new trial. The respondent must pay to the appellant firm their costs of these appeals.

Solicitors for the appellants, *Bircham & Co.*

Solicitors for the respondent, *Freshfields & Williams.*

Court of Appeal.

App. Bankruptcy.
(Lord Esher, M.R., and Lopes and Kay, L.JJ.)

Nov. 29.

In re CORNISH.
Ex parte BOARD OF TRADE. (*a*.)

Bankruptcy—Trustee—Liability to render account—Board of Trade—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 162, *sub-section* 2 (a) (b)—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.

The words "any such trustee or other person" contained in section 162, *sub-section* 2 (b) *of the Bankruptcy Act*, 1888, *apply to a trustee or any other person empowered to collect, receive, or distribute any funds or dividends under any of the four Acts of Parliament mentioned in the fourth Schedule to that Act.*

It is not necessary for the Board of Trade, on an application to enforce under sub-section 2 (b) *against a trustee an account of the sums received and paid by him, to show that the trustee has had in his hands, since the passing of the Act of* 1883, *funds which he has not distributed.*

Section 8 *of the Trustee Act*, 1888, *which limits the claims upon trustees, does not apply to a trustee in bankruptcy.*

This was an appeal by the trustee of an estate in liquidation from an order of the Divisional Court (Vaughan Williams and Kennedy, JJ.), ordering him to submit to the Board of Trade an account, verified by affidavit, of the sums received and paid by him as trustee.

On the 10th of February, 1875, the debtor filed a petition in the Exeter County Court for the liquidation of his affairs by arrangement, and E. Fewings was appointed trustee in the liquidation.

The debtor, whose principal asset consisted of a life estate, died in 1876. The trustee received in respect of the debtor's estate the sum of £850. In 1895, at the instance of certain creditors, the Board of Trade requested the trustee to fill up and return a form giving an account of the sums received and paid by him as trustee. In reply he furnished the Board of Trade with a summary of his receipts and payments, whereby it appeared that he had received £850 and had expended £905, £250 being in respect of law costs, and £655 in the discharge of certain incumbrances. Subsequently the Board of Trade, not being satisfied with the statement, ordered the trustee, under section 162, sub-section 2 (*b*) of the Bankruptcy Act, 1883, to furnish them with an account, verified by affidavit, of the sums received and paid by him in respect of the liquidation. Section 162, sub-section 2, provides as follows:—(*a*) "Where after the passing of this Act, any unclaimed or undistributed funds or dividends in the hands or under the control of any trustee or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule" (the Bankruptcy Act, 1869, is one of the Acts therein mentioned), "or any petition, resolution, deed, or other proceeding under or in pursuance of any such Act, have remained or remain unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay the same to the bankruptcy estates account at the Bank of England. The Board of Trade shall furnish each trustee or other person with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof."

(*b*) "The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding as aforesaid, and may direct and enforce an audit of the account."

The trustee failed to comply with the order, whereupon the Board of Trade applied to the county court judge at Exeter for an order to enforce such an account. The learned judge refused to make such order, on the ground that he considered himself bound by the judgment of Cave, J., in *In re Chudley*, 33 W. R. 708, 14 Q. B. D. 402. Thereupon the Board of Trade appealed to the Divisional Court, which reversed the decision of the county court judge, and held that the order could be made, although the trustee had received no funds since the passing of the Act of 1883; and further, that "any such trustee" in clause (*b*) means any trustee appointed under any of the Acts mentioned in schedule 4 of the Act.

From this decision the trustee now appealed.

Herbert Reed, Q.C., and *Ward Coldridge*, for the appellant.—The court has no jurisdiction to make this order, nor does clause (*b*) of sub-section 2 of section 162 give such power. At any rate, before the Board of Trade are entitled to such an order they must prove to the court that the trustee has had in his hands, since the passing of the Act, some unclaimed or undistributed funds. This they have not done. The appellant is not such a trustee as would come under clause (*a*)—namely, a trustee in whose hands there have been, after the passing of the Act, unclaimed or undistributed funds or dividends, therefore he is not such a trustee as comes under clause (*b*): *In re Chudley*. Further, twelve years had passed since the passing of this Act without any such application as this being made. The lapse of such time bars relief, and the trustee is entitled to the protection of the Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8: *In re Page*, 41 W. R. 357, [1893] 1 Ch. 304. The trustee has already rendered a sufficient account.

Sir R. Finlay, S.G., and *Muir Mackenzie*, for the Board of Trade, were not called upon.

Briscoe appeared for parties interested.

Lord ESHER, M.R.—It seems to me that this case is perfectly clear. The question is whether under section 162, sub-section 2 (b) the Board of Trade had a right to call upon this trustee to render them an account. It was argued before the learned judges that "such trustee or such other person" was confined to a particular kind of trustee, one who had money in his hands. The learned judges, however, held that it applied to a trustee or any other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule of this Act, and I entirely agree with them. That being so it applies to this trustee.

Then it is said it only applies to this trustee if the Board of Trade have fulfilled a condition precedent, which condition precedent is that before they can have any right to ask this trustee to give an account they must be able to shew that he has money in his hands which he has not distributed. There is no such condition in sub-section 2 (b). It is as plain as words can be. We are asked to imply such condition.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

So far from thinking it implies such a condition it seems to me that it would upset the whole of the Act of Parliament, and let accountants who are trustees do just what they like. Therefore on the first point I agree with the learned judge (Vaughan Williams, J.). In his judgment he says, "It was argued that one ought to read the words 'such trustee' as meaning a trustee who, after the passing of the Act, has funds which he has to discharge himself of in his hands within the meaning and the definition of sub-section 2. I do not agree. I think 'such trustee' means a trustee appointed under the scheduled Acts, and I so construe it." I agree with him, and, therefore, that ground of appeal fails.

Then you come to the Trustee Act of 1888. Upon that the learned judge has said, "The object of the Act of Parliament is to make him furnish such an account as would show whether he is an accounting party or not." "When he has done that it may or it may not be that a claim for the balance arising on that account would be barred by the Statute of Limitations." Therefore he leaves that question open. But it has been so pressed upon us that I do not object here, in this Court of Appeal, to give a binding decision which seems to me to be this: That that Trustee Act, speaking of trustees in general, does not apply at all to such a trustee as the present one, that is a trustee in bankruptcy. So that there are two answers to this point. First of all, that the Trustee Act does not apply to such a trustee as the present, and, secondly, if it does, it can only apply when a claim is made upon him to do something, and no claim has yet been made upon him other than to give this account, which is for the purpose of showing whether any further claim can be made upon him.

Therefore on both grounds I think the learned judges in the court below were right, and that this appeal must be dismissed.

LOPES, L.J.—To my mind this is a very clear case, and I can add nothing to that which has been said by the Master of the Rolls. I only desire to say this, that I agree with the Master of the Rolls when he says that in his opinion the Trustee Act does not apply to such a trustee as this. I think the appeal must be dismissed, with costs.

KAY, L.J.—I agree also that this appeal must be dismissed. With regard to the construction of the Act I will only just add this. Sub-section 2 (*b*) of section 162 of the Act of 1883 provides that "The Board of Trade may at any time order any such trustee or other person to submit to them an account"; "such trustee or other person," these are relative words. Now what do they refer to? They refer to clause (*a*) of the same sub-section, "any trustee or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule, or any petition, resolution, deed, or other proceedings under or in pursuance of any such Act." That is the description of "such trustee or other person." The words relied on are no part of the description of trustee or person. In sub-section (*a*) it is provided that where "such trustee or other person" after the passing of the Act has undistributed funds in his hands he is to pay them into the Bank of England, but the fact of his having undistributed funds in his hands is no part of the description of a trustee or other person. It would be the greatest possible nonsense if we were to introduce that as part of the description of a "trustee or other person," and it would be to limit sub-section (*b*) in the most extraordinary manner. The argument has seriously been this: that the Board of Trade cannot call upon any trustee or other person mentioned in this sub-section (*b*) unless they first of all show that since the passing of the Act he has had funds in his hands. Well, the trustee may say, "I have not had any funds in my hands since the passing of the Act, and I am therefore not liable to account." The learned judge was perfectly right, I think, in holding that that is not the true construction of sub-section 2 (*b*). It gives a large power for calling for accounts, and there is no reason to limit it. It is a power to the Board of Trade to call upon a trustee in a bankruptcy or liquidation to account to the Board of Trade, and if he refuses or hesitates they are to obtain an order from the Court of Bankruptcy to enforce that direction of theirs. Therefore the whole thing is the accounting of an officer of the Court of Bankruptcy to the Court of Bankruptcy or to the Board of Trade who have now a certain right to interfere in bankruptcy matters.

Now the other point was that the Trustee Act applied to such a case. It seems to me that there are two or three sufficient answers to that. I do not think the Trustee Act, limiting the claims upon trustees, has anything to do with the case of an officer of the court who is required by the court to account; if it did it would apply to the case of a receiver, and the other cases, where officers of the court have, by the court been put in possession of property, and are required by the court to account to the court. I never heard that the Trustee Act applied to such a case.

There is this further point—that if it did apply, it would not apply to this case, because, if, by the result of the account, it should turn out that the trustee had money which he has not properly applied, then he comes within the exception of the Act of Parliament, and that part of the limitation of the liability of a trustee does not apply to him at all. However, I think that point also fails, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Collyer & Collyer.*

Solicitor for the respondents, *Solicitor to the Board of Trade.*

From Q. B. Div. (A. L. Smith and Rigby, L.JJ.) Oct. 25; Nov. 11.

CONSTANTINE & Co. *v.* WARDEN & SONS. (DOBELL & Co. *Third Parties*). (*a*.)

Practice—Third-party procedure—Action by shipowners against charterers—Contract of charterers with purchasers of cargo—Indemnity express or implied—R. S. C., 1883, *ord.* 16, *r.* 48.

By the terms of a charter-party entered into between the plaintiffs, the shipowners, and the defendants, the charterers, it was provided that the ship should be discharged at port of delivery as customary. The defendants subsequently sold to D. & Co. certain bones to be shipped in one or two vessels, at sellers' option, from the River Plate to Birkenhead as per charter-party; and by the contract it was agreed that the bones were to be weighed in the usual manner, and taken with all faults and defects by D. & Co. from over the ship's side as fast as the captain could deliver, failing which to be resold at the defendants' discretion, D. & Co. being liable for any loss, demurrage, or expenses arising therefrom.

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

The plaintiffs' ship arrived at the port of delivery with the bones on board, and D. & Co. took delivery thereof in fulfilment of their contract with the defendants.

The plaintiffs having brought an action against the defendants for not having discharged the ship pursuant to the terms of the charter-party, the defendants sought to bring in D. & Co. as third parties under ord. 16, r. 48.

Held, reversing the decision of Day, J., *that the contract of D. & Co. with the defendants was not a contract of indemnity, either express or implied, and that, therefore, upon the authority of* Speller *v.* Bristol Steam Navigation Co., 32 *W. R.* 670, 13 *Q. B. D.* 96, *the defendants were not entitled to a third-party notice.*

Appeal from an order made by Day, J., in chambers on the 7th of August, 1895.

The plaintiffs were shipowners, and the action was brought against the defendants for not having unloaded the plaintiff's ship at the port of discharge pursuant to the terms of a charter-party dated the 15th of June, 1894, by which it was stipulated that "the ship shall be discharged at port of delivery as customary."

On the 16th of June, 1894, the defendants sold to Dobell & Co., the appellants, 1,500 to 2,000 tons of bones, to be shipped in one or two vessels, at seller's option, during the months of August and (or) September and (or) October, from the River Plate to land at Birkenhead as per charter-party; and by the contract it was agreed that the bones should be weighed in the usual manner and taken, with all faults and defects, by Dobell & Co., from over the ship's side as fast as the captain could deliver, failing which to be resold at the defendant's discretion, they (Dobell & Co.) being liable for any loss, demurrage, or expenses arising therefrom.

The plaintiffs' ship, with the bones on board, arrived at Birkenhead in due course, and the appellants took delivery thereof in fulfilment of their contract with the defendants.

The plaintiffs brought this action against the defendants for not having discharged the ship at port of delivery, as customary.

The defendants sought to bring in Dobell & Co. as third parties to indemnify them against the claim of the plaintiffs.

Day, J., held that the defendants were entitled to have leave to issue a third-party notice under ord. 16, r. 48.

Dobell & Co. appealed.

Bigham, Q.C., and *H. F. Boyd*, for the appellants.—The respondents must show a direct contract of indemnity: *Speller* v. *Bristol Steam Navigation Co.*, 32 W. R. 670, 13 Q. B. D., 96. The contract in the present case is not one of indemnity, but merely to do a certain act. Demurrage is specifically dealt with in our contract, and not as in the charter-party.

Joseph Walton, Q.C., and *T. G. Carver*, for the respondents.—This is in substance a contract of indemnity, for if any default arises under the charter-party, it must be in consequence of the default of the appellant. That is also shown by the use of the word "demurrage." There is no demurrage between buyer and seller, and the demurrage referred to must be that referred to in the charter-party.

Bigham, Q.C., in reply.—The fact that the contract of purchase is more stringent than the charter-party does not prove that it is a contract of indemnity. "Demurrage" in the third parties' contract is not used in its strict legal sense.

Cur. adv. vult.

A. L. SMITH, L.J.—This case has been extremely well argued on each side. The question is whether the defendants are entitled to have leave to issue a third-party notice under ord. 16, r. 48. The learned judge at chambers held that they were, and hence the present appeal. [His lordship stated the facts, and continued:—] The case of *Speller* v. *The Bristol Steam Navigation Co.* in this court has decided that a defendant is not entitled to a third-party notice under ord. 16, r. 48, unless he can show a contract by the third party, either express or implied, that the defendant shall be indemnified by him, which means a contract by the third party to indemnify the defendant against the causes of action upon which the plaintiff is suing. We have nothing in this case to do with contribution or with any implied contract, and the question is, Do the defendants make out such an express contract by the third parties?

In my judgment the first part of the contract of the 16th of June, 1894, between the defendants and Dobell & Co., down to the words "as per charter-party," deals with the contemplated voyage, and the clause commencing with "the bones to be weighed," and ending with the words "arising therefrom," deals with the unloading of the ship at the termination of that voyage.

It is argued for the defendants that in this document is to be found an express contract by Messrs. Dobell & Co. to indemnify the defendants against demurrage. They do not allege any implied contract.

It is true that in it Messrs. Dobell & Co. contract to pay to the defendants any loss, demurrage, or expenses which may result from their not taking the bones from over ship's side as fast as the captain could deliver; but where is the contract that they will indemnify the defendant against the causes of action the plaintiffs may have, under the charter-party of the 15th of June, 1894, against the defendants? I can find no such contract. Messrs. Dobell & Co. do not undertake to pay any demurrage the plaintiffs may recover against the defendants under the defendants' contract with the plaintiffs to unload as customary, but they undertake to pay any loss, demurrage, or expenses which may arise by reason of their (*i.e.*, Messrs. Dobell & Co.'s) failure to perform their contract with the defendants—viz., in not taking delivery over ship's side as fast as the captain could deliver.

But it is said that the result is the same as if there were a contract to indemnify, for unless the third parties have broken their contract with the defendants, the defendants cannot have broken their contract with the plaintiff, because the greater obligation undertaken by Messrs. Dobell & Co. with the defendants must include the lesser obligation undertaken by the defendants with the plaintiffs, and, therefore, it is said the third parties have, as regards demurrage, in substance undertaken to indemnify the defendants.

But this argument, ingenious though it is, does not show any contract to indemnify, which must be proved to exist before ord. 16, r. 48, can be made available.

If the defendants sued Messrs. Dobell & Co. for not indemnifying them they should be nonsuited, for the only cause of action they could establish against Dobell & Co. is a contract, not to indemnify, but to pay what damages the defendants may have against them for not unloading in accordance with their contract—*i.e.*, from over ship's side as fast as the captain could deliver. It is true that the loss, demurrage, and expenses Messrs. Dobell & Co. might have to pay the defendants might be the same in amount as the damages the defendants might have to pay the

under contract to purchase, see them. He subsequently received them back, and redelivered them to Thorne. It is said that in this way he did become acquainted with the fact of this second mortgage whilst acting as solicitor in this transaction for the respondents.

Considering that the solicitor knew *aliunde* of the existence of this mortgage, that it was not necessary in any way to communicate its existence to the first mortgagees in regard to their sale under the powers given by that mortgage, and seeing that all he did was to make use of the knowledge he had previously acquired to ask for the deeds in the way I have described, I think it may be a matter open to question whether that would be knowledge by their solicitor which could be imputed to the respondents so that it must be regarded as their knowledge. It is quite unnecessary to express an opinion upon or to determine that point. I have only made these observations in order that I may not be supposed to assent without further consideration to the proposition contended for on behalf of the appellant.

Now the question arises whether the Statute of Limitations can be pleaded. First, it is said that the right did not arise until 1892 when the fraud was discovered—that there was here a concealed fraud, and that although there was no fraud on the part of the respondents (that is not alleged) nor any concealment on their part, yet that there was fraud on the part of a person acting as their agent (namely Searle) —a concealment by Searle, who was the agent for the respondents, and that consequently it was not until the discovery that any cause of action arose.

I am entirely unable to give any countenance to such an argument. It appears to me perfectly clear that in order to charge any person with a fraud which has not been personally committed by him, the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something and purporting to do something on behalf of the principal. If the person is doing something within the scope of his authority, and purporting to do it for his principal, although in doing it he commits a wrong which his principal neither sanctioned nor intended, the principal may be liable. But if the person, although he has been employed as agent, is not in the transaction which is the wrongful act acting for or purporting to be acting for the principal, it seems to me impossible to treat that as the fraud of the principal. Now in this case there is no pretence for saying that in what he did that was fraudulent, or what he improperly concealed, Searle was acting for the respondents. It appears to me that as soon as they had received that £1,000, leaving Searle in possession of the remainder in which they claimed no right or title, to which they believed either Searle or somebody for whom he was acting was entitled, all agency on their behalf by Searle in relation to that surplus was absolutely at an end. From that moment he held it not as their agent at all; it was not intended that he should hold it for them, they did not contemplate that he was holding it for them, nor did he intend to hold it for them. To suppose that, in defiance of the intentions of both the parties to such a transaction, nevertheless there was the relation of agency, would, it seems to me, be a somewhat extravagant conclusion. I therefore can entertain no doubt that in the present case there has been no such fraud or concealed fraud shown as to prevent the statute running, if the statute applies, from the year 1878.

I ought to notice one point which was pressed—or rather two points—that it was the duty of the respondents to find out Mr. Thorne, and to see that he was paid, that that was a continuing duty which they have violated. If such a doctrine as that were to be given assent to in a case such as this, the value of the statute of 1888 would be practically at an end. It is said that here the respondents gave back to Searle the appellant's deeds, and so enabled him to commit the fraud. They only had those deeds in their possession by an accident. There was nothing to call their attention to the fact that they were Thorne's deeds. They received them after the sale was completed, at a time when they did not believe they had any further interest in the transaction at all. They were asked to look in a bundle of deeds to see if they had two deeds described in a particular way. They found those deeds and returned them. There was no obligation upon them to see what the contents were, and there is no reason to suppose that they ever did know the contents. To say that under those circumstances the Act imposes any liability upon them seems to me a hopeless contention.

The only remaining question is, Did the statute apply? It is contended that it did not because of the exception contained in the first sub-section to section 8, "except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy." It seems to me to be impossible seriously to say that the respondents were "party or privy" to the fraud in this case. The fraud was a fraud committed by Searle entirely subsequent to the transaction in which they had any interest or any concern, and they neither knew of it nor assented to it nor received any benefit from it nor took part in it in any sort of way. Under these circumstances I am at a loss to see how it can be said that they were "party or privy" to it.

But then it is said there is another exception. The claim is "to recover trust property or the proceeds thereof still retained by the trustee," "still" of course meaning at the time when the action is brought. In spite of the ingenious argument addressed to us by Mr. Cozens-Hardy upon this point, I remain unconvinced. I have a difficulty in seriously grasping the contention. To say that the leaving of this sum of money with Searle by the respondents under the belief that it was money which Searle was entitled to keep and hold and distribute, in which they had no sort of concern, with which they had nothing to do, was a retaining of the money by them so that it was in their hands at the time when this action was brought, is a proposition I can scarcely treat seriously.

For these reasons I think that the judgment of the court below is right and ought to be affirmed.

Lord ASHBOURNE.—I entirely concur. I think that section 8 of the Trustees Act of 1888 supplies a clear defence; and that is the opinion of all the learned judges before whom this case has come. Romer, J., had no doubt upon that, and the three Lords Justices of Appeal in giving reasoned judgments also came clearly to that conclusion. I really think this section might be nearly torn up if it is not to be held to apply to a case of this kind. It is difficult to imagine what case it would apply to if it does not apply to this.

It has been urged in the lengthened argument which has been addressed to your lordships that the section would not apply because some case of fraud might be imagined or imputed or suggested against the defendants. It has also been urged that it might be imputed that they still have the fund under their control. I am unable to follow either of these contentions. I am unable to see any ground on which it can be suggested that anything like fraud can be imputed to the trustees or on which anything

can be suggested bringing them within the exceptions in the clause in regard to their action. That being so, I think the appeal entirely fails.

Therefore I am clearly of opinion that the appeal should be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion. By a recent, and I think a very beneficial change of the law, a trustee who has committed a breach of trust is entitled to rely on any statute of limitations as fully as anybody may do who is not a trustee, provided his conduct has been free from any taint of fraud, and provided he has not derived, and is not in a position to derive, any personal benefit from the transaction impeached as a breach of trust. I assume that but for recent legislation the respondents would have been liable to answer the appellant's claim. But I think the Act of 1888 was intended to apply and does apply to such a case as this, and, indeed, I cannot imagine any case to which the Act could more properly or more clearly apply than the case which has been discussed before your lordships to-day.

Lord DAVEY.—I am of the same opinion. It appears to have been assumed, or it is stated in one of the judgments which have been read to us to be not in dispute, that but for the Act of 1888 the defendants would have been liable in the present case. I do not desire to dispute that, or to say that that is not so. I only desire to say that it is not by any means clear to my mind that such a consequence would have followed from the state of facts which is revealed in the evidence.

But, assuming that the constructive notice for which Mr. Phillpotts contended would have brought to the knowledge of Mr. Heard that which certainly he did not in fact know at the date of the sale, that Thorne was an encumbrancer upon this property so as to convert Mr. Heard and his co-trustee into trustees for Thorne, I am of opinion that the statute of 1888 forms a perfect answer to the claim.

Two questions have been argued—first, whether the case is not within one of the exceptions mentioned in the early part of the 8th section; and, secondly, it has also been argued that, independently of the statute, the time began to run only at a period less than six years before the commencement of this action. I do not desire to say anything more than has been already said by your lordships, or more than is contained in the judgments which have been delivered in the courts below upon this point. It appears to me to be impossible to say that the money was "still retained" by the trustees, and it must be remembered that there is no evidence of actual knowledge, or rather, I should say, that the evidence disproves actual knowledge on the part of the respondents of Mr. Thorne's position. But it is sought to say (I am not speaking of constructive notice) that they must have acquired knowledge of it through the receipt which was signed by Mr. Searle, purporting to act as Thorne's agent, and put with the respondents papers.

Now it appears to me that the appellant is in this dilemma—either the respondents read that receipt or they did not. If they did not read it, I see no evidence whatever that they acquired any knowledge of Thorne's existence or of his interest in the property. If they did read that receipt, what did it tell them? It told them that Searle was (I will assume wrongly) purporting to act as Thorne's agent, and that he had given a receipt in discharge of the respondents in that character. If they did read this receipt, why were they not at liberty to believe, erroneously as it turns out, but still to believe, that Searle was acting in that character? If so, it appears to me the case is exactly the same, in fact; the case is that they paid away upon that view the money to Searle erroneously, believing that he was Thorne's agent. If that be the state of facts, it seems to me idle to contend that money which is paid away by a trustee to another person, in the erroneous belief that he fills a particular character which it turns out he does not fill, is still retained by the trustee.

Upon the other point, which was so fully discussed before your lordships, that the statute did not begin to run till within six years of the beginning of this action, I only desire to say this: In my opinion, if fraud, or a non-discovery of fraud, is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of the person who invokes the aid of the Statute of Limitations. Now, the fraud which is imputed to Searle, and apparently justly, is that he put Thorne off his guard by continuing to pay his interest to him as if his security was still a subsisting one. It cannot be pretended for a moment that he was acting as agent for the respondents in doing that. He did not make the payments of interest in his character of agent for the respondents, he made them as agent for the mortgagor; and I see no foundation whatever upon which Searle's fraud can be attributed to the respondents, or can be said to have been committed by him while he was acting in the character of the respondents' agent.

Upon that ground, and the other grounds which have been stated in the judgments delivered in the courts below and by your lordships, I hold that there was no fraud imputable to the defendants which would prevent the running of the Statute of Limitations.

Judgments of the Court of Appeal and of Romer, J., affirmed, and appeal dismissed, with costs.

Solicitors for the appellants, *Mear & Fowler*, for *G. H. Thorne*, Nottingham.

Solicitors for the respondents, *Yarde & Loader*, for *Burd, Pearse, & Prickman*, Okehampton.

Privy Council.

(*From the Supreme Court of Queensland.*)

June 29, 1895.

BRABANT *v.* KING.
KING *v.* BRABANT. (*a.*)

Negligence—Public body—Nonfeasance—Liability to an individual under a contract—Deposit of goods for safe custody—Inspection of premises—Risk of injury to goods—Duty of bailee.

The principle of exemption from liabilities afforded to public bodies for mere nonfeasance, as enunciated in Municipality of Pictou *v.* Geldert, 42 *W. R.* 114, [1893] *A. C.* 524, *and other cases, has no application to a case in which the parties charged with the nonfeasance are under obligations to an individual member of the public to perform the duty, which they have neglected to his prejudice, in consideration of their being remunerated by him for its performance.*

A depositor of goods for safe custody, who by himself or his servants has had an opportunity of observing defects in the storehouse, incurs no obligation from this

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

will and the codicil together as admitting, of such a conclusion.

I think, therefore, there is a revocation or substitution by the codicil of the smaller annuities for the larger all through; and, bearing in mind the rule which was impressed upon us very properly by the learned counsel for the appellants, which is laid down in *Doe* v. *Hicks* and *Randfield* v. *Randfield*, that you are not to guess at the revocation or to extend it further than the clear language of the thing requires you to do; it does appear to me, I confess, that we should be missing the real intention of this testator if we were to adopt the construction contended for by the appellants. I think the error consists in not seeing that that which is revoked is the thing given, and not the interest of the takers.

I think, therefore, that both appeals ought to be dismissed.

LOPES, L.J.—I am clearly of the same opinion. The rule which we have to regard in this case, I take it, is this—that to cut down a previous gift it must be reasonably clear that it was intended to be cut down. The words "cutting it down" must not be equivocal, but they must show with a reasonable certainty that a revocation was intended. I take it that that is the rule beyond all question upon which we have to act in this case.

Now, the object in construing all wills is to ascertain the intention of the testator or testatrix, so far as it is expressed by the words used. I do not propose to read the will and the codicil, which have been already read by my brother Lindley, but I do say that this passage in the will seems very strongly to show that the view which we take is the correct one. I mean these words: "I give and devise unto my granddaughter Ellen Elizabeth, the wife of Graham Lloyd, a like annuity of £300, to be a charge upon the said property in John-street aforesaid." Then come these words: "and to be paid to her and her children in the same manner in all respects as the annuity hereinbefore given to my granddaughter Anna Helena." That makes me think that the testator, in the will, was dealing with the entire annuity. The result that I arrive at is this, that it is reasonably certain that an entire revocation of the devise was intended by the codicil, and a substitution of an annuity of £150 payable to the granddaughter's appointees and children, instead of an annuity of £300 given by the will.

Now, unless that is the correct view, it appears to me that it would be difficult to attach the power of appointment given in the will to the codicil. I cannot construe the will and the codicil together unless I adopt the view which I have expressed with regard to the effect of that codicil upon the will.

I come, therefore, to the conclusion that Kekewich, J., was right in the interpretation that he put upon this will and codicil.

RIGBY, L.J.—I have considered the will and the codicil carefully, and I am unable to arrive at the same conclusion as the Lords Justices. The testator by his will gives in quite plain and unambiguous language to Mrs. Hall, one of his granddaughters, an annuity of £300 a year. [His lordship read the gift, and continued:—] He then gave to his granddaughter Mrs. Lloyd a like annuity of £300 to be a charge upon the same property, and to be paid to her and her children in the same manner in all respects as the annuity before given to Mrs. Hall. The two latter gifts refer to the gift to Mrs. Hall in an inaccurate manner, but the inaccuracies appear to be mere slips of the draftsman, and from neither of these taken separately, nor from both taken together, is there raised the slightest difficulty as to what is really given to the granddaughter. The granddaughters take under the will annuities for their respective lives, and nothing more; and it is with this broad fact in view that we must approach the codicil.

Now, the codicil is a much better drawn instrument than the will, and there is not a word in it which could raise any suspicion that the express revocation of the annuities to the granddaughters was intended to revoke the annuities to their children.

Direct revocation of the latter annuity there is none, and the only way in which a revocation can be brought about is by supposing that the language of the codicil means something different from what would be the result of the plain interpretation of words in themselves clear. The supposition must be that the draftsman used the plain words of reference and revocation in an inaccurate manner because there were inaccuracies in the will; and I do not think, having regard to the recognized canon of construction—viz., that a disposition in a codicil must be a plain revocation of a gift in a will in order to take effect as a revocation, that such a conjecture (for it seems to me little more) can be founded upon it. In order to make the codicil a revocation of the gifts to children of grandchildren it has to be altered, for everything in it shows careful drafting. The supposed improbability of the testator meaning to give a larger annuity amongst the children of a grandchild than is given to the grandchild herself weighs little or nothing in my judgment against the plain language of the codicil. We can no more tell the motives operating upon the testator in this case than we can in his treating differently the family of one granddaughter and the family of another. There may have been reasons personal to the grandchildren whose annuities are dealt with by the codicil.

With regard to the power of appointment I find no difficulty. The power of appointment arises under the will, and, according to my view, is not interfered with; and I cannot see the slightest difficulty in supposing that the testator meant to give this power of appointment among the children, whatever the annuity might happen to be, whether it was a larger or only the same amount as that which was given to the donee of the power.

Appeal dismissed.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Holland & Rigby*, Ashbourne; *Patersons, Snow, Bloxam, & Kinder*, for *Peele & Peele*, Shrewsbury; *Field, Roscoe, & Co.*, for *Gibbons & Arkle*, Liverpool.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 28.

THE GOVERNMENTS STOCK INVESTMENT AND OTHER SECURITIES CO. (LIMITED) v. THE MANILA RAILWAY CO. (*a*.)

Company — Debentures — Floating security—Condition allowing company to carry on business until default for certain period — Subsequent issue of bonds — Priority.

A company issued debentures "by way of floating security," and subject to certain conditions, one of which was that, notwithstanding the charge, the company should be at liberty, for the purpose of its business, to deal with any part of its property until default should

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

be made in payment of any interest thereby secured for a period of three months, or until the company should be compulsorily or voluntarily wound up. The company made default in payment of interest. More than three months after such default, but before the debenture-holders had taken any active steps to enforce their security, the company issued bonds covered by a trust deed, which recited the issue of the debentures and the fact that default had been made in the payment of interest.

Held, reversing the decision of North, J., *that the bonds had priority over the debentures.*

This was an appeal from a decision of North, J.

The Manila Railway Co. was formed in 1888, and in the same year issued debentures to the extent of £730,000 as a floating security.

The words of charge were as follow: "And the company hereby charges by way of floating security all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being."

The debentures were issued subject to conditions indorsed thereon, of which the second was as follows: "Nothwithstanding the said charge, the company shall be at liberty in the course and for the purpose or its business to use, employ, sell, lease, exchange, or otherwise deal with any part of its property until default shall be made in payment of any interest hereby secured for the period of three calendar months after the same shall have become due, or until an order of some court of competent jurisdiction shall have been made or a special or extraordinary resolution shall have been duly passed for the winding up of the company."

In 1891, before any default had been made in the payment of interest on the debentures, the company issued bonds to the amount of £229,250, known as "A" bonds.

On the 1st of January, 1892, the company made default in paying interest on the debentures. The company then proposed to raise money by the issue of further bonds, and on the 1st of March, 1892, a covering deed was executed which recited that debentures had been issued, and recited the second condition subject to which they were issued, and recited that default had been made in the payment of the interest on such debentures. Subsequently "B" bonds were issued for £300,000. There was some dispute as to when these bonds were issued, but for the purpose of the present case it was assumed that the issue took place after the 1st of April, 1892—*i.e.*, more than three months after default was made in paying the interest on the debentures. At the time when the bonds were issued the debenture-holders had taken no active steps to enforce their security.

The question was raised as to whether the debenture-holders or the "B" bondholders had priority. No question was raised at to the priority of the "A" bondholders.

The debenture-holders moved for an injunction to restrain the defendant company from paying dividends to the "B" bondholders which would become due on the 1st of July.

North, J., on the 27th of June, held that the plaintiffs' security ceased to be a floating security on the expiration of three months after default had been made in the payment of interest on the debentures, and that the plaintiffs were entitled to priority. He therefore granted an injunction.

The defendant company appealed.

Levett, Q.C., and *P. B. Abraham*, for the appellant company.—This is a question of the construction of the debenture. No doubt if the debenture-holders had appointed a receiver they would have gained priority, but having taken no steps they have not gained it. This is on the face of it a floating security and can only be "crystallized" by (*a*) the appointment of a receiver, (*b*) a compulsory winding up, or (*c*) a voluntary winding up. The decision of North, J., is inconsistent with the idea of this being a floating security.

Whitehorne, Q.C., and *W. E. Vernon*, for one of the "B" bondholders.

C. E. E. Jenkins, for the trustees for the "B" bondholders.

Farwell, Q.C., and *Disturnal*, for the plaintiffs.—A floating security is none the less a chaage because it is a floating one: *Driver* v. *Broad*, 41 W. R. 483, [1893] 1 Q. B. 744. It is a charge with a contract attached that the charge shall be a floating one until default has been made for three months. The "B" bondholders advanced their money with their eyes open, for their trust deed recites the default in payment of interest. The appellants are obliged to contend that, in spite of default for three months and the pendency of a motion for a receiver, the company might swamp the debentures by issuing any number of new bonds. We rely on *In re Horne and Hellard*, 29 Ch. D. 736, 33 W. R. Dig. 234, where Pearson, J., held that the fact of a charge on land being a floating charge did not make it any the less an interest in land. [LINDLEY, L.J.—If your are right, may not the debenture-holders allow the company to go on contracting debts, and then prevent the company from paying them?]

Byrne, Q.C., and *E. Beaumont*, for other debenture-holders.

Latham, Q.C., and *Kirby*, for "A" bondholders.

Levett, Q.C., replied.

LINDLEY, L.J.—This is an appeal from an order made by North, J., granting an injunction in the terms of the first paragraph of the notice of motion. The debenture-holders ask for an injunction to restrain the defendants from parting with any moneys for the purpose of paying the interest due on or about the 1st of July next from the railway company upon what are called "B" bonds. That is the substance of it, and the question is, whether that is right. It is a pressing matter, because the 1st of July is close at hand, and the case has been advanced to be disposed of out of its order in consequence of the pressing nature of it; and, so far as I can judge, I do not think we shall gain anything by thinking it over further.

I confess at first I thought the language was such as to render the interpretation put upon it by North, J., the correct one; but when I thought that I did not see how it would work, and now that I do see how it would work I have come clearly to the opinion that it cannot be supported, and is wrong.

The case turns upon the true construction of this debenture. The debenture is issued by this railway company, and it is a charge. There is a covenant to pay at certain dates, and to pay interest at 6 per cent. on certain other dates. Then comes the clause in the debenture which gives the debenture-holder a charge on the assets of the company. That clause runs thus: [His lordship read the clause and the second condition, and continued:—] Now, what is the effect of that? In the first place, a charge by way of floating security means, I suppose, what it says; that is to say, it is a charge. It is an equitable charge, not a legal mortgage. It is an equitable charge upon all the assets of the company present and future; and "by way of floating security" means this, that the company is to go on not-

withstanding the charge, and to carry on its business. Now, if it were not for the second condition, what would be the position of affairs? The position of affairs would be this, that the moment there was default in payment of interest the going on of the company could be stopped immediately. That is to say, a debenture-holder could immediately bring an action for a receiver, and so stop the business of the company. To prevent that the second condition is inserted for the benefit of the company, to give them, as Lopes, L.J., expressed it, "three months law." "Notwithstanding the said charge." What does that mean? That means the charge which is created by the debenture, whatever it is—call it what you like, call it by any name. It is notwithstanding that charge, and no other, that this company shall be at liberty to carry on its business. For how long? Until default shall have been made in payment of interest for three months.

Now we come to the real crux. What is to happen at the end of that three months? The condition does not say that. It says nothing about it. The rest of the condition "or until an order" applies to the event of an order of the court being made within the three months. They could stop the concern before the three months, whether the debenture-holders liked it or not. But the important point, the point upon which everything turns here, is that nothing is said as to what is to happen at the end of the three months. Now, what does that mean? What is the legal effect of that? From the absence of expression as to what is to happen are we to draw an inference which will work and make the whole machinery produce the end for which it is designed; or are we to draw an inference, equally consistent with the words, which will scarcely work at all as a matter of business, and will produce the grossest injustice? It appears to me, when the court is in that position, it has not to grapple with words, it has to grapple with the absence of words, and to draw that inference which is reasonable, having regard to the language which is used and the objects of the document in which that language is found.

Now, according to the construction put upon this by the learned judge this consequence would happen, that the debenture-holders could, if they chose, allow this company to go on after the three months, allow debts to be contracted and then say that none of them should be paid. That would be the legal consequence of that inference. Well, I call that a monstrous inference. The other inference is this: "It depends upon you, the debenture-holders, what is to be done. The clause does not say it. If you like to let the company go on, your charge shall remain a floating security. If you don't like it, and like to stop it, you can, at the end of three months, get a receiver and manager, or whatever redress you like." That appears to me to be the true inference; and I am not prepared to go to the length of holding that it is right to say to the debenture-holders: "You can get a receiver and stop payment of the debt, and yet let the company go on and contract more debts." The right thing to say is: "If you want to interfere, you must stop the company going on and realize your security; if you do not choose to do that, you are not entitled to an injunction." I think, therefore, the appeal ought to succeed. The appeal, therefore, will be allowed, and the order made by North, J., will be discharged. The costs of all parties here and below will, I understand, by consent be costs in the action.

LOPES, L.J.—I am of the same opinion. I had considerable doubt on the language, but on the whole, after careful consideration, I think the construction put upon it by my brother Lindley is th right one. I think this clause is inserted in th interests of the company in order to give them the benefit of the three months which they would not have had except for this condition.

RIGBY, L.J.—I am of the same opinion. This debenture and the condition attached to it are not expressed in the clearest possible language, but for this purpose I think they are quite sufficient. In the body of the debenture a charge is created upon all the property of the company. But it is a charge by way of floating security. Now, whenever that charge is referred to again it is a charge by way of floating security. Mr. Farwell ingeniously attempted to say that the creation of a charge was one thing, and the making of it a floating security was a different one, and that you could refer to the charge, leaving out of view the floating security. I do not think that is sound.

I will only say a few words about the way in which this matter grew up. We know there were charges upon the undertaking. Now, if you charge all your property, you charge each individual item of it. But the courts at once saw that if you charge an nndertaking, it is not intended that that undertaking should be immediately stopped and wound up; but it is charged with this common object in view, that until events happen which amount to default, the business shall be carried on; and if the business is carried on, it follows as a matter of necessity that the company must withdraw some part of its assets, though charged, from the general charge, substituting, of course, the assets which are acquired in place of those which are released. I do not mean merely those that cover the purchase-money, but those which, in the course of business, are added to the company's property. So we get a very adequate idea, for the purpose of this case at any rate, of what is meant by floating security, the object being that the business of the company shall be carried on for the benefit of both parties until some default is made.

Then we come to the second condition, and I think we are bound to construe the charge as if the words were "the said charge is a charge by way of floating security, and the company is to be at liberty notwithstanding the charge." That points to something which, to a certain extent, contradicts the idea of floating security. Notwithstanding the floating charge, the company shall be at liberty to do something which, but for this clause, they would not be entitled to do—that is, to carry on for a certain period. Now, what is the point? As I read the clause, I think the fair way to put it is, for a period hereafter to be defined, that is to say, three calendar months after the interest has become due, or (this will lessen the period) until an order of some court or an extraordinary resolution. It is not a fixed period of three months, but it is a period whose maximum is three months, and the minimum may be determined by an order of the court or by an extraordinary resolution to wind up. Now, so construed, I do not think I am travelling out of it in the least, but I am giving the literal interpretation of the words. It is a relaxation in favour of the company, during the period defined, of the right of the debenture-holders—saying nothing at all as to what is to take place at the expiration of the period. Of course, if that period were brought to an end by a winding up, nothing requires to be said at all. The winding-up stops the business of the company, and makes the debenture charge a charge upon the existing assets without power to the company to carry on. But if it stops by the effluxion of the three months the charge is to be as though this had not been contained in the condition. The charge

is then a simple ordinary floating security. The debenture-holders are under no obligation to come in and get a receiver appointed, and thereby put an end to the business. They may do so—any of them may do so if they think it to their advantage. On the other hand, if they do not think it to their advantage, they may permit the floating security to go on as a floating security, with the necessary consequence that the company in the course of its business may mortgage that security and give a good title to the mortgagees. I think that is all that is necessary for the determination of this case. I do not think we are going contrary to the case that was cited before Pearson, J. (*In re Horne and Hellard*), at all. There was a totally different charge there, and it was a vendor and purchaser's case. I do not think it is necessary to say more about that case except that I am not in the least satisfied that we are saying anything that would infringe upon its authority.

Appeal allowed.

Solicitors, *Bompas, Bischoff, Dodgson, Coxe, & Bompas; Ashurst, Morris, Crisp, & Co.; Murray, Hutchins, Stirling, & Murray; Davidson & Morriss; Beaumont & Son; Bircham & Co.*

High Court of Justice.

Chan. Div.)
Chitty, J.) Nov. 27.

VINE *v.* RALEIGH. (*a.*)

Settled land—Act of Parliament—Settlement—Tenant for life—Thellusson Act (39 *&* 40 *Geo.* 3, *c.* 98), *s.* 1—*Will—Next of kin—Executor of deceased next of kin—Settled Land Act*, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 2, *sub-sections* 1, 5; *s.* 58, *sub-section* (1) V.

The survivor of two next of kin and the executors of the deceased next of kin were, under the joint operation of a will and the Thellusson Act, entitled during the life of another to receive the rents of the property subject to the trusts of the will in equal moieties.

Held, that, inasmuch as the definition of a settlement in section 2, *sub-section* (1), *of the Settled Land Act*, 1882, *included a will and an Act of Parliament, the will and the Thellusson Act together created a settlement within the meaning of the Act.*

Held, also, that the survivor of the next of kin and the executors of the deceased next of kin together either constituted the tenant for life for purposes of the Act, by virtue of section 2, *sub-section* (5) *of the Act, or had the powers of a tenant for life under the Act by virtue of section* 58, *sub-section* (1) V., *of the Act.*

Summons.

This was an application on the part of the trustees of the will of Edward Ward Walter Raleigh that they and the receiver in the action might be at liberty to present to the court a petition under the Settled Estates Act, 1877, for power to grant to the Commissioners for executing the office of Lord High Admiral a lease of part of a certain estate called the Mount Boone Estate.

The testator, by his will dated in 1864, after appointing Sir Edward C. Dering and Charles Vine his executors, and directing that all property which he might leave in trust was to be in their confidence and custody, directed that all the residue of his invested or moneyed property should eventually, together with accumulations, be invested in landed estate, and out of the interest derived on his property invested in funds or on rental of land he directed that the sum of £500 should be paid yearly to his nephew, the plaintiff Edward Walter Raleigh, for his life, and that the surplus should from time to time during the lifetime of his nephew be expended in the purchase of additional land, or in the improvement of the landed estate and the property, and that should his nephew marry, and at his death leave a son, such son should inherit a life interest in the whole of the landed property, subject to certain conditions, and that the property under similar engagements should pass on to the lawful male heir of his nephew in succession for ever, with remainder over to another nephew, and to his male heirs after him, in the event of his nephew Edward Walter Raleigh dying without male issue. The will contained no powers of leasing.

The testator died on the 22nd of January, 1865, and shortly afterwards this suit was instituted for the administration of his estate, and a receiver was appointed.

In 1874 the then trustees of the will purchased, with the approval of the judge, the Mount Boone Estate. Edward Walter Raleigh was at that time married, and the defendant W. F. C. Raleigh, who was then an infant, was his eldest son, and the annuity of £500 a year was being paid out of the income of the estate, and the residue of the income was being accumulated.

In July, 1883, it was ordered that the applicants should be at liberty to present such petition under the Settled Estates Act, 1877, for obtaining the leasing powers thereby conferred as they might be advised (31 W. R. 855, 24 Ch. D. 238).

A petition was accordingly presented, and by the order made thereon, dated the 12th of July, 1884, general powers of granting occupation leases of a portion of the Mount Boone Estate were vested in the trustees of the will and the survivor of them, or other the trustees or trustee for the time being of the will.

In March, 1886, it was ordered that the receiver should, after keeping down the annuity of £500 per annum, and after maintaining in good habitable repair the houses and tenements on the property, subject to the trusts of the will, divide the residue of the balances which should from time to time be certified to be due from him, as from the 22nd of January, 1886 (being twenty-one years from the death of the testator), and during the life of the plaintiff Edward Walter Raleigh, or until further order, into two equal moieties, and should pay one moiety to the said plaintiff as one of the next of kin of the testator, and another moiety to the defendants O. A. and J. D. Curtis, as executrixes of the other next of kin of the testator.

Part of the property referred to in the summons not being included in the order of the 12th of July, 1884, further powers of leasing became necessary, and the question was whether, having regard to the order of March, 1886, the trustees and the receiver were the proper persons to present a petition under the Settled Estates Act, 1877, or whether the plaintiff Edward Walter Raleigh, and the defendants O. A. and J. D. Curtis, as executrixes, were not the proper persons as constituting the tenant for life under the settlement within the meaning of the Settled Land Act, 1882.

Byrne, Q.C., and *Wace*, for the applicants.—The will and the Thellusson Act, by the combined operation of which the land is now settled, constitute a settlement; but the plaintiff, the surviving next of

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

kin of the testator, and the executrixes of the deceased next of kin have not the powers of a tenant for life within the meaning of the Act.

Levett, Q.C., and *S. Dickinson*, for the plaintiff, the surviving next of kin and his eldest son.—The executrixes of the deceased next of kin are persons beneficially entitled within the meaning of the Act, s. 2, sub-section (5).

Farwell, Q.C., and *Yate Lee*, for the executrixes of the deceased next of kin.—We are clearly within section 58, sub-section (1), of the Act.

CHITTY, J.—Under the will the personal estate has been laid out in the purchase of real estate. The real estate purchased was settled by the will. The will, however, directed that the rents should be accumulated for a period which, in the result, has exceeded the twenty-one years allowed by the Thellusson Act. That Act avoids the accumulations after the lapse of that time, and directs that the rents shall, so long as the same shall be directed to be accumulated contrary to the provisions of the Act, go to and be received by such person or persons as would have been entitled thereto if such accumulations had not been directed. The period of twenty-one years elapsed in January, 1886, and but for the Act the accumulations would still be going on. The persons entitled under the statute are the testator's next of kin, consisting of two persons, one of whom is alive and the other is dead. The surviving next of kin is before the court, and the executrixes of the deceased next of kin.

The first question is whether there is a settlement affecting the rents in the present circumstances of the case within the meaning of section 2, sub-section (1) of the Settled Land Act, 1882, and in my opinion there is. Without reading the whole of the definition, it is enough to say it includes a will and an Act of Parliament, and in my opinion, putting the will and the Act together, there is a settlement. It is not necessary to consider what would have been the result if the Thellusson Act had merely avoided the direction to accumulate, but the Act goes beyond that, and directs to whom the rents directed to be accumulated contrary to the Act are to go. I hold, therefore, that the case falls within the Settled Land Act, 1882.

Then it is said that the next of kin, that is, the survivor and the executrixes of the deceased one, are tenants for life within the meaning of the Settled Land Act, 1882, either by virtue of section 2, sub-section (5), or section 58, sub-section (1) V. In my opinion it is not necessary to say whether the case falls under one section or the other. It is plainly within section 58, sub-section (1) V. It is quite possible there may be a question with regard to the executrixes under section 2, sub-section (5), whether they are beneficially entitled to possession. My present opinion is that for this purpose they are persons beneficially entitled to possession. I hold accordingly that the surviving next of kin and the executrixes of the deceased next of kin have the powers of a tenant for life under the Settled Land Act, 1882.

Solicitors, *Paterson, Snow, Bloxam, & Kinder; Petch & Smurthwaite; Peacock & Goddard.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) July 22; Aug. 12, 1895.

In re DENNIS.
Ex parte DENNIS. (*a.*)

Bankruptcy—Rescission of receiving order—Money paid into court to meet claims of creditors who cannot be found—Statute of Limitations (21 *Jac.* 1, *c.* 16), *s.* 3 *—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 35, 36.

When a debtor has paid money into court to meet the claims of creditors who cannot be found, the Statute of Limitations does not run against such claims, and the debtor is not entitled of right to have such money paid out to him after the expiration of six years during which no claim has been made to it.

The court may, however, as a matter of grace, allow the debtor to have the money paid out to him, upon his giving reasonable security to repay the same in the event of any creditors appearing to claim it.

Application for the payment of a sum of money out of court under the following circumstances:

A receiving order was made against the debtor in November, 1888, and upon the 12th of March, 1889, he applied to have it rescinded upon the grounds that he had paid all but two of his creditors in full.

These two creditors he was unable to discover, and he was willing to lodge the amount of their claims in court.

The receiving order was rescinded upon his paying the money into court.

In April, 1895, the official receiver wrote to inform the debtor that there was a sum of £51 19s. 7d. lying to the credit of his estate, but refused to pay it over to him without an order of the court, whereupon this application was made.

J. F. P. Rawlinson, for the debtor.—The debtor is entitled to have this money repaid to him, because the Statute of Limitations has now run against the creditors. [VAUGHAN WILLIAMS, J.—The Statute of Limitations does not run against the creditors, for they could not have brought an action to recover the money.] I submit that after the rescission of the receiving order they could have brought an action, and it is now more than six years since the date of of the rescission, and no claim has been made. [VAUGHAN WILLIAMS, J.—I think this money is the creditors' money, and that you cannot ask to have it paid out to you.] I submit that it was paid in for security, and that the object for which it was paid in has failed.

Muir Mackenzie, for the official receiver, left the matter in the discretion of the court.

Cur. adv. vult.

Aug. 12.—VAUGHAN WILLIAMS, J.—This is an application by the debtor against whom a receiving order was made in 1888. That receiving order was rescinded in 1889, and the order rescinding it recites that the debtor has paid into court the whole amount of the debts for which he could not produce a receipt. Six years having elapsed, the debtor now wants to have those moneys paid out to him. I ought to deal with the rescission of a receiving order in the same way as I should deal with an order of adjudication, adopting the provisions of sections 35 and 36 of the Bankruptcy Act, 1883. Now section 35 provides for the annulment of adjudication when all

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

debts have been paid in full, and section 36 provides, firstly, that "any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt with costs"; secondly, that "any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into court."

With regard to the first part of this section, referring to disputed debts, I think that if the creditor made no claim for six years the Statute of Limitations might run against him; but with regard to the second part, referring to admitted debts due to creditors who cannot be found, I think that the Statute of Limitations does not apply, and that the applicant in this case is not entitled to have the money paid out to him, although six years have elapsed without the creditors appearing to claim it.

I am, however, anxious to help the applicant, for if no one is really going to claim this money, it seems hard that he cannot get it back. All that I can do is this, I will not make any order to the official receiver to pay this money out to the applicant, but I think I may say that if the official receiver is really satisfied that these creditors or their personal representatives cannot be found, and reports to me to that effect, I will allow the applicant to have the money, subject to his giving reasonable security to repay the same should the creditors appear to claim it.

Solicitors for the applicant, *Morse & Simpson.*

Solicitor for the official receiver, *Solicitor to the Board of Trade.*

Q. B. Div.
(Vaughan Williams and Wright, JJ.) Aug. 5, 6.

In re PURRETT.
Ex parte PURRETT. (*a*.)

Bankruptcy—Practice—Hearing of petition — Attendance of petitioning creditor—Right of debtor to cross-examine—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7—*Bankruptcy Rules*, 1886, *rr.* 162, 164.

Upon the hearing of a petition the registrar refused to allow the petitioning creditor to be cross-examined, upon the grounds that, the debt being based upon a judgment and verified by affidavit, no right to cross-examine arose until evidence had been given to displace the judgment.

Held by the court, that the grounds of the registrar's decision were wrong.

By Vaughan Williams, J., *that unless the petitioning creditor's attendance is dispensed with by the court under rule* 164, *he must be present at the hearing, whether he is a witness to any matter or not, and that the reason for such practice is that questions may be put to him.*

By Wright, J., *that it does not follow from the statute or the rules that the petitioning creditor need be present unless required as a witness, or that there is any right to cross-examine him unless he gives evidence.*

Appeal from a receiving order made by the registrar of the County Court at Luton.

The debtor was a tenant of Madame de Falbe, who obtained a judgment against him for £300 arrears of rent, upon which she issued a bankruptcy notice, and upon the debtor's failure to comply therewith presented the petition upon which the order appealed against was made.

Upon the hearing of the petition, no application to dispense with the personal attendance of the petitioning creditor being made, the debtor's counsel desired to cross-examine her; but, although she was within the precincts of the court, the registrar refused to allow her to be cross-examined, upon the grounds that her debt being founded on a judgment and verified by her affidavit her presence was not necessary until some evidence was given to displace the judgment.

The debtor appealed.

G. M. Cohen, for the appellant.—The petition was disputed, and notice had been given to the petitioning creditor to attend for cross-examination. The debtor was therefore entitled to insist that she should appear and submit to cross-examination: *Ex parte Dodd, In re Ormston*, 25 W. R. 185, 3 Ch. D. 452.

Reed, Q.C., and *Shearman*, for the respondent.—There was no improper use of the process of the court; the debt was proved to have been unpaid down to within four days of the date of the hearing by the affidavit. A debtor is not invariably entitled to assist on the presence of the petitioning creditor: *Ex parte Barrow, In re Irving*, 23 W. R. 432, L. R. 10 Ch. App. 269.

G. M. Cohen replied.

VAUGHAN WILLIAMS, J.—This case itself is one of no great importance, but, having to sit here and administer the law in bankruptcy, I feel very strongly the importance of the rules of procedure being properly adhered to, and I cannot bring myself to hold that the rules were adhered to in this case.

The attendance of the petitioning creditor upon the hearing of the petition has been the uniform practice ever since the practice in bankruptcy took an established form at all. In my judgment that practice was right and well founded. The consequences of bankruptcy are serious, and under those circumstances one finds that in bankruptcy practice the courts have always insisted on the strongest proof of the good faith of the petitioning creditor—for instance, where the subject-matter of the petition is a legal debt vested in trustees, the court will not adjudicate without the presence of the *cestui que trust*. One knows, too, that cases do occur where petitions are presented for improper purposes; for instance, to stop a prosecution or get rid of a partner. Rule 164 provides that "the personal attendance of the petitioning creditor and of the witnesses to prove the debt and act of bankruptcy or other material statements, upon the hearing of the petition, may, if the court shall think fit, be dispensed with"; and those provisions carry out this practice well, for it seems to me that they contemplate the attendance of the petitioning creditor, whether he is a witness to prove the debt or the act of bankruptcy or not, and I think that the reason for requiring the petitioning creditor's presence is that questions may be put to him.

It is, however, within the discretion of the court to dispense with the attendance of the petitioning creditor, and I think that the registrar might have dispensed with her appearance in this case upon the ground that no useful purpose would be served by putting questions to her; but it appears from his note that he dispensed with her attendance because the debt was based on a judgment. That reason I think wholly wrong, and I am not sure that the registrar applied his mind as to whether he was satisfied that no useful purpose could be served by putting questions to her.

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

It is of the greatest importance to the practice that it should not be thought that in the case of a debt founded on a judgment the right of cross-examination is lost until evidence is given to displace the judgment. The petition must go back to the registrar to be reheard.

WRIGHT, J.—I am not prepared to dissent from my brother upon a question of practice, but I do not think that it follows from rule 164 that the petitioning creditor is bound to be present, whether he is a witness to prove the debt or other material fact or not. It seems to me that the rights of the parties are settled by section 7 of the Bankruptcy Act, 1883, where in sub-section 1 it provides that "a creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the matter." If the creditor gives fresh evidence at the hearing, of course he must be liable to cross-examination; but I do not see how the debtor can have the right to cross-examine a person who is not put in the witness-box.

Appeal allowed.

Solicitor for the appellant, *J. L. Calcott.*

Solicitors for the respondent, *Rowcliffes & Rawle.*

House of Lords.

From C. A. England. } May 10.

DAVIS & SONS *v.* TAFF VALE RAILWAY CO. (*a*)

Railway company—Customer—Special Act—Competing railways—Excessive rates.

By a special Act, promoted by one railway company and opposed by another, running powers were given to the promoters over the line of their opponents, but these were to remain in abeyance so long as they should afford all reasonable facilities for goods and mineral traffic . . . . "at rates per mile not greater than the lowest rate" charged by the opponents for like traffic to or from three distinct places.

Held (Lord Halsbury, L.C., Lords Watson, Ashbourne, Macnaghten; Lord Morris *dissenting*), *that the Act was for the advantage of the public; that the railway company were under a legal obligation to the appellants as customers who could insist on its provisions; and that the appellants, therefore, were entitled to ascertain the mileage rate to each of the three different places, and to take the lowest of the three as the basis of the rate to be charged.*

By Lord Watson.—*The provisions of a Railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature. And when provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties, who are sufficiently designated, I am of opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation* inter alios *in which they may have an interest, but have no title to enforce.*

Decision of the Court of Appeal reversed.

This was an appeal from the Court of Appeal (Brett, M.R., and Lopes and Kay, L.JJ.) reported 42 W. R. 215, [1894] 1 Q. B. 43, where the facts are set out at length.

The action was brought by the respondents against the appellants to recover the amount of rates and tolls alleged to be due in respect of the carriage of coals for the appellants upon the respondents' railway.

The appellants alleged that the rates claimed were in excess of the lowest rates for the time being charged by the respondents for like traffic to or from the docks at Cardiff, Penarth, or Barry, in contravention of the terms of section 23 of the Barry Dock and Railways Act, 1888, by which the respondent company were to afford "facilities for goods and mineral traffic destined for or coming from the undertaking of . . . the Barry Docks and Railway Co. . . . at rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Co. for like traffic to or from the docks at Cardiff, Penarth, or Barry."

The appellants paid into court so much as they admitted to be due to the respondents, and contended that the respondents were not entitled to claim from them rates in excess of those permitted by the section.

Day, J., decided in favour of the respondents. The Court of Appeal affirmed the judgment of Day, J.

Sir R. E. Webster, Q.C., and *J. Fletcher Moulton, Q.C.*, (*Joseph Shaw* with them), for the appellants.—The Barry Dock and Railway Act, 1888, is not confined in its operation to the two railway companies. The fact that, as in *Barry Railway Co.* v. *Taff Vale Railway Co.*, 43 W. R. 372, [1895] 1 Ch. 128, a special remedy is given for breach of statutory obligation to one company as against the others, does not take away that of the individual trader. The 23rd section is an express enactment in favour of the public.

They cited *Pryce* v. *Monmouthshire Canal and Railway Companies*, 27 W. R. 666, 4 App. Cas. 197; *Saunders* v. *Holborn District Board of Works*, 43 W. R. 26, [1895] 1 Q. B. 64; *Herron* v. *Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. 498, 41 W. R. Dig. 246.

Balfour Browne, Q.C., and *W. J. Noble*, for the respondents.—It is not a question of rates paid by the public. The same question was decided in the Court of Appeal in *Barry Railway Co.* v. *Taff Vale Railway Co.* The act is simply a contract between the two companies. In *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners*, 7 App. Cas., at p. 707, Lord Watson stated that provisions in a local and personal Act must be considered a legislative contract.

Sir R. E. Webster replied.

The House took time for consideration.

Lord HALSBURY, L.C.—This was an action in which the Taff Vale Railway Co. sued the consignors of coal for the carriage of coal, and there was no dispute that the amount of coal carried was accurately claimed to have been carried, but it was contended on two separate grounds that the rates at which the coals were charged were excessive.

The Taff Vale Railway Co. had charged the rates within their maximum tolls as originally permitted by the Legislature, but beyond what was permitted by a later statute, to be presently stated. That statute limited the power of the Taff Vale Railway Co. to charge, provided that statute could be insisted on by the consignors of the coals.

The action was tried before Day, J., who decided

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

in favour of the Taff Vale Railway Co. upon two grounds.

First, that upon the true construction of the Acts to be presently referred to, the terminus *ad quem* was not to be ascertained by measuring the distance; in short, not by a mileage rate; but that Cardiff, Penarth, and Barry were to be treated as one terminus as being a grouped district, and that therefore there was no excess in the rate charged.

Secondly, the learned judge held that the Act relied upon by the consignors was only intended to give legislative sanction to a contract between the two companies to which the traders, the consignors of the coals, were no parties, and that therefore they could not insist upon its provisions; and that if it did give the traders any ground of complaint, it must be insisted upon before the Railway Commissioners, and could not be made the ground of defence in a court of law against the right of the Taff Vale Railway Co. to charge their full tolls.

The Court of Appeal did not deal with the first point at all, but they affirmed the judgment of Day, J. This is an appeal to your lordships from that judgment, and the question now in debate seems to me to resolve itself into two somewhat simple propositions.

While I certainly do not question what the Master of the Rolls so emphatically declares, that we are entitled to look at the circumstances (a proposition which Mr. Moulton declares he never questioned), I do not see that we gain very much light here if we do look at the circumstances, beyond this, that two possibly competing railways were before Parliament, and Parliament enacted certain provisions, which it is now our task to construe.

The first question which seems to be involved in the judgment of Day, J., though the last treated, is that, even supposing the rate charged to be excessive, the proper jurisdiction to apply to is that of the Railway Commissioners, and that the excess cannot properly be made the subject of debate in an ordinary court of law.

I notice this ground to clear my way for dealing with the questions I have enumerated, since I think it is covered by authority which I think your lordships would be reluctant to shake. Very similar words come under review in *The Great Western Railway Co.* v. *The Railway Commissioners*, in 29 W. R. 901, 7 Q. B. D., at p. 193. There Lord Bramwell, when Lord Justice of Appeal, pointed out that where the complaint is that too much had been charged by the carrier the ordinary courts are the proper tribunal to decide such a question, and in that case Field, J., and Manisty, J., Lord Bramwell, the present Master of the Rolls, and Cotton, L.J., actually restrained by prohibition the Railway Commissioners from entertaining the matter where it only raised the question of an excessive rate being charged, since that was a matter which might and ought to be determined in an ordinary court of law.

"I think," says Lord Bramwell, "there is a sort of presumption against the Railway Commissioners having jurisdiction in this matter, since it is quite certain that if there have been overcharges the moneys paid in excess can be recovered back by the person overcharged by the company."

It is obvious here to remark that the company is suing for an amount in a court of law which, if the objection insisted on by the trader is a good one, is not due, and therefore it would be impossible to contend that, upon the hypothesis that the charge is excessive, the court had not jurisdiction to determine that question.

That brings me to the question, first, with reference to the excess in part of the charge. One obligation of the Taff Vale Railway Co. is in respect of the rates. "They are to afford facilities at rates per mile not greater," &c. What can be the meaning of rates per mile? The words are inconsistent with a group charge which shall be the same to any distance within a group. The two things are absolutely, to my mind, inconsistent with each other. Of course, it is a totally different proposition to say that when the Legislature has fixed a terminus *ad quem* the mileage rate is only supposed to extend to that one place, at whatever point of that one place the goods may be delivered. But to me it seems impossible to contend that when the Legislature speaks of Cardiff, Penarth, or Barry, it means to treat all of these places as if they constituted but one place. They are three different places; they are at various distances from the point from which traffic is to be carried, and, independently of the objection that you must strike the disjunctive "or" out of the statute, and read "and" instead, it seems an absurd incongruity to be applying a mileage rate to places differing in distance. Assuming there is to be no group charge, what part of Cardiff, what part of Penarth, what part of Barry is to be taken as the point of arrival and delivery is not now before us, and I do not express any opinion.

That brings me to the question whether the two Acts do in truth constitute a contract between the two companies giving no right except to each other, and therefore not justifying the trader in refusing to pay the amount demanded. Now it seems to me that there is a very obvious answer to the argument that the 23rd section of the Act constitutes merely a contract between the companies. It is not a contract; it is not to my mind even like a contract; it bears no analogy to a contract. It is an express enactment which imposes an obligation on the Taff Vale Railway Co. to charge certain rates; it is immaterial what the terms are upon which those rates are to be charged; we are now construing the statutory obligation, and if the Taff Vale Railway Co. have done the thing which the Legislature has contemplated they might do, and which, if I am right in what I have said before, they have done, then their right to charge more than the lowest rate which for the time being they have charged for like traffic to or from the Docks at Cardiff, Penarth, or Barry has ceased, and the Legislature has prohibited them from doing it. It would be strange indeed if this be true, that a trader sued for the higher charge should not be able to set up the unlawful character of the excess.

The words seem to me to be plain, the obligation is to "charge the rates." This is a matter not between the two companies, though, of course, when you are dealing with two competent companies it affects the two companies very much; but the obligation is to charge the prescribed rates and no more, and rates must be charged to traders and not to the other company.

It is said that these are private Acts. So they are; they are Acts which give great powers, and in giving which the Legislature has generally been careful to look to the rights of the public. It would be a very singular course of legislation to commit the interests of the traders of the district to be dealt with by two railway companies, so that if they agreed the private trader should have no remedy.

Conveyance of goods by a railway company established by Act of Parliament is a public right, and the obvious meaning, to my mind, of the whole of these arrangements is that unless the Taff Vale Railway Co. carry at the rates which I have described as the prescribed rates, they shall have a competing line permitted; but this does not in the least degree

interfere, in my mind, with the remedy of the trader himself, who when he has been overcharged should refuse to pay, or recover back when he has paid, an overcharge prohibited by the Act of Parliament.

For these reasons I move that this appeal be allowed, that the amount should be properly ascertained in the Queen's Bench Division, and that the respondents should pay all the costs both here and in the courts below.

Lord WATSON.—Section 23 of the Barry Docks and Railways Act, 1888, enacts, *inter alia*, that the Taff Vale Co., the respondents in this appeal, "shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the company from or to Treforest, or any place northward thereof, at rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Co. for like traffic to or from the docks at Cardiff, Penarth, or Barry, and shall deliver all such traffic into and take the same from the company's sidings as regards all traffic coming from or destined for Hafod, or any place westward thereof, at Hafod." It also provides that the Taff Vale Co. shall receive from the Barry Co. a bonus, to be fixed by agreement or arbitration, in respect of the traffic interchanged at Hafod.

The same clause enacts that, in the event of its being decided by the Railway Commissioners that the Taff Vale Co. have failed to give proper facilities, and have not within reasonable time after notice remedied such failure, the Barry Co. shall have the right to exercise running powers over certain portions of the Taff Vale system. During the exercise of these powers the obligations of the Taff Vale Co. with respect to interchange of traffic at Hafod are suspended.

The appellant firm have two collieries at Ferndale, on the Rhondda Fach branch of the respondents' railway. They are sued by the respondents for a balance alleged to be due upon an account for carriages of coal and other articles from or to their collieries, and exchanged at Hafod. There is no controversy between the parties except as to the amount of the rates charged. The appellants plead that the charges made by the respondents are in excess of the maximum rate sanctioned by section 23 of the Barry Docks and Railways Act in the terms just quoted. The respondent company do not dispute that the traffic charged for is traffic falling within the description given in section 23; but they maintain, in the first place, that its enactments are only imperative as between them and the Barry Railway Co., and cannot be enforced by the appellants; and, in the second place, that, upon a sound construction of the statute, the rate charged is not excessive. Day, J., who tried the cause, decided both points in favour of the respondents; and his judgment on the first point was unanimously affirmed in the Court of Appeal by the Master of the Rolls, sitting with Lopes and Kay, L.JJ. Upon the second their lordships did not find it necessary to express any opinion.

If the provisions of section 23 had not been statutory, but had simply been matter of private stipulation between the two railway companies, I should have been of opinion that the decision of the courts below upon the first of these points was right. The result might have been very different according to Scotch law, which, in ordinary circumstances, enables one who is not a party to the contract, and who gives no consideration, to enforce any condition which is made in his favour by the parties contracting; see *Finnie* v. *Glasgow and South-Western Railway Co.*, 3 Macq. 75, 6 W. R. H. L. Dig. 26. But in England, where consideration is necessary to the validity of a mutual contract, the doctrine of *jus quæsitum tertio*, if admitted, at least is not recognised to the same extent.

In cases where the provisions of a local and personal Act directly impose mutual obligations upon two persons or companies, such provisions may, in my opinion, be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter, not of enactment, but of private agreement. It was in that sense that in *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 707, I ventured to observe that "such statutory provisions as those of section 43, occurring in a local and personal Act, must be regarded as a contract between the parties, whether made by their mutual agreement or forced upon them by the Legislature." For all purposes of construction, I thought that the provisions which the House had to interpret might be legitimately viewed in that light. But it did not occur to me then, nor am I now of opinion, that the analogy of contract, for it is nothing more, could, in an English case especially, be carried farther.

The provisions of a railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature. And when provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties, who are sufficiently designated, I am of opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation *inter alios*, which they may have an interest but have no title to enforce. These observations are not meant to apply to any case where a private contract made between two companies is scheduled to and confirmed by the Act; because, in such a case, the very form of the enactment indicates that it is to operate as a contract, and not otherwise.

In this case, imbedded in a series of obligations laid upon the Taff Vale Co., there is a positive enactment to the effect that, for the carriage of such traffic as the appellants', the company shall not charge more than a certain rate. I am of opinion that, so long as the Barry Co. do not obtain running powers, and these obligations continue to be incumbent on the respondent company, the appellants have a good title to insist upon their traffic being carried at the rate specified in section 23 of the Act of 1888.

Having arrived at that conclusion, I find it necessary to consider the second point upon which the respondents rely.

The clause in question requires that for the carriage of their traffic from Ferndale to Hafod, on its way to Barry Docks, *viâ* the Barry line, the appellants shall pay to the respondent company a rate per mile "not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Co. for like traffic to or from the docks at Cardiff, Penarth or Barry." From Ferndale or Hafod to Penarth, the distance is about a mile longer than to the common point to which the mean length of the transit to the Cardiff Docks is calculated. Under the provisions of various Acts, passed prior to 1888, Cardiff and Penarth Docks were grouped, or, in other words, the same rate was made chargeable between these termini and other points on the Taff

Railway. Notwithstanding the uniformity of the gross rate thus established, it is obvious that, if the actual distances between the Cardiff Docks and the Penarth Docks be taken into account, the mileage rate to Penarth Docks will be the less of the two. The respondent company maintained successfully before Day, J., that, as a legal consequence of the grouping together of Cardiff and Penarth Docks, the mileage rate to Penarth must be ascertained by assuming the distance to Penarth to be the same with the distance to that which is regarded as the common terminus of the Cardiff Docks.

The question thus raised upon the construction of section 23 was subsequently considered by the Court of Appeal, consisting of the Lord Chancellor, with Lindley and A. L. Smith, L.JJ., in an action at the instance of the Barry Railway Co. against the present respondents. Their lordships unanimously dissented from the view which had been taken by Day, J., in this case. The Lord Chancellor said: "The Legislature seems to me to have provided that you may ascertain either the rate being charged to the docks at Cardiff, or the rate being charged to the docks at Penarth, or the rate being charged to the docks at Barry. Whichever of those is the lowest mileage rate is the lowest mileage rate to the docks at Cardiff, Penarth, or Barry, within the meaning of this section; and, of course, that would be ascertained by taking the charge from any given colliery to Penarth, finding the mileage and the rate charged, and then ascertaining by a comparison of the mileage and the rate charged what was the mileage rate." I fully concur in these observations, which appear to me to contain the true interpretation of the clause before us.

At your lordships' bar the respondent company raised another question, which is not noticed by the learned judges who decided *Barry Railway Co.* v. *The Taff Vale Railway Co.* The company maintained that they had power to group, and had in point of fact grouped, the docks at Cardiff and Penarth, in virtue of the powers conferred upon them by section 29 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25). It appears to me to be open to doubt whether they have really done so, because the 3rd sub-section of the clause provides that, where any group rate is proposed, the railway company must, after giving notice in the prescribed manner, apply to the Commissioners, and, in the event of opposition, the rate is not effectual until it has been approved by the Commissioners. There is no evidence before us that these conditions have been observed.

But, assuming that a group rate has been duly fixed in terms of section 29, that circumstance cannot, in my opinion, aid the argument of the respondents. The clause, no doubt, declares that such rate may be fixed, "notwithstanding any provision in any general or special Act"; but I do not think that declaration can affect any mileage rate which is not converted into a gross rate by the grouping. The object of the clause is to enable railway companies to relieve themselves of complaints and claims, in respect of unequal mileage rating, from traders at different termini, by grouping these termini together, abolishing mileage rates, and substituting a uniform gross rate. That procedure can, in my opinion, have no practical effect upon the rate chargeable, under express statutory provisions, for the conveyance of traffic to any terminus which is not included in the group. In this case the rate chargeable by the respondent company for the carriage of the appellants' mineral traffic from Ferndale to Hafod is determined by section 23 of the Barry Docks and Railway Act, 1888. And, in my opinion, that clause must receive the same interpretation, whether Cardiff and Penarth Docks were grouped before the passing of that Act, or have been grouped since that date, under the powers conferred by the Railway and Canal Traffic Act of 1888.

For these reasons I concur in the judgment which has been moved by the noble and learned lord on the woolsack.

Lord ASHBOURNE.—This case depends upon the construction of section 23 of the Barry Docks and Railways Act, 1888, the terms of which I need not repeat. The respondent company contends that that section cannot be enforced by the appellants, and is only binding between them and the Barry Railway Co.; and, secondly, that, from the true point of view, the rate demanded cannot be regarded as excessive.

The respondents' contention on the first point presents a somewhat narrow, restricted, and illiberal view of railway Acts. The public have a deep concern in all such legislation, and their interests require to be regarded and protected. Railway promoters and companies know that their Bills have to pass through a stringent Parliamentary ordeal, and that the committees of both Houses will scan the proposals submitted jealously, in order to see that the rights and interests of the public are duly safeguarded. The railway companies, when they ask for powers and concessions, know that they must show some public advantages, and that if they seek to ignore them Parliament will demand an account.

In this section there is a clear enactment that for traffic like that in question the company shall not charge more than a certain rate. Why should the appellants be debarred from the right of relying upon plain words contained in an Act of Parliament? It is their goods which are forwarded, it is their money which pays the rates; why should they be excluded from the benefit of the statutory provision? It is the natural construction of the words of the section. It violates no principle of justice or fairness or convenience. It is too narrow a view to seek to dwarf the enactment into a rigid contract between the companies. The rights and protection of the public compelled the companies to come to Parliament, and then the obligations of the companies became statutory, and cannot be regarded as merely contractual.

I do not deem it necessary to add anything on the second point.

I concur in the opinion that the appeal should be allowed.

Lord MACNAGHTEN.—It seems that before the year 1884 the Taff Vale Railway Co. had established a railway system serving the mineral districts of Merthyr Tydfil, Aberdare, and the Rhondda Valley, and bringing the collieries there into communication with docks at Cardiff and Penarth. In 1884 the Barry Dock and Railways Co. were incorporated for the purpose of constructing a dock at Barry, with railways to connect it with the Taff Vale system at Treforest and at Hafod, which is about two miles to the north of Treforest. The Taff Vale Co. had themselves a communication with Barry by a more circuitous route by means of the Cardiff, Penarth, and Barry Railway. In 1888 the Barry Co. applied to Parliament for further powers. Amongst other things, they sought for running powers over the Taff Vale system northward of Treforest—an interference with the rights of the Taff Vale Co. only to be justified by considerations of public interest. The Bill promoted by the Barry Co. passed into law, and became the Barry Dock and Railways Act, 1888. The Act recites that it is

expedient that running powers over the Taff Vale Railway should be conferred upon the Barry Co. in certain events. Accordingly, in certain events these running powers are given. They are not to be exercised immediately or at any fixed and definite time. They were to remain in abeyance so long as the Taff Vale Co. chose to observe certain terms and conditions which are to be found in section 23 of the Act. For the purposes of this appeal it will be sufficient to quote the opening words of the section: "23 (1.) The Taff Vale Railway Co. shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the company" (that is the Barry Dock and Railways Co.) "from or to Treforest or any place northward thereof, at rates per mile not greater than the lowest rate which shall, for the time being, be charged by the Taff Vale Railway Co. for the traffic to or from the docks at Cardiff, Penarth, or Barry."

The appellants, D. Davis & Sons (Limited), are proprietors or lessees of collieries in connection with the Taff Vale Railway to the north of Treforest. They have been in the habit of sending their coal to Barry by Hafod Junction and the Barry Railway. The Taff Vale Co. brought this action to recover a sum alleged to be due from the appellants for the carriage of their traffic on the Taff Vale Railway. Part of the claim is disputed on the ground that the rates charged are in excess of the mileage rate authorized by section 23 of the Act of 1888. The respondents' reply is twofold. They say that if section 23 is rightly understood it will be found that their rates are not excessive. And, further, they contend that the appellants are not in a position to complain, even assuming the prescribed limit to have been exceeded. Day, J., decided both points in the respondents' favour. The Court of Appeal dealt only with the second. On that point, agreeing with Day, J., they dismissed the appeal.

Now, it cannot be disputed that there has been an overcharge if the rate per mile for the appellants' traffic to and from Hafod is to be ascertained by taking the gross rate to Penarth, and dividing it by the number of miles in the distance. But the respondents insist that that mode of calculation is wrong. They are entitled, they say, to charge, and do in fact charge, a group rate to and from Cardiff, Penarth, and Barry, and therefore they contend that the appellants are not at liberty to select one of those three places, and calculate the rate on the actual distance in miles. Why not? The respondents may be right in grouping Cardiff, Penarth, and Barry for the purpose of fixing the rates to be charged between those places and any particular point of destination or departure on their line. They may even be bound, as they allege they are, by statute for some purposes to group Cardiff and Penarth. But grouping is beside the question here. The thing to be ascertained is the limit of charge from or to the appellants' collieries to or from Hafod. The limit is to be the lowest rate per mile for the time being "charged for like traffic to or from the docks at Cardiff, Penarth, or Barry"; that is, to or from the docks at Cardiff, or to or from the docks at Penarth, or to or from the dock at Barry. You have to ascertain the mileage rate to each of those different places, and take the lowest. Given the gross rate and the number of miles, the calculation is easy enough. The conditions of the problem are not altered, the task is not rendered more difficult, because the dividend—the gross rate to each of the three places—is the same. It seems to me that there is no substance in the respondents' argument on the first point.

The second point, like the first, depends on the scope and language of section 23.

Speaking for myself, I am quite at a loss to follow the reasoning upon which it has been held that the appellants are not at liberty to defend themselves under the provisions of that enactment. At first sight one would suppose that those whose goods are forwarded under statutory provisions must have the right to rely on those provisions so far as they make in their favour. They are the persons liable to pay. It seems only reasonable that they should be heard when they complain that they are charged too much. The construction for which the appellants contend does no violence to the language of the section. It leads to no injustice. It creates no inconvenience. The charge is a simple matter of arithmetic. The persons to be charged are ascertained when the goods in respect of which the charge is made are delivered to the railway company. There can be nothing unfair in holding a railway company to terms which they themselves offered, or to which they profess to be willing to submit, as the price of escape from conditions more onerous or more unpalatable.

It was contended, on behalf of the respondents, that the only duty or obligation imposed by the section was a duty or obligation as between the two railway companies. The public, it was said, were not concerned in the matter at all. Nobody thought of them. Their interests were not regarded either by the promoters of the Bill or by Parliament. I rather protest against that view of railway legislation. Ever since it has become the practice for promoters of undertakings of a public nature to apply to Parliament for exceptional powers and privileges, the Acts of Parliament by which those powers and privileges are granted have been regarded as Parliamentary contracts, as bargains between the promoters on the one hand and Parliament on the other, Parliament acting on behalf of the public as well as on behalf of the persons specially affected. Those powers and privileges are only conceded on the footing that the concession is for the benefit of the public who are likely to use the railway, as well as for the benefit of the promoters. As a general proposition this was not disputed by the learned counsel for the respondents, but they pointed out that the obligation in section 23 to forward goods at certain rates was an obligation imposed, not on the Barry Co., who promoted the Bill, but on the Taff Vale Co., who opposed it. Can that make any difference? The clause was accepted by Parliament. In accepting a particular clause in a railway Act the governing consideration with Parliament must be the same, whether the proposal comes from one side of the table or from the other, from the promoters of the Bill or its opponents. In the present case there can be no room for doubt. The Act declares that it is expedient—expedient, that is, in the interests of the public—that running powers over the Taff Valley Railway system should be conferred on the Barry Co. in certain events. For the present those running powers are held in suspense. Why? Because an alternative arrangement was proposed by the Taff Vale Co., and accepted provisionally by Parliament. Is it not reasonable to suppose that in considering the propriety of accepting the alternative Parliament kept in view the interests of the public, and that the alternative arrangement was accepted because the Legislature considered that the interests of the public would not suffer by the alteration?

It was urged that section 23 was to be treated as a contract between the two companies, and thence it was argued that no one could enforce the obligation imposed by it but the parties to the arrangement.

No doubt it is perfectly true that, as a general rule, no one can enforce a contract who is not a party to it. A third person, though intended to be benefited by a contract, cannot enforce it, because no consideration moves from him. But the simple answer to the argument is that the obligations in section 23 are statutory, and not contractual. They are not expressed in the form of a contract, nor are they founded on contract between the two companies. There is no reason why the peculiar doctrine of English law applicable to contracts should be applied to an enactment which speaks plainly and directly in the language of command. The argument, if I may say so with all deference, seems to be founded on an erroneous assumption in point of fact, and an imperfect analogy in point of law.

Then it was said that the statutory right of the Taff Vale Railway Co., as between themselves and the public, was to charge for the conveyance of traffic such tolls as they might think fit within the maximum allowed by their Acts, and it was argued that it would be a strong thing to hold that that power is interfered with or altered by a section in an Act of another railway company. But the truth is that the section in question does not interfere with the power of the Taff Vale Co. to charge tolls up to the maximum allowed. There is nothing in this section inconsistent with that power. The Taff Vale Co. may charge what tolls they please within the limits prescribed by their own Acts. The provision in section 23 only comes to this, that when they have exercised the power, when they have fixed the charges, they are not to charge higher rates per mile for traffic destined for or coming from the undertaking of the Barry Co.

The suggestion that it really cannot matter to traders who use both lines whether they are overcharged or not by the Taff Vale Co., because the Barry Co. will have to make up the loss if they want to keep their business, hardly seems to call for a serious reply.

For these reasons I am of opinion that the appeal ought to be allowed.

Lord MORRIS.—The respondents, the Taff Vale Railway Co., sued the appellants, colliery owners, for the carriage of goods over their railway. By the Taff Vale Railway Act the company are entitled to charge rates and levy tolls for the carriage of goods. There is no allegation that the respondents' claim is at any higher rate than that authorised by their Act, as the toll charged the appellants is within the maximum rate empowered to be charged. How, then, does the rate become altered? The appellants say by the operation of section 23 of the Barry Dock and Railway Act, 1888.

The history of that Act, so far as material to this case, is that the Barry Dock Co. promoted a Bill in Parliament, and sought for certain running powers over the Taff Vale Railway. This was granted by the House of Commons, but in the House of Lords, in substitution, and as matter of agreement between the two railway companies, section 23 was inserted, as follows:—"(1) The Taff Vale Railway Co. shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the company, from or to Treforest or any place northward thereof, at rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Co. for like traffic to or from the docks at Cardiff, Penarth, or Barry, and shall deliver all such traffic into and take the same from the company's sidings, as regards all traffic coming from or destined for Hafod or any place westward thereof at Hafod, and as regards other traffic at Treforest, without any terminal or other charge in respect thereof, but with such bonus (if any) in respect of traffic exchanged at Hafod as, in default of agreement between the Taff Vale Railway Co. and the company, shall be from time to time determined, on the application of either of them, by the Railway Commissioners sitting as arbitrators, having regard to all the circumstances of the case." On the construction of this section a question arises which disposes of the case in the view I entertain.. In my opinion the section is only a legislative sanction given to the agreement entered into between the two companies, and neither the appellants nor any other person has any right conferred upon them thereby. The object of the section was to benefit the Barry Dock Co. by the substitution of section 23 for running powers. No third party had any interest in the granting of running powers to the Barry Dock Co., who might or might not have sought for them, as it suited their interests.

It is now sought on the part of the appellants practically to repeal the Act settling the rates and tolls which the respondents were entitled to claim. There is no such express enactment in section 23. The portion of the section relied on by the appellants is part of a sentence, the whole sentence referring to the "forwarding and affording facilities" by the respondents' company to the Barry Dock Co., one incident of which is the rate per mile relied upon by the appellants. Facilities for exchanging traffic appears to be the object as enacted, and the marginal note, whatever value may be attached to it, bears out this view. There is no right or privilege conferred on traders over the respondents' line, nor is any duty imposed on the respondents in relation to the public or to any third party. In my opinion there never was any such intention, nor in my opinion can the section be read as if it simply and expressly enacted that the rates for carrying traffic from Treforest or any other place north of it should be at rates per mile not greater than the lowest rate charged by the respondents from the points named. If such were enacted, it would be the enactment of a new rate of tolls within certain limits, and would necessarily be a repeal to that extent of the old rates. But I find no such express and simple enactment, and it would be strange if it could be found. Here is an Act promoted by the Barry Dock Co. for their own objects and interests. It would be a curious place to find an enactment regulating the tolls of another railway company as between that railway company and the general public, when section 23 is merely an alternative for the running powers sought for by the Barry Dock Co.

The obligation of the Taff Vale Co. is no doubt statutory, but that only leads to what does the statute say; in my opinion, it only says that, as between the Barry Dock Co. and the respondents, the respondents shall not charge rates per mile greater than the lowest rate charged by the respondents between the points referred to. It is said this enactment of section 23 is not a matter solely between the two companies. I am unable to concur in that proposition; it just is, for they are the parties contracting, and whose contract is made statutory. I am also unable to follow the supposed principles on which Parliament grants powers to railway companies. Whatever they are, I presume they are to be collected from the statute itself, and that the interest, or alleged interest, of the public, if it is intended to be safeguarded in any special way, must be found in the statute; if there was any intention to safeguard colliery traders, or any trader, and give them benefits of lowering of rates, why does the statute not say so? I decline to torture a facility as between two com-

panies, wrapped up with other facilities, into an enactment altering the rights previously existing by statute as between one of the companies and the general public.

With all respect for your lordships' opinion to the contrary, I am clearly of opinion the judgment of Day, J., on the question is right, and that the judgment of the Court of Appeal affirming it should stand.

Order of Court of Appeal and decision of Day, J., reversed, with costs here and below. Case remitted to Queen's Bench Division.

Solicitors for the appellants, *Downing, Holman, & Co.*, for *Downing & Hancock*, Cardiff.

Solicitors for the respondents, *Ince, Colt, & Ince*, for *Ingledew & Sons*, Cardiff.

Court of Appeal.

From Q. B. Div. (Lindley, Lopes, and Rigby, L.JJ.) — July 18, 19, 1895.

THE MANCHESTER TRUST (LIMITED) *v.* FURNESS, WITHY, & CO. (LIMITED). (*a*.)

Admiralty—Ship—Charter-party—Bill of lading—Charter-party making the master the agent of the charterers for certain purposes—Liability of owner of chartered ship on bills of lading signed by master—Constructive notice.

A charter-party expressly stipulated that the captain and crew, although paid by the owners of the ship, should be "the agents and servants of the charterers for all purposes," and that in signing bills of lading the captain should "only do so as agent for the charterers," who thereby agreed to indemnify the owners from all consequences or liabilities that might arise from the captain signing bills of lading. Goods were shipped under a bill of lading which made no specific mention of this stipulation, but provided for delivery at the port of discharge, under certain conditions, "and all other conditions as per charter."

Held, (1) *that such a stipulation, though valid as between the charterers and the owners, did not protect the owners from a claim by the holders for value of the bill of lading, founded on the negligence of the master in delivering the goods to the wrong persons; and* (2) *that the words "all other conditions as per charter" did not incorporate into the bill of lading the above-mentioned stipulation in the charter-party so as to make it binding by way of constructive notice upon a holder for value of the bill of lading who had no actual notice of such stipulation.*

Observations on the undesirability of extending the equitable doctrines of constructive notice to commercial transactions.

Decision of Mathew, J., *affirmed.*

This was an appeal from the decision of Mathew, J. The action was brought against the owners of the steamship *The Boston City* to recover damages for the non-delivery of 2,200 tons of coal, shipped at Cardiff and deliverable at Rio under bills of lading signed by the master of the ship.

The owners denied liability, on the ground that the bills of lading had not been signed by the master as their agent, but as agent for the charterers of the ship, Messrs. Beuchimol & Sobrinho.

On the completion of the loading of the ship the master, on the 27th of April, 1893, signed bills of lading in the following form: "Shipped in good order and well conditioned by Cory Brothers & Co. (Limited) for account of Messrs. Beuchimol & Sobrinho in and upon the good steamship *Boston City*, whereof —— is master for this present voyage, and bound for Rio de Janeiro, —— tons of Cory's Merthyr steam coal, which are to be delivered in the like good condition at the aforesaid port of Rio de Janeiro (all and every the dangers and accidents of the seas and of navigation of what nature and kind soever excepted) unto order or to assigns, he or they paying freight for the same, and all other conditions as per charter-party." After the bills of lading had been delivered to the charterers, who were also the shippers, the master, at their request, sailed for Buenos Ayres instead of Rio, he accepting their assurance that the coals belonged to them and that the bills of lading would be forwarded to that port. Messrs. Beuchimol & Sobrinho then endorsed the bills to the plaintiffs for an advance of £3,217 10s. Upon the ship's arrival at Buenos Ayres the master was told by the agent of Messrs. Beuchimol & Sobrinho there that the bills of lading were in his possession, and he thereupon, without demanding their production, delivered the coals. The coals were sold and the proceeds received by Messrs. Beuchimol & Sobrinho, who subsequently stopped payment. The plaintiffs then applied to the defendants for payment of the money they had lost by the coals having been delivered by the master of their ship without the production of the bills of lading. The defendants denied their liability, on the gound that under the charter-party the master of the ship was the agent of the charterers, and not of the owners.

The charter-party, which was dated the 7th of April, 1893, was for the most part in the ordinary form of a time charter, where possession of the ship is retained by the owners. The owners were to let the ship with full complement of officers, seamen, engineers, and firemen, and were to provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew. The freight was to be paid monthly, and the charterers were to provide cash for disbursements as required by the master. The cargo was to be laden and (or) discharged in any dock, or at any wharf or place, that the charterers should direct, where the vessel could always safely lie afloat, and the whole reach of the ship was to be at the charterers' disposal, reserving proper space for ship's officers. The owners were not to be responsible for the excepted perils mentioned, and were to have a lien upon all cargoes for the charter money due under the charter. And the charter-party contained the following further provision, upon which the defendants relied: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under this charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers, and the charterers hereby agree to indemnify the owners from all consequences or liabilities, if any, that may arise from the captain signing bills of lading or in otherwise complying with the same." At the time the charter-party was signed the master of the ship was admittedly the servant of the owners, and he did not at any time enter into any express contract with the charterers. Nothing was done to alter his position as master of the ship or to exonerate him from his obligations as the owners' agent and representative, but a copy of the charter-party was handed to him by the owners with directions to carry it out.

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Mathew, J., held that the special agreement in the charter-party, which provided that the captain should only sign bills of lading as agent for the charterers, did not exonerate the owners from liability to the plaintiffs; but that the true meaning of the clause was that the charterers undertook, as between themselves and the owners, to underwrite, as it were, the risks of each voyage under the charter, and that the undertaking did not affect the rights of those who might become holders of the bills of lading in the belief that the captain in signing was exercising his ordinary authority. He accordingly gave judgment for the plaintiffs with costs on the 27th of May, 1895.

The defendants appealed.

Sir W. Phillimore and *Holman*, for the appellants.—The special clause in the charter-party, whereby it was agreed that the captain should be the agent and servant of the charterers for all purposes, and that in signing bills of lading he should only do so as agent for the charterers, showed that the master had ceased to be the servant of the owner and had become the servant of the charterers. The reference in the bill of lading to the charter-party gave notice to the respondents of all the provisions of the charter-party, including the clause in question.

They referred to the following cases—viz., *The Baumwoll Manufactur von Carl Scheibler* v. *Furness*, [1893] A. C. 8, 41 W. R. Dig. 222; *Colvin* v. *Newberry*, 8 B. & C. 166, 7 Bing. 190, 1 Cl. & F. 283; *Frazer* v. *Marsh*, 13 East. 238, 2 Camp. 517.

Joseph Walton, Q.C., and *Carver*, for the respondents.—Before the decision in *The Baumwoll Manufactur* v. *Furness* there was a difficulty in saying whether the master was the servant of the charterer or of the owner, but the difficulty was cleared away by that case. It is clear that, if the special clause had not been inserted, there could have been no question but that the master was the servant of the owner. The condition incorporated in the special clause may be binding as between the owner and the charterer, but cannot affect any liability to third parties which the owner, as employer of the master, would have been under had the clause not been inserted in the charter-party. The words "all other conditions as per charter-party" could not incorporate the special clause into the bill of lading so as to affect the respondents with notice of it: *Serraino* v. *Campbell*, 39 W. R. 356, [1891] 1 Q. B. 283. Even if the respondents had notice of the special clause, the appellants would still be liable in tort, as the claim is in respect of the conduct of the master as manager of the ship, and clearly, in that respect, the master was the servant of the owner.

They referred also to *Fry* v. *Chartered Mercantile Bank of India*, 14 W. R. 920, L. R. 1 C. P. 689.

LINDLEY, L.J.—This is an appeal by the defendants from a decision of Mathew, J., which is in favour of the plaintiffs.

The plaintiffs brought their action for non-delivery of a cargo, and being holders for value of the bill of lading they based their action partly on the non-delivery according to contract, and partly in trover, taking their chance of whichever is the best in the long run. I do not think myself that it matters from which point of view you look at their rights. Now, the bill of lading under which the plaintiffs claim is in the ordinary form, so far as I know. It is signed by Mr. Thomas Clark, master, his principal not being disclosed; it may be the shipowners, or it may be someone else, and the bill of lading is to the effect that the goods shipped are to be delivered to the holder of the bill of lading, "he or they paying freight for the same and other conditions as per charter-party." So there is a distinct reference in the bill of lading to the charter-party to that extent. In the margin there is this—Perils on the sea and so on: "Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull not resulting from want of due diligence by the owners of the ship or any of them or by the ship's husband or manager."

The charter-party, which was dated on the 7th of April, 1893, is a time charter, and by it the defendants, who are the owners of the ship *Boston City*, agree to let, and the charterers, who are a Spanish firm of Beuchimol & Sobrinho, of Manchester, agree to hire, the steamship for the term of six months, and so on; the vessel to be delivered or placed at the disposal of the charterers at Victoria Dock, London, where she then was. Then the ports to which she is to go are specified—nothing turns upon that—"as the charterers or their agents shall direct." Then there is a clause (I will allude shortly to the more important ones) that the owners are to provide and pay for the provisions and wages of the captain, officers, engineers, and so on; that is to say—they are to appoint them and they are to pay them. The owners are to do that much, and they are to maintain the ship in a thoroughly efficient state. Then the charterers are to pay for coals, and so on. The charterers are to pay for the use of the ship 8s. per ton per calendar month. Then cash for disbursement as required by the master free of charge. The whole of the ship is to be at the charterers' disposal, reserving only a proper space for ship's officers, and so on, and for provisions and stores. There is this clause in it, which I suppose is a common form: "The captain shall prosecute his voyage with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. All salvages and derelicts for owners and charterers' mutual benefit."

Then comes a clause which is unusual, and which I confess I never saw before, and which I am told has given rise to this controversy. The real question we have to determine is, What is the effect of the clause I am going to read, as between the holder of such a bill of lading as I have read and the shipowner? The clause is a very unusual one. It is this: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under the charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers; and the charterers hereby agree to indemnify the owners from all consequences or liabilities, if any, that may arise from the captain signing bills of lading, or in otherwise complying with the same." I do not pause to comment upon that for the moment; I will pass on. Then: "That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and if necessary make a change in the appointment." Then the master is to be furnished from time to time with the requisite instructions, and so on, and to keep a log which is to be patent to the charterers. Then there is a clause in the event of loss of time from deficiency of men or stores, and so on, the payment of hire shall cease until she be again in an efficient state to resume her service. That is relied upon, and that is not unimportant. Then there are some exceptions, so far as the same can apply—the act of God, perils of the sea, and so on, and "not answerable for any loss or damage arising from improper

stowage, explosions, bursting of boilers, and so on." Then there is a clause of lien, which is a common one: "The owners shall have a lien upon all cargoes, and all sub-freights, for freight or charter-money due under this charter; and charterers to have a lien on the ship for moneys paid in advance and not earned."

Now upon the true construction of that document, and having regard to the circumstances to which I have alluded, the question arises whether the shipowners are liable for the non-delivery of this cargo by the captain. The story of the trick played upon the captain, and how he fell into the trap which was laid for him, was stated at the bar, and I need not go through it; but the long and the short of it is that, having signed bills of lading for delivery of the coal at Rio, he was deceived and misled, and he took the coals to Buenos Ayres, and there they were stolen; that is what it comes to, and the question is now, Who is to bear the loss?

The plaintiffs, who are holders of the bills of lading, rely upon the general rule of law that, *primâ facie* at all events, a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner. Of course, in the ordinary course of business that is so; but it may not be always so; it may turn out that the master is not the servant or agent of the shipowner, and in the case to which we were referred, of *The Baumwoll Manufactur von Carl Scheibler* v. *Furness*, the charter was such that the master was not the servant of the shipowner, but was the servant of the charterer. The peculiarity of that case was this—that, although the charter-party there contained a great many clauses similar to those which we find in the charter-party in this case, the hiring of the master was by the charterer and not by the shipowner. The charterer employed him, paid him, dismissed him, and upon the strength of that clause the House of Lords held, affirming the decision of this court, that the master was in fact the servant of the charterer, and was not in fact the servant of the shipowner. Of course, when you have got to that all the rest follows.

Now, it is said that, notwithstanding that case, the peculiar clause to which I have alluded shows that in truth the master here had ceased to be or was not the servant of the owner, but had become the servant of the charterer, and the real question we have to consider is what is the effect of that clause as between the holder of the bill of lading and the shipowner. Let us look first of all at the true construction of the clause as between the shipowner and the charterer. They are the persons who make that bargain, and as between them the captain and crew, although paid by the owners, are to be the agents and servants of the charterer. Then the clause is very significant, because it does not stop there by any means, but it contains an indemnity clause, which, to my mind, is extremely significant. It seems as if these parties felt that, notwithstanding this clause, the owners might be held liable for the acts of the master, and they stipulated in that event, notwithstanding the previous bargain, that the captain is to be the agent and servant of the charterer; that the charterer shall indemnify the shipowner. The view taken by Mathew, J., is that that is a stipulation which is valid enough as between the charterers and the owners, but which does not affect the true position of the captain and the crew, and has no effect at all upon the holder of the bill of lading, although the bill of lading refers in terms to this charter-party. Upon reflection, I am of opinion that that is the true and correct view. I cannot regard all these clauses taken together without coming to the conclusion that the true view is that the master was and continued to be in fact the servant of the owner, subject to a stipulation that as between the owner and the charterer the charterer should treat the master as his servant and indemnify the owners from the consequences of what the master might do as regards signing bills of lading, and so on.

Now, if that is the true view to take, that ends the question; but then we are pressed with the fact that in this case the bill of lading referred to the charter-party, and it is said that the holder of the bill of lading took it with notice, at all events of the charter-party, and with notice, therefore, of this contract, and with notice that the master was the servant of the charterer.

That argument appears to me to be pushing the doctrine of constructive notice a great deal too far. It is quite true that the bill of lading refers to the charter-party to the extent which I have mentioned. The effect of that reference has been considered more than once; it has been considered in *Serraino* v. *Campbell*, and also in *Fry* v. *The Mercantile Bank*, and the effect of it is to incorporate so much of the charter-party as relates to the payment of freight and other conditions to be performed on the delivery of the cargo. But there is no authority whatever for carrying that doctrine to the extent necessary in this case. What is wanted in this case is to say that by reason of that reference to the charter-party the holder of the bill of lading, and the person who takes it in the ordinary course of business, is to be treated as having notice of all the contents of the charter-party. There is no doctrine that goes to anything like that extent, and as regards the extension of the equitable doctrines of constructive notice to commercial transactions the courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealings with land and estate, but there have been protests over and over again against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with legal estate, title is everything; in commercial transactions, possession is everything, and title is comparatively nothing; and if we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief by paralysing the trade of the country. That I am not going too far in making these observations will be found by turning to what was said by the Appeal Court about constructive notice in the case of *English, Scottish, & Mercantile Investment Co.* v. *Brunton*, 41 W. R. 133, [1892] 2 Q. B 701. That case had reference to a notice in respect of debentures, but whether commercial documents are negotiable instruments, or whether they are only more or less like them, is a matter to my mind of very little importance as regards the question of constructive notice. Again, Lord Herschell said in the case of the *London Joint Stock Bank* v. *Simmons*, 41 W. R. 108, 113, [1892] A. C. 201, "I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments." As regards debentures, therefore, and everything of that kind, and other commercial documents, the protest which I have been making has been made before, and I do not think it is likely to be made in vain.

Now, having got that far, we come back to the question, Whose servant was the master in signing the bill of lading? Sir Walter Phillimore and Mr. Holman have exerted themselves very ingeniously to persuade us, on the strength of the case of *Colvin* v. *Newberry*, that we ought to hold he is the servant of the charterer. I do not think we ought. In the first place, the facts of the two cases are totally different.

The case of *Colvin* v. *Newberry* was a very curious case. The master there, so far as I understand it, had no principal at all. He was himself the charterer, and he was doing everything on his own account, subject to some payment to the shipowner. But the true view to take is, I think, this—that, although there is a great difficulty in reconciling all the earlier cases about demises of ships and so on, the test in each case is that which was applied by the House of Lords in the case of *The Baumwoll Manufactur* v. *Furness*, "Whose servant is the master?" Who is his undisclosed principal when he signs the bill of lading? My answer to that question is that upon the true construction of these documents he was the servant of the shipowner.

The appeal will be dismissed, with costs.

LOPES, L.J.—On consideration, I am clearly of opinion that the learned judge in the court below was right. The question which we have to decide and which determines everything is this: Whose servant was the master when he signed the bill of lading? Was he the servant of the charterers or of the owners? I have no doubt that, as regards third parties, the master was the servant of the owners. They had hired him, they paid him, they alone could dismiss him. I will illustrate it by a case of this kind. Suppose *The Boston City* had come into collision with another ship through the negligence of the master, could it be said that the owners would not be liable? In my opinion such a contention would be impossible. It is conceded that if there were no such clause as that novel and unusual one to which my brother Lindley has referred, there would be no difficulty in this case. Therefore the important matter to consider is, What is the true meaning of that clause? Now, in my opinion the meaning of that clause is this, that it protected the owners so far as the charterers are concerned, but it did not protect them against third parties. But then it is said in this case a notice was conveyed to the indorsees for value of the bill of lading, of what was contained in the charter-party by means of a reference to the charter-party contained in the bill of lading. The words relied on in the bill of lading are these, "other conditions as per charter-party," and that is all. Now these words, in my judgment, are not sufficient to give notice to the indorsees of a bill of lading for value of any such special provision as the one relied upon in the charter-party. It would require very clear and very explicit words contained in the bill of lading to exonerate the owners from liability to third parties, such as the holders of a bill of lading—to exonerate the owners from the liability attaching to them by the acts of their master. The holders of the bill of lading, in the absence of any such explicit words as I have mentioned, would naturally believe and imagine that the master, when he signed the bill of lading, was exercising the ordinary authority which attaches to him in his capacity of master.

Now, I think that disposes of the case. I would only wish to add this, that I entirely agree with every word that has been said by my brother Lindley with regard to constructive notice. If I am correct in the view I have taken, it is perfectly clear that the judgment of the court below was right; that the master was the servant of the owners, so far as regards the plaintiffs in this action, and that there was nothing in the clause above referred to which relieved them from the liability which, in ordinary circumstances, would attach to them owing to the act of their master.

RIGBY, L.J.—I am of the same opinion, and I have very little to add. I think the real question here may be said to be—Have the shipowners, by which, of course, I mean the permanent owners—the absolute owners—given up altogether the possession and control of the ship to the charterer? I think it is impossible to read the charter without seeing that they had, in many cases at any rate, reserved to themselves the possession and control through the master. I will not go through the matters in particular, but, with the exception of the two lines, "the captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise under this charter," I do not think there is anything at all in substance that could lead to the conclusion that the possession and control were given up substantially and entirely to the charterers. I quite agree that the clauses that we find here are not to be taken to be conclusive in a case where the master is actually and *de facto* and for all purposes the agent of the charterer—that was decided in the *Baumwoll case*, in the House of Lords—but it is important to remember them. Then we have to consider a clause which undoubtedly is an important one. "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise, under this charter." Can that mean that for all errors of navigation the shipowners, as between themselves and third parties, shall be free from responsibility? It cannot mean that. I think the fair meaning is: A captain and crew are placed at your disposal, to be under your orders for all purposes where there is not a reservation of the right of the master, acting on behalf of the shipowners; and that comes to this, that as regards the liability between the shipowners and the charterers, that shall be the state of things. The acts of the officers, the master, and others, shall be the acts of the charterers, as between the shipowners and charterers themselves. Then it is a very strong thing to say that that went the entire distance of giving up entire possession and control, especially when we find that clause about indemnity from all consequences and liabilities, if any. No doubt the words were cautiously put in because it could not be supposed that there would ordinarily be any such consequences. But still it contradicts the idea to a certain extent—I do not say absolutely—but it goes a long way to contradict the idea that the shipowners had no responsibility as between themselves and third parties for the acts of the master.

I will say nothing about the question of constructive notice, because Lindley, L.J., has already expressed, in language which I will not weaken by any repetition, my entire feeling upon the matter, and my judgment on the matter, as regards the introduction into commercial transactions of the doctrine of constructive notice. I will say so much for the doctrine—that I am satisfied that this would be the extreme doctrine of equity as regards constructive notice.

Appeal dismissed.

Solicitors for the appellants, *Downing, Holman, & Co.*

Solicitor for the respondents, *George Trenam*, for *Addleshaw & Warburton*, Manchester.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 13, 14, 1895.

BETJEMANN *v.* BETJEMANN. (*a.*)

Partnership — Accounts — New partnership — Concealed fraud—Statute of Limitations.

A father carried on business in partnership with his two sons A. and B. from 1856 *until the father's death in* 1886, *without articles of partnership. On the father's death the partnership accounts were signed by A. and B. for probate, and they continued the partnership, sharing profits equally, on the same terms as before. A. died in* 1893, *and his executrix brought an action against the surviving partner B. to wind up the affairs of the partnership, and for an account since* 1886, *the date of the death of the father. B., by way of defence, alleged concealed fraud on the part of A., and counter-claimed for an account from* 1870, *the date of A.'s marriage, when a fresh arrangement was made by the partners as to their shares, and if necessary from* 1856, *the commencement of the partnership; the Statute of Limitations was thereupon relied on by the plaintiff by way of defence to the counter-claim.*

Held (*reversing the decision of* Wright, J.) *that, the concealed fraud having been proved, the Statute of Limitations commenced to run only from the time when the concealed fraud had been in fact discovered, and could not be set up as a defence to the counter-claim.*

It is the duty of a partner to trust his co-partner without examining the partnership books to ascertain if any fraud is being committed.

Rawlins *v.* Wickham, 7 *W. R.* 145, 3 *De G. & J.* 304, *followed.*

Appeal from a decision of Wright, J., sitting as an additional judge of the Chancery Division.

George Betjemann carried on the business of a dressing-case manufacturer in partnership with his two sons, John and George William, from 1856 until his death in 1886.

In 1870 John married, and the business was continued under a fresh arrangement as to the shares, but without any articles of partnership.

In 1886 George, the father, died, and the partnership accounts were signed by the two sons, the surviving partners, for the purposes of probate.

The business was continued by the two sons as before, each sharing the profits equally.

In 1893 John died, and the present action was brought by his legal personal representative against the surviving partner, who was also an executor of his father, for the usual partnership account as from 1886, the date of the death of the father.

In his defence the defendant alleged that John had fraudulently drawn out large sums of money from the partnership during his father's lifetime, and counter-claimed the return of those sums to the partnership, and asked that the account should be taken as from 1870, or even if necessary from 1856.

The plaintiff, in reply, set up the Statute of Limitations as a defence to any claim for partnership accounts before the father's death.

Wright, J., at the trial, ordered the accounts to be taken as from 1886, and dismissed the counter-claim, but without costs, holding that by reasonable care the fraud could have been discovered, and therefore the Statute of Limitations would run as against the defendant.

The defendant appealed.

Sir Henry James, Q.C., Hopkinson, Q.C., and *Edward Ford,* for the appellant.—Partners in a business should have implicit trust in each other, and it is not the duty of one partner to search the books in order to discover the concealed fraud of the other partner: *Rawlin* v. *Wickham,* 7 W. R. 145, 3 De G. & J. 304. The claim is brought within two years of the discovery of the fraud, and is, therefore, not statute-barred.

Cozens-Hardy, Q.C., and *Fooks,* for the respondent. — The moment the new partnership came into existence the partners had rights which came into existence then, and against which the Statute of Limitations would run.

They referred to *Gibbs* v. *Guild,* 30 W. R. 407, 8 Q. B. D. 296, 30 W. R. 591, 9 Q. B. D. 59; *Lawrance* v. *Lord Norreys,* 38 W. R. 753, 15 App. Cas. 210; *Maund* v. *Allies,* 5 Jur. 860; *Knox* v. *Gye,* L. R. 5 H. L. 656.

Hopkinson, Q.C., in reply.—The Statute of Limitations does not apply in the case of an agent who has money in his hands to invest for his principal.

He referred to *Burdick* v. *Garrick,* 18 W. R. 387, L. R. 5 Ch. App. 233; Lindley on Partnerships, p. 511; and *Moore* v. *Knight,* 39 W. R. 312, [1891] 1 Ch. 547.

LINDLEY, L.J.—The question raised on this appeal is as to the time from which a partnership account is to be taken. The material facts are very short. It appears that there was a father and two sons who commenced business and carried on business in partnership in 1856. In 1870 one of the sons, John, married, and we are told there was some new arrangement come to at that time. In 1886 George, the father, died, and in 1893 one of the sons, John, died. An action has been brought by John's legal personal representative against the surviving son, who is also an executor of the father George, for a partnership account, and the plaintiff has, of course, obtained the usual decree for an account of the partnership as from 1886, when the father died. The defendant does not resist that, of course, but he says the account ought to be taken from 1870, and if necessary even from 1856. The plaintiff objects to that, and the question really is from what time this partnership account ought to be taken—whether it ought to be taken from 1886, when the father died, or from some earlier time—from 1870, or even 1856 if desired.

Now, the learned judge has directed the account from 1886, and he has dismissed, without costs, the counter-claim of the surviving partner for the account from an earlier time; and the question on the appeal is whether the learned judge is right upon that. In my opinion he is wrong. There is no doubt that in 1886, when the father died, there was a partnership of the three which determined.

One died, and, to use the expression of one of the witnesses, the other two sons went on as before, minus one. That is quite true; and there is no doubt now, after the decision of the House of Lords in *Knox* v. *Gye,* that the executors of the father George who had died could set up the Statute of Limitations to an action for an account which was brought more than six years after his death. They do not do anything of the sort. The Statute of Limitations is set up by the plaintiff. But what is the plaintiff? The plaintiff is the executor of John; and John and William, the two sons, although, of course, they continued the partnership business, it was in point of law a different partnership—namely, a partnership between two. They continued the partnership account as one account, and never broke it and never wound it up; they brought in all the balances and carried on the balances at the bankers, carried on the ledgers, and carried on the account without a break.

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Now, as between persons who deal with each other upon that footing, I fail to see that the Statute of Limitations has any application whatever. Notwithstanding, therefore, that the partnership was determined between the three, and that there was a new partnership between the two, there was no break in the account, and the account was never brought to an end.

My view is that the learned judge misapplied the doctrine of *Knox* v. *Gye* in holding, as between these two brothers, who went on without a break, that the account could be continued as severed in 1886, and that there was a new cause of action arising then.

Now, even if I am wrong in that, it appears to me I confess, that the learned judge is wrong upon the other point. The surviving partner then says: "Well, if the statute is an answer, this is a case of concealed fraud," and he proves that John unfortunately did commit frauds in the way which was explained yesterday, and which is not now disputed. The plaintiff's answer to that is: "Although John committed these frauds, you, the surviving partner, had every opportunity of discovering them, and under these circumstances this statute applies and the doctrine of concealed fraud is excluded." That appears to me, I confess, to be erroneous, and contrary to all the principles which the court of equity has been in the habit of applying as between partners—I say nothing as between trustees and *cestuis que trust*, although I daresay that would be found to be based on similar principles. This doctrine of means of knowledge, which is incorporated in terms in the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 26, is perfectly reasonable and applicable to cases of ejectment. If a man brings an action of ejectment to recover property after twenty years' lapse of time, it is only reasonable to say, even in the case of concealed fraud, the statute shall apply, if he has means of knowledge and has not used them. That is intelligible enough, but Field, J., in *Gibbs* v. *Guild* went a little too far when he said the 26th section expressed the whole doctrine of equity applicable to concealed fraud. As between such persons as vendor and purchaser, where the maxim of *caveat emptor* applies, the observations of the learned judge were not open to criticism. I am not aware that there is any difference between law and equity in a case of that kind, but the learned judge was not correct in applying it to partners. What right has a partner to say: "You had no right to trust me. You are bound to look at the books and see that I am not cheating you." Such a doctrine as that is unfounded. I am not expressing a view of the law for the first time, for the doctrine will be found very well put in the leading case of *Rawlins* v. *Wickham*. There a partner had been induced to enter into a firm by a fraudulent misrepresentation. He continued a partner for four years, he had access to the books, and he had means of knowledge and means of finding out that he had been induced by those fraudulent representations to become a partner; and that circumstance was strongly relied upon as an answer to the bill, or suit in equity, brought by him to have the contract for partnership rescinded, and to be indemnified against the liabilities of the firm. How did Knight Bruce and Turner, L.JJ., deal with that? I will read the marginal note shortly before I read the passage in the judgment: "Where a person has been induced to enter into a contract by a material misrepresentation of the other party he is entitled to have the contract set aside, and not merely to have the representation made good. Held that the lapse of time was no bar to the plaintiff; for that, although he had means of ascertaining the representation to be untrue, he was entitled as between him and the persons who made it to believe it to be true, and was not bound to make inquiry until there was something to raise suspicion." Then Knight Bruce, L.J., who goes into this matter with great care, as does Turner, L.J., says on p. 313 (3 De G. & J.): [His lordship read the passage, and continued:—] and Turner, L.J., makes remarks to the same effect. It appears to me that that is the principle which is applicable to a case of this kind of means of knowledge; unless suspicion is proved, and unless the person complaining, not only has means of knowledge but does not choose to avail himself of that means when his suspicion is aroused, it is not *ad rem*.

On that ground it appears to me that the defendant is right in his counterclaim. The result, therefore, is that the appeal must be allowed. Instead of the counterclaim being dismissed, without costs, an account must be directed as from 1870, or logically, if the parties wish it, from 1856—I leave them to settle that—and as to the costs I take it that the costs of the counterclaim are rather material, and they ought to be the defendant's in any event, because the counterclaim included the case of fraud. That has cost a great deal of money, and the defendant is right, in that he has proved the fraud; and he is entitled, I think, to the costs occasioned by the denial of that fraud. He is also entitled to the costs of the appeal. The costs of the partnership suit will be dealt with in the ordinary way, but the costs of the counterclaim and of the appeal ought to be the defendant's in any event.

LOPES, L.J.—I am of the same opinion, and I will not add anything further.

RIGBY, L.J.—I am also of the same opinion, and I should not think it necessary to add anything at all, but for the respect I have for the judgment of the learned judge, and I will only say shortly the grounds, which are substantially those expressed by Lindley, L.J., on which I think that this appeal should be allowed.

First of all, there has been a continuous account from 1856, through 1870, down to 1886. There has been nothing approaching to a settled account. The account has been kept on from day to day. When the two formed their new partnership, for it is a new partnership, of course, they did it on the terms that they would not interfere with the accounts in the least. Each of the accounts with each of the customers, all the accounts of the old firm, were continued by the two who formed the new partnership. Under those circumstances, I do not see that there is any ground whatever for applying the Statute of Limitations to this case; but if you do apply the Statute of Limitations, it is a matter of essential importance to call to mind the doctrine of the court of equity in cases of concealed fraud. That there was concealed fraud here is abundantly plain. Apparently, if this gentleman had drawn out all these moneys in his own name, it might have been discovered; in fact, when he did that on anything like a large scale it was discovered, because in that case there was no concealment. The device adopted was such that on examining the banker's passbook with the cheques that were actually in their possession I suppose they found them to correspond altogether, and the very reason for drawing a cheque as if it were for a payment to a customer was to conceal the thing from the partners. That concealment was effective, and it continued to be effective upon the evidence until a time well within the Statute of Limitations. Now that there are means of discovering the fraud there can be no doubt at all. I am not at all sure that that would have been done by anything like a cursory

inspection of the books; but clearly if there had been anything like an audit the fraud must have been discovered.

Then the question is whether it is involved in the decision of the case of *Gibbs* v. *Guild*, or whether it is shown to be the doctrine of the court of equity before the Judicature Act, that concealed fraud only postpones the running of the statute in cases where there was no sufficient means of discovering it, and upon that point I can entertain no doubt. First of all, in *Gibbs* v. *Guild* the cases are gone very carefully through, and I will not attempt to repeat them, because I adopt all that is said by the Court of Appeal in that case, and as it appears that there are other cases, such as *Booth* v. *Earl of Warrington*, 4 Bro. P. C. 163, to the same effect. The equitable doctrine came to this, that the statute did not run, or the law which the court of equity applied in these cases did not attribute laches or negligence until the discovery of the fraud, and in none of them, so far as I recollect, was it part of the defence that there were no reasonable means of knowledge. What is the duty of a man to inquire? To whom does he owe that duty? Certainly not to the person who has committed the concealed fraud. For a man in that position to come and say, "You ought to have inquired, and if you had inquired you would have found me out," is utterly opposed to every principle of equity. I consider that we ought to take the law, so far as it is applicable to this case, from the judgment of the Court of Appeal in *Gibbs* v. *Guild*, and not from the judgment of Field, J., in that case in the court below, and there they place it entirely on what I have always understood to be the old law, that the time runs against you in the court of equity from the time when the concealed fraud has been discovered. I agree with what Lindley, L.J., has said about *Rawlins* v. *Wickham*. It is a different case entirely, but it contains the principle on which I believe the court has always acted, and I think it ought to act.

I agree that here, with care—with the usual care, I may say—this ought to have been discovered long before; but as regards the person on whose behalf the claim is set up it does not lie in his mouth to say, "I was fraudulent, but you ought to have found me out, and I will take advantage of the fact that you did not find me out." I agree with what Lindley, L.J., said about the costs.

Appeal allowed.

Solicitor for the appellant, *E. H. Goddard.*

Solicitors for the respondent, *Beyfus & Beyfus.*

High Court of Justice.

Chan. Div. }
Romer, J. } Nov. 15.

HINDSON v. ASHBY. (*a.*)

Water—River—Bed of river—Riparian owner—Change of bed—Accretion.

The bed of a river is to be ascertained by ascertaining when the presence and action of water are so common usual and continued as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation as well as in respect to the nature of the soil itself.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Trial of action.

This was an action brought by the trustees of the church lands of Wyradisbury in the county of Bucks, for an injunction to restrain the defendant, Mr. John Ashby, from trespassing on the plaintiffs' lands.

The facts of the case were as follows: The plaintiffs and defendant were both owners of adjoining lands on the same bank of the river Thames, and it was admitted for the purposes of the action that the defendant and his predecessors in title were entitled to the bed, or original bed of the river at the point at which the alleged trespass was committed.

The course of the river had, however, shifted and left bare (except during one or two winter months) a strip of land opposite to the plaintiffs' land which had originally formed part of the old bed.

In 1866 a small ditch, seven inches in depth, had been formed by the defendant's predecessor in title on this strip, which was from time to time cleaned out. The ditch was not, however, noticeable from the plaintiffs' land. Trees had also been planted here and trimmed by the defendant.

In 1893 the defendant made a concrete path along the length of the ditch, which enabled his tenants to pass from his own land on the bank to an eyot in the river.

The plaintiffs thereupon commenced the present action.

Fletcher Moulton, Q.C., A. d'Beckett Terrell, and *Baden Fuller,* for the plaintiffs.—Assuming the defendant to be entitled as he says to the bed even on this statement of facts, there is practically no defence. The plaintiffs' land unquestionably reaches the river. If the river moves, the plaintiffs as riparian owners have a right to follow it by the law of accretion.

Bucknell, Q.C., and *Stuart Moore,* for the defendant.—The argument of the plaintiffs comes to this, that because the river has shifted they are entitled to claim its boundary as their property. The general rule that the owner of land adjoining the river may claim the land *usque ad medium* may be rebutted if it can be shown that another person is owner of the bed. To whom does the land in dispute belong during those winter months in which it is still actually covered by water? In Hale's *De Jure Maris*, p. 371, it is stated that "special usage may alter the common presumption; for one man may have the river and others the soil adjacent, or one man may have the river and soil thereof and another the free or several fishing in that river": *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263, 36 W. R. Dig. 217; *Smith* v. *Andrews*, [1891] 2 Ch. 678, 40 W. R. Dig. 90. Whether this is part of the bed of the river, or whether it is accreted land is a question of fact, and the evidence shows that it is still part of the bed. Further, we have had possession for thirty years as is shown by our having made the ditch and planted the trees.

Fletcher Moulton, Q.C., in reply.—The very fact that a path has been made shows that whatever may have been the case in the past this land is no longer part of the bed of the river. There must be a time when land is disputatious land, when it is difficult to say whether it is or is not part of the bed of the river. The argument from possession is itself inconsistent with the rest of the defendant's case. If the acts done by him were done when the land was overflowed there was no call on us to interfere. All the time that these acts were being done the plaintiffs were in possession of a field on the bank, and this fact will entitled them to claim to the accretions.

The following were also referred to: *Attorney-General* v. *Chambers*, 2 W. R. 636, 4 De G. M. & G.

206; *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875; *Attorney-General* v. *Emerson*, [1891] A. C. 649, 40 W. R. Dig. 90; Gould on Waters, 2 ed. p. 190. A considerable amount of evidence was offered, the effect of which will be found summarized in the judgment.

ROMER, J.—The plaintiffs' case is shortly this. They admit for the purposes of this action that the defendant is entitled to the bed of the river in the immediate neighbourhood of the land in dispute, and that at one time the bed of the river included this land. But they say that by a gradual process the river has receded, and that this land was added by insensible degrees to the adjacent land, and ultimately ceased to be part of the bed of the river, and became part of the land of the plaintiffs as the riparian owners at that part of the river. They say that this was the condition of matters when the defendant did that which gave immediate rise to this action—namely, put down that concrete path to afford his tenants of a neighbouring eyot a convenient path and access to that eyot, and they further say that this condition has continued to the present time.

Now, if the plaintiffs establish this, then, subject to any special defence the defendant may raise, they would be entitled to judgment in this case; for it is clearly settled that in the ordinary case where two different persons own the opposite banks of a non-tidal river, and each is entitled to the bed of the river adjacent to him up to the centre, then, if the river, not by any sudden action or by leaps, but by a gradual and almost insensible process, changes its beds and adds land to one side or takes land away from it, then the centre of the new bed becomes the boundary of the two properties, and each owner is entitled to enjoy the gain or has to bear the loss occasioned to his land by the shifting of the river: *Foster* v. *Wright*, 4 C. P. D. 438, where all the earlier authorities are cited and examined. And I can see no distinction in principle between the ordinary cases to which I have referred and the somewhat unusual case before me, where the river bed belongs to a separate proprietor, and not to the riparian owners.

I proceed to consider the defences raised by the defendant. The main defence is that the land in dispute has never ceased to be, and still is, part of the bed of the river.

Now in considering this question there has been considerable discussion as to how the bed of the river is to be ascertained. Of course, if a river preserves a tolerably even flow and does not fluctuate in volume much, except on extraordinary occasions, there is no difficulty in determining its bed. But when the river is one like the Thames—that is to say, one which, apart from extraordinary floods and draughts, changes considerably in volume in the course of each year, being, as a rule, much higher in some months of the year than in others, the question how its bed is to be determined is not so very easy. Among others, the following suggestions, which have been put forward, may be considered: (1) That any land which is covered by the river in the course of its flow at any time during an average or ordinary year, is of necessity to be considered part of the river; (2) that no land is to be considered as part of the bed which is not always covered by the river throughout any ordinary or average year; and (3) that by some sort of analogy to the method of fixing the margin of the bed of the ocean on the seashore, the margin of the river is to be ascertained by taking a line midway between the margin of the bed covered by the average highest flow, and of that covered by the average lowest flow of the river. But, in my opinion none of these suggestions are well founded. I think that the question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, often of considerable difficulty, not to be determined by any hard and fast rule; but by regarding all the material circumstances. I know of no authority in English law that has expressly decided this, but on principle I think it ought to be so decided. In the United States the question has been judicially considered, and a view expressed substantially in accordance with that found by me. I find that in the case of *Howard* v. *Ingersoll*, before the Supreme Court, Curtis, J. (13 Howard's Rep. 427) states what (although his decision in no way binds our courts) is, I believe, in substance in accordance with English law. He says, "that the banks of the river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks by the character of the soil or vegetation or both, produced by the common action and presence of the flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and the banks, and ascertaining when the presence and action of water are so common and usual and so long continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below or at a middle stage of the water must depend upon the character of the stream. The height of a stream during much the larger part of the year may be above or below a middle point between its highest and its lowest flow. Something must depend also upon the rapidity of the stream and other circumstances. But in all cases the bed of a river is a natural object and is to be sought for, not merely by the application of any abstract rules; but as other natural objects are sought for and found by the distinctive appearances they present; the banks being fast land on which vegetation appropriate to such land in this particular locality grows. Wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water." On this footing I have now to decide the question of fact, as to the piece of land now in dispute; and on the evidence I find that at the date when the defendant made the concrete path, and thenceforth to the present the land formed no part of the bed of the river; and, further, I find that it ceased to be part of the bed of the river and became an accretion to the adjacent land belonging to the plaintiffs, not by leaps and bounds, but by a gradual and insensible process. It appears to me impossible for the defendant to contend, looking at the present condition of the land and his own act in putting down the concrete path, and his attempted uses of it as a way for his tenants, that this land still forms part of the bed of the river. It is true that at times when the river is full, and particularly in the winter months, this land is under water; but so is much land near the river, which, without doubt, forms no part of the bed of the river; and but for the fact that this land did formerly form part of the bed of the river, I doubt whether anyone would have had the boldness to contend that on its present state, and under its present conditions it did form part. On the above findings of fact the plaintiffs are clearly entitled to this land, subject only to a consideration of

the remaining defence raised on behalf of the defendant.

That defence is in fact inconsistent with the first and main defence which I have alone to deal with. For by it the defendant takes up this position. He says that the land had ceased to be part of the bed of the river for more than twelve years before action brought, and that during all that period he alone has been in possession of it, and has thereby acquired a title to it under the Statute of Limitations. In my opinion the defendant has failed in substantiating the case. It is difficult, if not impossible, to say exactly when this land ceased to be bed of the river and became part of the adjacent bank, but the defendant has utterly failed in establishing before me that he has been as against the plaintiffs for twelve years in possession of this land, since it ceased to be part of the river bed. Conceding as he does that the plaintiffs have a right of access over this land to the river, he has rendered it almost impossible for him to contend that he has been in possession as against the plaintiffs. The fact is that there has been nothing done since the land ceased to be river bed which would enable the defendants to say that the plaintiffs have lost possession of their property down to the verge of the river. The first act of the defendant which might, if unchallenged, have amounted to the taking possession of this land as dry land forming part of the bank was the putting down of the concrete path, and this was immediately complained of by the plaintiffs and led in fact to the present action. As to the other facts relied on by the defendant in support of his claim to possession, it is no doubt true that he did dig a small ditch in the land on the site of which he subsequently put the concrete and from time to time he cleaned this ditch out. But this ditch was not noticeable from the plaintiffs' land, and when it was first made and for some time afterwards, the land was in its transition state, and I think it would be extremely hard on riparian owners like the plaintiffs if they were to be held excluded from their position and no longer entitled to the land down to the margin of the river by reason of acts of the kind that I am now considering done on the margin of the river in its transition state.

The only other fact I need refer to is the planting of trees on this land by the defendant or his predecessor in title, and the occasional trimming of these trees. But these trees were planted at a time when, in my opinion, the land did form part of the river bed, and the fact that some trimming of the trees was done by the defendant or on his behalf down to the time that I have called the transition period, and possibly, even for a short time, even after the land passed into its present condition, is not sufficient to support the defendant's claim.

As I have already said, the defendant has failed to prove before me his plea of possession for the statutory period of this land as land not part of the bed of the river, and, this being so, his second defence also fails.

It follows that the plaintiffs are entitled to succeed, and I make the following declaration in their favour: "Declare that the land in dispute was at the time when the defendant put down the concrete complained of, and has since continued to be, and now is, land belonging to the plaintiff, and not part of the bed of the river." Then there will be liberty given to apply to enforce the declaration if necessary, and liberty to apply generally. And I order the defendant to pay the costs of this action.

Solicitors, *S. Vigers & Richardson; Soames, Edward, & Sons*, for *Rowell & Lomas*, Rickmansworth.

Chan. Div.
Vaughan Williams, J. } Nov. 13.

BRABOURNE *v.* THE ANGLO-AUSTRIAN PRINTING AND PUBLISHING CO. (*a.*)

Company — Winding up — Debentures — Misfeasance — Property of company—Costs of petition to wind up—Companies (Winding up) Act, 1890 (53 *& 54 Vict. c.* 63), *s.* 10.

In the winding up of a company ordered to be wound up by the court, misfeasance proceedings were taken by the official receiver and liquidator which resulted in an order that contribution should be made by certain persons, officers of the company, to the assets of the company, and the liquidator thereby, and also by proceedings to enforce calls against shareholders, realized certain moneys.

The company had issued debentures charying the undertaking and property, whatsoever and wheresoever, both present and future, of the company, including its uncalled capital for the time being. The assets of the company were insufficient to pay the debenture-holders in full. The winding-up order directed the petitioner's costs to be paid out of the assets of the company, and a claim was made that the costs of the petitioner were payable out of the fund recovered by the liquidator as aforesaid. It was not disputed that the fund in question was included in the debenture-holders' security.

Held, that the petitioner's costs were not payable out of the fund.

On the 2nd of May, 1891, an order was made for the compulsory winding up of The Anglo-Austrian Printing & Publishing Co. (Limited), which directed that the costs of the petitions should be taxed and paid out of the assets of the company. The company had issued debentures covering the undertaking and property of the company, whatsoever and wheresoever, both present and future, including the uncalled capital for the time being. The debenture-holders had commenced two actions in February and March, 1891, and the official receiver (who was also liquidator in the winding up) had been appointed receiver in the debenture-holders' actions. In June, 1892, an order was made in the winding up that the official receiver and liquidator should be at liberty to institute misfeasance proceedings under section 10 of the Companies (Winding up) Act, 1890, and that he should be indemnified against costs out of the assets of the company. The official receiver had recovered by means of these misfeasance proceedings and of compromises, and in respect of unpaid calls, a sum amounting, after deducting the expenses of realisation, to about £8,780. This sum was in court to the credit of the official receiver as receiver in the actions.

The solicitor who acted for the petitioners in the winding up, and for certain parties who supported the petition had assigned the costs under the winding-up order to a Mr. Mason by way of mortgage.

The assets were insufficient to pay the debenture-holders in full, and the question was raised whether the costs assigned to Mason were payable out of the fund in court.

Martelli, for the official receiver and liquidator, stated the facts to the court.

Muir Mackenzie, for Mason.—The sums in question were produced by means of proceedings under section 10 of the Act of 1890 against directors and contributories, and would not have been recovered

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

unless the winding up had taken place. The case is analogous to a case of salvage. These funds could not have been obtained without the petition for winding up, and the costs of obtaining them ought to be paid to the person who caused them to be obtained. [VAUGHAN WILLIAMS, J.—When the costs of the petition were first incurred, it could not have been argued that I could have made any order charging these assets for those costs in priority to the debenture-holders. Therefore, at one time these costs had been incurred, but no order could have been made that they should be paid out of these assets.] There is a distinction to be drawn after the winding up. With regard to sums recovered from the contributories in respect of calls, these sums could not have been recovered except by reason of the winding up. When the winding up occurs the power of the directors to make calls comes to an end, and calls can only be made by the liquidator who is brought into existence by the execution of the petitioner in taking proceedings for winding up: *Fowler* v. *Broad's Patent Night Light Co.*, 41 W. R. 247, [1893] 1 Ch. 724. The sums received for calls are assets produced entirely by the winding up. As to the assets recovered under section 10 of the Act of 1890 for misfeasance, section 10 shows what the real nature of these assets is. They are assets which come into existence in consequence of the proceedings taken under the section, and are no part of the property originally charged in favour of the debenture-holders. The fund in court has been produced by the winding up alone, by means of an officer of the court acting under the court's order and in the courts procedure.

Eustace Smith, for the debenture-holders, was not called upon.

VAUGHAN WILLIAMS, J.—I have no doubt that the view taken by Mr. Mason, the mortgagee of the solicitors who acted for the petitioning creditor in the matter of the petition, is wrong. I am asked in this case to say that, because certain misfeasance proceedings have been taken which resulted in an order that contribution should be made by certain persons to the assets of the company, and because the liquidator has realized some unpaid calls, therefore, the debenture-holders are not to be entitled to enforce their rights against these funds, which are admittedly included in their security, without paying the costs of the petitioning creditor. It is said that the case is based on some principle of salvage, because section 10 could not have been resorted to unless there had been a winding-up order, and there could not have been a winding-up order unless there had been a petition. That is quite true, but it does not bring these costs within any such doctrine as to salvage as that contended for. If the application had been that there should be deducted from this fund the costs of recovering it, I could have understood the application; but I am not asked to deduct any such costs. What I am asked to deduct are the costs of the petition, and I cannot do that. I wish to say this:—It was not contended before me that the money which has been contributed to the assets, owing to the proceedings under section 10, is not covered by debentures such as these. I can only say that, speaking for myself, I am very sorry that such should be the state of the law at the present time. I cannot help thinking that when the question was first raised a different conclusion might have been arrived at, and it might very well have been held that such sums were outside the security. However, the contrary view has been adopted. It is only to be hoped that the Legislature may think fit to interfere. It seems to me to be an unwholesome state of things that the debenture-holders should have the control of money which has to be recovered from officers of the company by proceedings for misfeasance. It continually happens that the debenture-holders and the persons mentioned in section 10 are intimately associated with each other, and then a winding up comes and there is not sufficient money to pay the debenture-holders in full, and in all probability the debenture-holders have acquired their debentures under such circumstances that they only expect to receive a percentage of their investment, and frequently, they are satisfied, as they are making a large profit. In this state of things a claim often arises against officers and promoters of the company in respect of what is a fraud not only on the company, but on the unsecured creditors of the company, and the debenture-holders are so intimately connected with the officers or promoters that they often, when proceedings are threatened, step in and say, "We are entitled to this security—*i.e.*, to the claims against these wrongdoers, and we do not think it worth while to enforce these claims." This is a very unwholesome state of things. I hope the Legislature will prevent funds arising from proceedings for misfeasance being chargeable in favour of debenture-holders, but will leave them free from the debentures and available for the benefit of the unsecured creditors. But that is not the present state of the law, and there is no ground for making the order I am now asked to make.

Solicitors, *Gush, Phillips, Walters, & Williams; Harold A. Farman.*

Q. B. Div.
Commercial Causes.
(Mathew J.)

Dec. 4, 9.

WOODSIDE & Co. *v.* THE GLOBE MARINE INSURANCE Co. (*a*.)

Insurance—Marine insurance—Valued policy—Insurance against fire—Depreciation by stranding—Repairs not done when a subsequent total loss occurred by fire—Right of assured to recover under fire policy.

The steamship B. *was insured with certain underwriters against the perils of the sea, and with the defendant company against loss by fire and explosion only. The vessel, through stress of weather, was driven ashore and became a constructive total loss. While stranded she was totally destroyed by fire.*

Held, that the insured were entitled to recover from the defendant company upon the ground that the loss by stranding would only become a total loss if due notice of abandonment of the ship were given; if no such notice were given the loss would be a particular average only, and that a partial loss, however serious, would not impair the right of the assured to recover for a subsequent total loss upon the basis of the valuation by which, in case of loss by fire, the parties agreed the indemnity was to be calculated.

Commercial cause.

The plaintiffs, Messrs. W. J. Woodside & Co., of Belfast, were the owners of the iron steamship *Bawnmore*, and this action was brought on a policy granted by the defendants dated the 10th of May, 1895, for £1,000 against risk of loss, or damage by fire, or explosion only. The vessel was valued at £20,000, and was insured for about half her value under ordinary policies in addition to this one, with other underwriters. Within the period covered by these policies the ship was stranded through stress of weather, and

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

became a constructive total loss. Thirty-six hours after stranding her cargo of lime ignited and burned for fourteen days, until the *Bawnmore* was completely gutted.

The question was whether the plaintiffs were entitled to recover under their policy with the defendant company as to loss by fire.

Bigham, Q.C., with him *D. C. Leck*, for the plaintiffs.—The two policies are separate and independent contracts made by different firms of underwriters, and it is not competent for the defendants to evade their liability under their policy to indemnify the plaintiffs in case of loss by fire by alleging that by reason of the happening of some other perils by which the ship became a total constructive loss their liability ceased. The fact that to repair the vessel would have cost more than she would have been worth when repaired does not prevent the ship from being in existence *quâ* ship after she had gone on the beach. After the fire she was sold to a salvage company for £34.

He cited *Barker* v. *Janson*, 16 W. R. 399, L. R. 3 3 C. P. 303; *Lidgett* v. *Secretan*, 19 W. R. 1088, L. R. 6 C. P. 616; *Ionides* v. *The Universal Marine Insurance Co.*, 11 W. R. 858, 14 C. B. N. S. 259.

Joseph Walton, Q.C., with him *J. A. Hamilton*, for the defendant company.—By the perils of the sea the vessel was stranded and became a constructive total loss. It is legally impossible that where a total loss has happened to a particular "thing" that another total loss can subsequently happen of the same "thing." The ship having once become a total loss the defendants cannot be called upon in law to make good any subsequent total loss by fire at all. In the alternative, the defendants contend that they are liable only for a particular average loss. The constructive total loss occurred while the defendants' policy attached, and, therefore, the case is distinguished from *Barker* v. *Janson* and *Lidgett* v. *Secretan*.

He cited *Livie* v. *Janson*, 12 East. 648.

Bigham, replied.

Cur. adv. vult.

MATHEW, J.—This is an action brought by certain shipowners to recover £1,000 in respect of a total loss under a time policy against loss or damage by fire and explosion only. The vessel was, by perils of the sea, driven ashore on the coast of Oregon, and while stranded was totally destroyed by fire. The defendant company denied liability, on the ground that at the time of the fire the ship was already a constructive total loss. The plaintiffs, on the other hand, contended that even upon the assumption that there had been a constructive total loss of the ship by reason of the stranding (which was not admitted) the assured, as a matter of law, were entitled to recover.

An order was made at chambers that the question should be argued as a preliminary point of law on the assumption that the vessel when stranded was still a "ship" capable of being floated and repaired, though at an expense exceeding her repaired value; and that the case should be argued as if the owners were their own underwriters against the perils of the sea which caused the stranding. The defendants said that the ship being, at the time of the fire, a constructive total loss a subsequent total loss was a legal impossibility. And, further, that it was not equitable that the plaintiffs should be permitted to recover twice for what was one loss.

The loss by stranding can only become total if the assured gave timely notice of abandonment. If none were given the loss would be a particular average only; and it is clear that a particular average loss, however serious, does not impair the right of the assured to recover for a subsequent total loss upon the terms of the valuation.

Whether the subject-matter of insurance is ship or goods, the valuation is the amount fixed by agreement at which, in the case of loss, the indemnity is to be calculated. Where goods are assured the valuation may be low when the policy attached, but the value to the owner may be enhanced when the goods have nearly reached their destination by the expenses of transit—and the line; nevertheless the valuation is binding. And again, if the valuation is high, but the goods are depreciated in value from causes for which the underwriters are not liable in case of loss, the valuation cannot be reopened. In the case of a ship, in the same way, it may from many causes be worth much less at the time of loss than the agreed value; but the valuation determines the amount of the underwriters' liability. That has clearly been the law since the case of *Shawe* v. *Felton*, 2 East. 109. I fail to distinguish the loss in the present case from a loss where the subject-matter of insurance is still existing, and there being no suggestion of fraud, a diminution in its value is not relied upon to exonerate the underwriters from the whole or part of their liability. I agree with Lord Kenyon that it is impossible to draw the line between a greater or less diminution of value. My judgment, therefore, must be for the plaintiffs with costs.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitors for the defendants, *Waltons, Johnson, Bubb & Whatton.*

Q. B. Div.
Commercial Causes.
(Mathew, J.)

Nov. 14.

HAY *v.* THE CORPORATION OF TRINITY HOUSE. (*a.*)

Admiralty—Ship—Light dues—Exemption—Order in Council of 16th May, 1893.

The mere fact that the master of a ship lands at a port a few persons whom he had previously taken on board, who paid no passage money, but who paid a sum of money each to the master for food provided by him, does not deprive the owner of the ship of the exemption from light dues which he would be entitled to under the Order in Council of the 16th May, 1893, *when the ship touches at that port merely for the purpose of obtaining bunker coals.*

Action tried by Mathew, J., in the Commercial Court, upon an agreed statement of facts.

The facts were as follow: *The Chelona* was a British steamship belonging to the port of Sunderland. The plaintiff, Hay, was managing owner, and he sued on behalf of himself and others, the owners of the vessel.

The defendants were the general lighthouse authority for (*inter alia*) the port of Portland.

In July, 1894, *The Chelona*, in the course of a voyage from Eupatoria to Aarhuus, laden with a cargo of barley, called at Malta for the purpose of obtaining bunker coals. While there—namely, on the 22nd of July, 1894—the master of the ship, at the request of a friend, took on board three persons who wished to return to England. The ship then proceeded on her voyage. The said three persons were charged no passage money, and did not in fact pay

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

any passage money, or render any services on board the vessel.

The master of the vessel provided and paid for the food consumed by the said three persons on the voyage in question, and charged the said three persons £4 a head for the same, which sum was received by the master, and was not accounted for by him to the plaintiff.

On the 2nd of August, 1894, *The Chelona*, in accordance with instructions received at Malta, touched at Portland for the purpose of obtaining bunker coals. While at that port the master landed the said three persons.

The defendants thereon demanded the sum of £16 18s. 4d. from the plaintiff for light dues alleged to have been incurred by the owners of the vessel, in consequence of her calling at Portland and landing the three persons there. This sum the plaintiffs refused to pay, contending that *The Chelona* was exempted from paying light dues by the terms of an Order in Council, dated the 16th of May, 1893, made in pursuance of section 398 of the Merchant Shipping Act, 1854 (now section 646 of the Merchant Shipping Act, 1894). The plaintiff, in order to avoid a distress or the arrest of *The Chelona*, paid the sum of £16 18s. 4d. to the defendants under protest, and now sought to recover the same in this action.

The question for the decision of the court was whether the plaintiff was liable in the circumstances to pay to the defendants the said sum for light dues.

The Order in Council of the 16th of May, 1893, is as follows: "All steamships which shall put into or touch at any port in the United Kingdom or in the Isle of Man for the purpose of filling up with coal their permanent bunkers, in which cargo is never carried, shall be exempted by the said general lighthouse authorities from the payment of the light dues receivable at such port, notwithstanding that such steamships shall also take on board at the port aforesaid provisions to be consumed on board, or stores required for the proper navigation or equipment of the vessel during the voyage in which she is engaged; provided, nevertheless, that the said exemption shall be subject to the terms or conditions following—that is to say, that the said exemption shall not apply to any such steamship as aforesaid, unless the person or persons liable to pay light dues in respect thereof shall satisfy the person appointed to collect the same that such steamship has not taken on board at the port aforesaid a larger quantity of coal than was sufficient with the coal already on board the same to fill up her said permanent bunkers in which cargo is never carried, and that such coal has been placed in such permanent bunkers, . . . and that such steamship has not called for or received orders, or broken bulk, or taken on board mails, cargo, or passengers at the port aforesaid."

B. Aspinall, for the plaintiff, was stopped.

H. F. Boyd, for the defendants.—Under the Order in Council, if a ship touches at a port merely to obtain bunker coals it is exempted from light dues, and the exemption remains if provisions or stores are taken on board. The plaintiff does not come within the exemption unless he can show that the only object in going into the port was to obtain bunker coals. He cannot show that here, as the ship really went into the port to land passengers. It is said that there were only three persons; but if he is exempted on landing three, the exemption would obtain for any number. It is said in the proviso the ship must not "break bulk." Here the ship has broken bulk, as that expression would cover the landing of passengers or goods. The landing of these persons prevents the case coming within the exemption, so that the plaintiff was liable to these light dues, and he cannot recover his money back.

Aspinall, in reply, referred to the case of *The Neptune Steam Navigation Co.* v. *The Corporation of Trinity House*, 3 Times L. R. 615.

MATHEW, J.—Judgment in this case must be given for the plaintiff, as I think this case is within the exemption referred to in the order. Under a previous order ships which put into a port for the purpose of obtaining bunker coals were exempt from light dues, but many ships took advantage of being in port for that purpose to obtain stores, and light dues were claimed against them. A new order expressly provided for this, and gave an exemption in such a case, but that order is subject to the conditions at the end of the order.

Here by agreement the master took on board three persons; the ship was to touch at an English port to take on board bunker coals, and the three persons were landed at that port. The defendants say they are entitled to light dues by reason of the landing of these three persons, and they contend that the plaintiff is bound by the master's act in so landing them. They also contended that if the plaintiff could land three persons without being liable, he could land a hundred persons equally without being liable. But in the latter case it might well be said that the object in calling at the port was not to obtain coals, but to land passengers. The present case, however, is similar to the captain taking a friend on board and landing him at some particular place, in which case it is perfectly clear he would come within the exemption. Here the three persons, so far as the plaintiff is concerned, were really taken on board as the friends of the master, and this does not bring upon the plaintiff the liability to these light dues. He is within the exemption, and judgment must be given for him.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Botterell & Roche.*

Solicitors for the defendants, *Sandilands & Co.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Cave, J.) Oct. 25.

BISCHOP *v.* TOLER (*a*.)

Margarine—"Le Dansk"—False trade description—Place of manufacture—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *subsection* (2); *s.* 3, *subsection* 1 (e) (d).

At a factory in Paris margarine was manufactured, which was sent to a branch factory at Southampton. There the margarine went through a process in which 10 *per cent. of Danish butter and milk were added. This compound was then sent to London, to a shop on the outside of which appeared the words "French Factory. Le Dansk," and was retailed to customers under the name of "Le Dansk."*

Held, that the substance was of English manufacture, and that the selling of the compound in cardboard boxes on which the words "French Factory. Le Dansk" were printed was a false trade description calculated to deceive the public as to the place or country where the substance was manufactured.

Special case stated by Mr. Newton, a metropolitan

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

police magistrate, sitting at Marlborough-street Police Court.

In this case Samuel Bischop was summoned in January for selling margarine to which a false description was applied, contrary to the provisions of the Merchandise Marks Acts, 1887.

On March 30 Bischop was convicted and fined, subject to the decision of this court upon a case stated.

From the special case it appeared that the appellant was manager of a shop, No. 59, Oxford-street, for M. Auguste Pellerin, of Paris, which is used exclusively for the sale of a class of margarine to which the name of "Le Dansk" is applied. "Le Dansk" is a material of which the foundation is made in France, and is known by the name of "Oleomargarine." This is sent over to Southampton, and there it goes through a process in which 10 per cent. of Danish butter and milk is added, and it is then consigned to the London shop, where it is retailed to customers in cardboard boxes on which appear the words "French Factory. Le Dansk." Before a box is handed to a customer the word "Margarine" is stamped on it. The window of the shop was filled with a pile of these boxes on which the word "Margarine" was not printed, and outside the shop appeared the words "Le Dansk. French Factory."

The conviction was based on two grounds—first, that the words "Le Dansk" were a false trade description as to the material of which the goods were composed within the meaning of section 2 (2) and section 3 (*i*) (*e*) and (*d*) of the Merchandise Marks Act, 1887, the substance called "Le Dansk" being, in fact, margarine; and secondly, that the words "Le Dansk. French Factory" on the outside and inside of the shop and on the cardboard boxes were a false trade description as to the place or country in which the margarine was produced within section 3 (*i*) (*b*) of the Act.

H. D. Bonsey, for the appellant.—I submit that the words "Le Dansk," with or without the words "French Factory," are not a trade description within the meaning of the Act. "Le Dansk" is a mere fancy name, and there is no evidence that it is a trade-mark, nor is there evidence that if that name is recognized as a trade-mark that the description would be a false one. It is wrong to contend that the words "Le Dansk" and "French Factory" necessarily mean that the article is solely of French manufacture. Moreover, no evidence has been given to show that, in fact, the public have been defrauded by the words and bought the article as one wholly of foreign make. Before 1887 the name was lawfully and generally applied to this particular kind of margarine.

Moulton, Q.C., and *Morton Smith*, for the respondent.—The words "Le Dansk" are a false description within the meaning of section 2 (2) (*e*) and (*d*) of the Act, the substance being margarine. There are only two classes of "butter" recognized in the trade. Pure butter is one, and margarine, sold under any name you like to call it, the other. The words "French Factory" used on the boxes, &c., are a false trade description as to the place of manufacture within the meaning of section 3 (i.) (*b*), as this margarine is, in fact, manufactured at Southampton.

Bonsey replied.

The COURT affirmed the conviction.

Lord RUSSELL, C.J.—I do not think that the first ground of complaint alone would have been sufficient to support the conviction, because the words "Le Dansk" do not sufficiently by themselves convey the idea of what was meant to mislead people into buying this material as something different and better than ordinary margarine. But on the second ground—namely, that the article is represented as being of foreign make—the conviction must be affirmed. The fact is that the margarine manufactured in Paris is mixed up with fresh ingredients at Southampton. The new product is a compound substance which then becomes a finished product, and receives as such the name of "Le Dansk." The false description consists in this, that by the words printed on the boxes and painted on the shop it is suggested to the customer that this article was made as a finished article in France, which is not the case.

CAVE, J.—I concur.

Appeal dismissed.

Solicitors for the appellant, *Neve & Beck.*

Solicitor for the respondent, *C. Urquhart Fisher.*

House of Lords.

From C. A. (England). July 29, 1895.

THE MAYOR, &c., OF BRADFORD *v.* PICKLES. (*a*.)

Water—Watercourse—Water percolating underground—Malicious intention—Bradford Waterworks Act (17 & 18 *Vict. c. cxxiv.*), *s.* 49.

The legal right of a landowner to divert or take water which percolates underground in undefined channels into adjoining land is not affected by his motive for doing so.

The Bradford Waterworks Act, 1854 (17 & 18 *Vict. c. cxxiv.*), *s.* 49, *held to preserve these rights of the respondent.*

Decision of the Court of Appeal, 43 *W. R.* 189, [1895] 1 *Ch.* 145, *affirmed.*

This was an appeal by the plaintiffs from a decision of the Court of Appeal (Lord HERSCHELL, L.C., LINDLEY and A. L. SMITH, L.JJ.), reported 43 W. R. 189, [1895] 1 Ch. 145.

The statement of the facts as given by Lord WATSON is as follows:—

The appellants have purchased under statutory powers, and are now vested with the whole undertaking of, the Bradford Waterworks Co., incorporated by an Act passed in 1854 (17 & 18 Vict. c. 124), which transferred to that company the undertaking of a corporation, having the same name, created by statute in 1842 (5 Vict. Sess. 2, c. 6), together with all rights and privileges thereto belonging. The older of these companies acquired for the purposes of their undertaking a parcel of land known as Trooper Farm, and also certain springs and streams arising in or flowing through the farm. From these springs and streams the appellants and their predecessors have hitherto obtained a valuable supply of water for the domestic use of the inhabitants of Bradford.

Trooper Farm is bounded on the west and north by lands belonging to the respondent, which are about 140 acres in extent. The first of these boundaries, on the west, which is alone of importance in the present case, is a public highway called Dolls-lane. The respondent's land to the west of that boundary is on a higher level than Trooper Farm, and has a steep slope downwards to the lane. Its substrata are intersected by two faults running from east and west, one from each end of the boundary, which prevent the escape of percolating water either

(*a*.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

to the north or south; and the nature and the inclination of the strata is such that the subterranean water which they contain must, by the natural force of gravitation, eventually find its way to Trooper Farm.

The sources from which the appellants derive a supply of water near to the western boundary of Trooper Farm are two in number. The first of these is a large spring, known as Many Wells, which issues from their ground twenty or thirty yards to the east of Dolls-lane. The second is a stream to the south of Many Wells, which has its origin in a smaller spring on the respondent's land, close to Dolls-lane, at a point known as the Watering Spot, from which the water runs in a definite channel into Trooper Farm.

It is an admitted fact that neither the appellants nor either of the companies whose undertaking is now vested in them ever acquired from the respondent or his predecessors in title any part of their legal right to or interest in the water in their land, whether above or below the ground; and also that the statutes, to the benefit of whose provisions the appellants are now entitled, make no provision for compensating the respondent in the event of such right or interest being prejudicially affected by the appellants' undertaking.

In the year 1892 the respondent began to sink a shaft on the other side of the lane, and to the west of the Many Wells Spring, and also to drive a level through his land adjoining the lane for the professed purpose of draining the strata, with a view to the working of his minerals. These operations had the effect of occasionally discolouring the water in the Many Wells Spring, and also of diminishing to some extent the amount of water in that spring, and in the stream coming from the Watering Spot; and it became apparent that, if persevered in, they would result in a considerable and permanent diminution of the water supply obtainable from these sources. The appellants then brought the present suit, in which they crave an injunction to restrain the respondent from continuing to sink the shaft or drive the level, and from doing anything whereby the waters of the spring and stream might be drawn off or diminished in quantity, or polluted, or injuriously affected.

The appellants alleged in their statement of claim that the respondent had not a *bonâ fide* intention to work his minerals, and that his intention was to injure the appellants, and so to endeavour to induce them either to purchase his land or to give him some other compensation.

North, J., was of opinion that the respondent's acts were forbidden by statute, and granted an injunction: 42 W. R. 697, [1894] 3 Ch. 53. The Court of Appeal reversed this decision.

The Bradford Waterworks Act of 1854 incorporated the Waterworks Clauses Act, 1847.

Section 49 of the Act of 1854, which was identical in terms with section 234 of the Bradford Waterworks Act of 1842, was as follows:—

"It shall not be lawful for any person other than the company to divert, alter, or appropriate, in any other manner than by law they may be legally entitled, any of the waters supplying or flowing from certain streams and springs called 'Many Wells,' arising or flowing in and through a certain farm called 'Trooper' or Many Wells Farm in the township of Wilsden, in the parish of Bradford, or to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs might be drawn off or diminished in quantity; and if any person shall illegally divert, alter, or appropriate the said waters or any part thereof, or sink any such well or pit, or shall do any such act, matter, or thing, whereby the said waters may be drawn off or diminished in quantity, and shall not, immediately on being required so to do by the company, repair the injury done by him, so as to restore the said springs and the waters thereof to the state in which they were before such illegal act as aforesaid, he shall forfeit to the company any sum not exceeding five pounds for every day during which the said supply of water shall be diverted or diminished by reason of any work done or act performed by, or by the authority of, such person, in addition to the damage which the company may sustain by reason of their supply of water being diminished."

Cozens-Hardy, Q.C., and *B. Eyre*, for the appellants.—The respondent, in diverting the water, is acting maliciously, the object being to injure another, which is unlawful: *Keeble* v. *Hickeringill*, 11 East. 574. In *Acton* v. *Blundell*, 12 M. & W. 324, Tindal, C.J., at p. 353, quotes Marcellus: "Si non animo vicini nocendi, sed suum agrum meliorem faciendi"; and the same is quoted by Lord Wensleydale in *Chasemore* v. *Richards*, 7 W. R. 685, 7 H. L. Cas. 349, 387.

Smith v. *Kenrick*, 7 C. B. 515, 559, and *Mogul Steamship Co.* v. *Macgregor, Gow, & Co.*, 37 W. R. 756, 23 Q. B. D. 598, were also referred to.

Everitt, Q.C., *Tindal Atkinson, Q.C.*, *Butcher*, and *A. P. Longstaffe*, for the respondents, were not heard.

The House took time for consideration.

Lord HALSBURY, L.C.—In this action the plaintiffs seek to restrain the defendant from doing certain acts which they allege will interfere with the supply of water which they want, and which they are incorporated to collect for the purpose of better supplying the town of Bradford. North, J., ordered the injunction to issue; but the Court of Appeal, consisting of Lord Herschell, L.C., Lindley and A. L. Smith, L.JJ., reversed his judgment.

The facts that are material to the decision of this question seem to me to lie in a very narrow compass. The acts done, or sought to be done, by the defendant were all done upon his own land, and the interference, whatever it is, with the flow of water is an interference with water which is underground, and not shewn to be water flowing in any defined stream, but is percolating water, which but for such interference would undoubtedly reach the plaintiffs' works, and in that sense does deprive them of the water which they would otherwise get. But, although it does deprive them of water which they would otherwise get, it is necessary for the plaintiffs to establish that they have a right to the flow of water, and that the defendant has no right to do what he is doing.

I am of opinion that neither of those propositions can be established. Apart from the consideration of the particular Act of Parliament incorporating the plaintiffs, which requires separate treatment, the question whether the plaintiffs have a right to the flow of such water appears to me to be covered by authority. In the case of *Chasemore* v. *Richards* it became necessary for this House to decide whether an owner of land had a right to sink a well upon his own premises, and thereby abstract the subterranean water percolating through his own soil, which would otherwise, by the natural force of gravity, have found its way into springs which fed the river Wandle, the flow of which the plaintiff in that action had enjoyed for upwards of sixty years.

The very question was then determined by this House, and it was held that the landowner had a right to do what he had done, whatever his object or purpose might be, and although the purpose might

be wholly unconnected with the enjoyment of his own estate.

It therefore appears to me that, treating this question apart from the particular Act and, indeed, apart from the 49th section of the Bradford Waterworks Act, 1854, upon which the whole question turns, it would be absolutely hopeless to contend that this case is not governed by the authority of *Chasemore* v. *Richards*.

This brings me to the 49th section of the Act of 1854, 17 & 18 Vict. c. 124, upon which reliance has been placed. [His lordship read it.]

Whatever may be said of the drafting of this section, two things are clear; first, that the section in its terms contemplates that persons other than the company may be legally entitled to divert, alter, or appropriate the waters supplying or flowing from the streams and springs; and, secondly, that the acts against which the section is directed must be illegal diversion, alteration, or appropriation of the said waters.

The natural interpretation of such language seems to me to be this: that where the generality of the language of the section might apply to any alteration or appropriation of waters supplying or flowing from the streams and springs called "Many Wells," the section only intended to protect such streams and springs and supplies as the company should have acquired a right to by purchase, compensation, or otherwise; but in suchwise as should vest in them the proprietorship of the waters, streams, springs, &c. And, lest the generality of the language should give them more than that to which they had acquired the proprietary right, the legal rights of all other persons were expressly saved; and upon this assumption the latter part of the section makes penal the illegal diversion, alteration, or appropriation of any streams, &c., of which, by the hypothesis, the company had become the proprietor.

I do not think that North, J., does justice to the language of the section when he says that "the section enacts that a man is not to do certain specified things except so far as he may lawfully do them." The fallacy of that observation (with all respect to North, J.) resides in the phrase "certain specified things." If my reading of the section be correct, the thing that is prohibited is taking or diverting water which has been appropriated and paid for by the company; but the thing which is not prohibited is taking water which has not reached the company's premises, to the property in which no title is given by the section, and which, by the very act complained of, never can reach the company's premises at all. To use popular language, therefore, what is prohibited is taking what belongs to the company, and what is not prohibited is taking what does not belong to the company.

I have used popular language because I have no doubt that the draftsman who drew the section was encountered with the proposition in his own mind that you could not absolutely assert property of percolating water at all. You may have a right to the flow of water—you may have a property in the water when it is collected and appropriated and reduced into possession; but, in view of the particular subject-matter with which the draftsman was dealing, it seems to me intelligible enough why he adopted the phraseology now under construction.

It appears to me that this is the true construction of the section from the language itself. But I confess I can entertain no doubt that the mere fact that the section, as construed by the plaintiffs, affords no right to compensation to those whose rights might be affected, is conclusive against the construction contended for by the plaintiffs.

The only remaining point is the question of fact alleged by the plaintiffs, that the acts done by the defendant are done, not with any view which deals with the use of his own land or the percolating water through it, but is done, in the language of the pleader, "maliciously." I am not certain that I can understand or give any intelligible construction to the word so used. Upon the supposition on which I am now arguing, it comes to an allegation that the defendant did maliciously something that he had a right to do. If this question were to have been tried in old times as an injury to the right of the plaintiff in an action on the case, the plaintiff would have had to allege, and to prove, if traversed, that he was entitled to the flow of the water, which, as I have already said, was an allegation he would have failed to establish.

This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your lordships seem to me to be absolutely irrelevant. But I am not prepared to adopt Lindley, L.J.'s view of the moral obliquity of the person insisting on his right when that right is challenged. It is not an uncommon thing to stop up a path which may be a convenience to everybody else, and the use of which may be no inconvenience to the owner of the land over which the path goes. But when the use of it is insisted upon as a right, it is a familiar mode of testing that right to stop the permissive use, which the owner of the land would contend it to be, although the use may form no inconvenience to the owner.

So, here, if the owner of the adjoining land is in a situation in which an act of his, lawfully done on his own land, may divert the water which would otherwise go into the possession of this trading company, I see no reason why he should not insist on their purchasing his interest from which this trading company desires to make profit.

For these reasons I am of opinion that this appeal ought to be dismissed, with costs, and that the plaintiffs should pay to the defendant the costs both here and below.

Lord WATSON [after stating the facts:—] It is clear that, apart from any privilege which may have been conferred upon them by statute, the respondent, as in a question with the appellants, has a legal right to divert or impound the water percolating beneath the surface of his land, so as to prevent its reaching Trooper Farm, and feeding or assisting to feed the Many Wells Spring or the stream flowing from the Watering Spot. Upon that point there can be no doubt since *Chasemore* v. *Richards* was decided by this House in the year 1859. But the appellants pleaded at your lordships' bar, as they did in both courts below, that the principle of *Chasemore* v. *Richards* is inapplicable to the present case, because, in the first place, the operations contemplated and commenced by the respondent are by statute expressly prohibited; and, in the second place, these operations were designed and partly carried out by the respondent, not with the honest intention of improving the value of his land or minerals, but with the sole object of doing injury to their undertaking.

The statutory provisions upon which the appellants rely as supporting the first of these pleas are to be found in section 234 of the Act of 1842, and in sec-

tion 49 of the Act of 1854, which is a mere repetition of the previous enactment. The cause relates to the Many Wells Springs, an expression which, as the context shows, includes the stream coming from the Watering Spot. It contains two separate enactments, the one of them prohibitory and the other penal. First of all, it declares that it shall not be lawful "for any person other than the said company to divert, alter, or appropriate, in any manner other than by law they may be legally entitled," any of the waters "supplying or flowing from" these springs, or to sink any well or pit, or to do any act, matter, or thing whereby "the waters of the said springs" may be drawn off or diminished in quantity. That declaration is followed by the provision that "if any person shall illegally divert, alter, or appropriate the said water, or any part thereof, or sink any such well or pit, or shall do any such act, matter, or thing whereby the said waters shall be drawn off or diminished in quantity," and shall not, on being required to do so by the company, immediately restore the springs and waters to the same condition in which they were before the illegal act, they shall be liable to pay five pounds to the company for each day until restoration is made, besides compensating the company for any damage sustained through their illegal act.

The appellants endeavoured to construe the prohibitory clause as effecting a virtual confiscation in their favour of all water rights in or connected with the respondent's land lying to the west of Trooper Farm. It appears to me to be exceedingly improbable that the Legislature should have intended to deprive a landowner of part of his property for the benefit of a commercial company without any provision for compensating him for his loss. But it is not necessary to rely upon probabilities, because, in my opinion, the language of the clause is incapable of bearing such an interpretation. I think the plain object of the statutory prohibition, which has two distinct branches, was to give protection to the supply of water which had been acquired by or belonged to the company for the time being; and that it was not meant to forbid, and does not prevent, any legitimate use made by a neighbouring proprietor of water running upon or percolating below his land before it reached the company's supply and became part of their undertaking.

The first branch makes it unlawful for any person other than the company to divert, alter, or appropriate any of the "waters now supplying" the Many Wells Springs, which appear to include sources of supply existing upon lands adjacent to Trooper Farm. Had the prohibition been absolute, it would have struck against the operations of the respondent; but it is subject to the qualification that the respondent, or any landowner similarly situated, may lawfully divert those waters which ultimately feed the Many Wells Springs, so long as he does so in any manner which is not in excess of his common law rights. The respondent's operations, of which the appellants complain, are within his proprietary right, and are therefore not obnoxious to that part of the prohibition.

The second branch, which prohibits the sinking of wells and other operations, has no reference to outside waters more or less distant which might ultimately find their way to the Many Wells Springs. It relates to "the waters of the said springs"—an expression which, in my opinion, can only denote the waters which have actually reached the Many Wells Springs, or some channel or reservoir which has been prepared for their reception upon their issuing from these springs. The prohibition gives effective protection against the withdrawal or diminution, either by an adjacent proprietor or any other person, of waters which have come within the dominion of the appellants. But it does not prevent the diversion or impounding by an adjacent proprietor of water in his own land which has never reached that point, so long as his operations are such as the law permits. For these reasons, in so far as concerns the first plea urged for the appellants, I concur in the judgment of the Court of Appeal.

The second plea urged by the appellants, which was rejected by both courts below, was founded upon the text of the Roman law (Dig. lib. 39, tit. 3, art. 1, s. 12), and also, somewhat to my surprise, upon the law of Scotland. I venture to doubt whether the doctrine of Marcellus would assist the appellants' contention in this case; but it is unnecessary to consider the point, because the noble and learned lords who took part in the decision of *Chasemore* v. *Richards* held that the doctrine had no place in the law of England.

I desire, however, to say that I cannot assent to the view as to the law of Scotland laid down by Lord Wensleydale in *Chasemore* v. *Richards*. The noble and learned lord appears to have accepted a passage in Mr. Bell's Principles (section 966), which is expressed in very general terms, and is calculated to mislead unless it is read in the light of the decisions upon which it is founded. I am aware that the phrase *in æmulationem vicini* was at one time frequently, and is even now occasionally, very loosely used by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained as being *in æmulationem*, where it was not attended with offence or injury to his neighbour. In cases of nuisance a degree of indulgence has been extended to certain operations, such as burning limestone, which in law are regarded as necessary evils. If a landowner proceeded to burn limestone close to his march so as to cause annoyance to his neighbour, there being other places on his property where he could conduct the operation with equal or greater convenience to himself and without giving cause of offence, the court would probably grant an interdict. But the principle of *æmulatio* has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same with the law of England. No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious.

I therefore concur in the judgment which has been moved by the Lord Chancellor.

Lord ASHBOURNE.—I concur. To my mind the case is clear, and turns upon considerations sufficiently simple and far from obscure.

The plaintiffs have no case unless they can show that they are entitled to the flow of the water in question, and that the defendant has no right to do what he is doing. Putting aside the statutes, the defendant's rights cannot be seriously contested. The law stated by this House in *Chasemore* v. *Richards* cannot be questioned. Mr. Pickles has acted within his legal rights throughout; and is he to forfeit those legal rights and be punished for their legal exercise because certain motives are imputed to him? If his motives were the most generous and philanthropic in the world, they would not avail him when his actions were illegal. If his motives are selfish and mercenary, that is no reason why his rights should be confiscated when his actions are legal.

It is to be noted that the defendant or his predecessors in title never parted with any of their legal

rights; it is not suggested that the plaintiffs, by agreement or otherwise, ever acquired them; and no indication is given that there is any intention to compensate the defendant for his legal rights sought to be appropriated or injuriously affected by the plaintiffs.

The appellants' contention on the construction of the statutes would practically confiscate the defendant's water rights. I see nothing in the statutes to interfere with or prejudice his legal rights. Very clear words would be required to support the contention that legal rights have been swept away without compensation. Waters that have come under the control of the appellants are fully protected; but there is not a word to hinder or cramp the action of Mr. Pickles, unless he acts "illegally," or proceeds "in any manner other than by law he may be legally entitled."

I therefore concur in the order proposed.

Lord MACNAGHTEN.—For fifty years the Corporation of Bradford have supplied their town with water. They were empowered to do so by an Act of Parliament passed in 1854, which authorized and required them to purchase the undertaking of a then existing company called "The Bradford Waterworks Co."

The chief source of their water supply was taken over from the company. It comes from a cluster of springs known as "The Many Wells." These springs issue from the lower slope of a hillside some distance from the town. Above them, in the immediate neighbourhood, there is a tract of land belonging to Mr. Pickles, the respondent. Owing to the fall of the ground and the nature and lie of the strata beneath the surface, Mr. Pickles' land forms a sort of gathering-room or reservoir for subterranean water. Two faults, nearly parallel to each other, run downwards through it, and there is a bottom of impermeable clay. At present there is no way of escape for the imprisoned waters except by the Many Wells Springs. Within the ambit of his own land Mr. Pickles has set about making a tunnel or drift which, apparently, is intended to pierce one of the two faults that keep the underground water within bounds. If this is done, the result, it is said, will be to allow the water to run off in some other direction.

The Corporation claim an injunction to restrain Mr. Pickles from going on with the proposed work. They put their case in two ways. They say that under the circumstances the operation which Mr. Pickles threatens to carry out is something in excess of his rights as a landowner. Failing that ground, they maintain that his proceedings are in contravention of the express terms of their special Act.

As regards the first point, the position of the appellants is one which it is not very easy to understand. They cannot dispute the law laid down by this House in *Chasemore* v. *Richards*. They do not suggest that the underground water with which Mr. Pickles proposes to deal flows in any defined channel. But they say that Mr. Pickles' action in the matter is malicious, and that, because his motive is a bad one, he is not at liberty to do a thing which every landowner in the country may do with impunity if his motives are good. Mr. Pickles, it seems, was so alarmed at this view of the case that he tried to persuade the court that all he wanted was to unwater some beds of stone which he thought he could work at a profit. In his innocent enterprise the court found a sinister design. And it may be taken that his real object was to shew that he was master of the situation, and to force the Corporation to buy him out at a price satisfactory to himself. Well, he has something to sell, or, at any rate, he has something which he can prevent other people enjoying unless he is paid for it. Why should he, he may think, without fee or reward, keep his land as a store-room for a commodity which the corporation dispense, probably not gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. But where is the malice? Mr. Pickles has no spite against the people of Bradford. He bears no ill will to the corporation. They are welcome to the water, and to his land too, if they will pay the price for it. So much, perhaps, might be said in defence or in palliation of Mr. Pickles' conduct. But the real answer to the claim of the Corporation is that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element.

On this point, both North, J., and the Court of Appeal decided against the Corporation. And the decision, as it seems to me, is plainly right.

On the second point on which North, J., was in favour of the Corporation and the Court of Appeal against them, there is certainly more to be said. I quite agree with the Court of Appeal in the result at which they have arrived. But, speaking for myself, I rather take leave to doubt whether the section of the special Act on which the question turns is so unsatisfactory, so ill-drawn, and so difficult to construe as it seemed to be to the Court of Appeal.

The old waterworks company was incorporated by an Act passed in 1842. It was dissolved and reincorporated in 1854 in view of the immediate transfer of the undertaking to the Corporation.

In the Act of 1854, the provisions of which were kept in force for the benefit of the Corporation, the section in question is the 49th. But that section is merely a reproduction of section 234 in the Act of 1842. And it will be more convenient to deal with the earlier Act.

The Act of 1842 scheduled certain lands which the company were empowered to take. Among them was part of a farm belonging to one Seth Wright, which was known as Trooper or Many Wells Farm. By section 233 the company were authorized to divert or alter the course of a certain beck called Hewenden Beck, which is a tributary of the River Aire, "and also to divert and take the water from" the Many Wells Springs, described as "the springs and streams of water called Many Wells, arising or flowing in and through . . . Trooper or Many Wells Farm."

At the date of the passing of the Act the waters issuing from the Many Wells Springs in Trooper Farm, and a stream which rose in the adjoining land, flowed in several defined channels through Trooper Farm into Hewenden Beck, which forms one of the boundaries of the farm. The scheduled portion of the farm comprised apparently some, but not all, of those channels. However, after the Act was passed, the company purchased the whole of Trooper Farm; and, as required by the Act, they made compensation to the millowners on Hewenden Beck for the loss of the waters of the Many Wells Springs.

Section 234 is a protective clause corresponding in the main with section 14 in the Waterworks Clauses Act, 1847. It was to come into operation after the purchase of the Many Wells Springs.

According to the ordinary course of legislation in this country, a clause of that sort is intended to protect property, rights, and interests which have been acquired by purchase, not to transfer arbitrarily from one person to another property and rights for

which nothing has been paid, and for which no compensation is provided.

Section 234 prohibits in terms two classes of Acts, and it imposes a penalty not exceeding £5 per day on any person infringing its provisions so long as the injury lasts. One of these classes is treated as legal or illegal according to circumstances; the other is treated as illegal under all circumstances.

In the first place, the section says that "after the Many Wells Springs have been purchased by the company, it shall not be lawful for any person other than the said company to divert, alter, or appropriate in any other manner than by law they may be legally entitled any of the waters now supplying or flowing from the same." Both as regards the underground sources of the springs and as regards the streams flowing from them in their natural course, it forbids any act by any person in excess of his legal rights. At that time it must be remembered that the rights of landowners in regard to underground water had not been finally determined. If the view which commended itself to the Court of Exchequer in *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. 282, had been established, the proposed action of Mr. Pickles would, no doubt, have been illegal. As it is, there is nothing in the first part of the prohibition to restrict or curtail his rights as a landowner in dealing with underground water percolating through his land in unknown channels.

In the second place, the section declares that no person but the company is "to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs may be drawn off or diminished in quantity." What is the meaning of the expression "the water of the said springs"? The natural and obvious meaning seems to me to be the waters issuing from the springs, such as they happen to be in quantity and volume, at the point of issue, or in one case at the point of entry, into Trooper Farm. The expression cannot include the underground sources which serve to feed the springs. Otherwise you would have this singular result, that things which by reason of the saving of existing rights are treated as legal and permissible in one part of the clause are treated as illegal and prohibited by another. It must mean the water which the company were authorized to "divert and take from" those springs which the section at its commencement assumes the company to have purchased—not the waters which supply the springs, but the waters which the springs supply. A comparison of other sections in the Act will confirm this view, if any confirmation is required. The expression, "the waters of the said 'Many Wells'" occurs in section 275, and then it is evidently synonymous with the following words in a parallel passage in section 238: "The water issuing from the springs of water before mentioned called 'Many Wells,' and which is hereby authorized to be taken and diverted for the purposes of this Act."

After the company had compensated the millowners on Hewenden Beck and purchased Trooper Farm, the waters of the Many Wells Springs at and from the point of issue in Trooper Farm, and the water of the stream which rose in the adjoining land at and from the point of its entry into Trooper Farm, became the absolute property of the company, and it was the duty of the company to carry those waters to Bradford. No one was to interfere with them. Any such interference is characterized, in a later part of the section, as an illegal act. And, indeed, it seems to me very difficult to conceive how such an act could in any case be legal, unless the company constructed their works in a perverse and foolish manner. No one from whom the company acquired land or even an easement for the purposes of their works could lawfully let down those works. No one else, it may be assumed, would be in a position to do so. No one could lawfully tap their aqueducts or conduits.

I am of opinion that the act which Mr. Pickles proposes to do is not within either of the two classes of prohibited acts mentioned in section 234. It is not within the first class, because at the time of the passing of the Act his predecessor was legally entitled, and he is now legally entitled, to do the thing which is complained of. It is not within the second class, because Mr. Pickles does not propose to do anything which can have the effect of drawing off or diminishing in quantity the waters of the Many Wells Springs, such as they may be at the point of issue in Trooper Farm, or as regards the stream which does not rise in Trooper Farm at the point of its entry into that farm.

It was argued somewhat faintly that section 49 of the Act of 1854 must have a wider meaning than that which I think ought to be attributed to section 234 of the Act of 1842, because the Act of 1854 incorporates the Waterworks Clauses Act of 1847, and section 14 of that Act covers, it is said, everything which is covered by section 234 of the Act of 1842, if it be construed as it seems to me it ought to be construed. There would be very little in such an argument under any circumstances, because it is only natural that the promoters of the legislation of 1854 would, on the reconstruction of the company, desire to retain or re-enact every clause in the former Act which could make for their protection. But the truth is that the section of the Waterworks Clauses Act of 1847, which corresponds with section 49 of the Act of 1854, does not apply to the Many Wells Springs, which were purchased under the Act of 1842. The Act of 1854, which incorporates the Waterworks Clauses Act, 1847, declares that in construing that Act the expression "the special Act" shall mean the Act of 1854. It does not mean or include the Act of 1842.

I am, therefore, of opinion that this appeal should be dismissed with costs.

Order appealed from affirmed, and appeal dismissed with costs; action dismissed with costs.

Solicitors for the appellants, *Cann & Son*, agents for *W. T. McGowen*, Bradford.

Solicitors for the respondent, *Ullithorne, Currey, & Currey*, agents for *W. & G. Burr & Co.*, Keighley.

Court of Appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Dec. 5.

In re LORD AND FULLERTON'S CONTRACT. (*a*.)

Trustee—Disclaimer—Partial disclaimer—Vendor and purchaser—Will—Trust for sale.

A person resident abroad, who has been nominated as trustee, cannot refuse to act as trustee for any part of the trust property situate without the bounds of the country where he is resident, and at the same time intermeddle in the trusts of that part of the trust property situate in that country. A document containing such a refusal is a partial disclaimer only, of the

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

office of trustee, and is nugatory. The disclaimer, in order to be valid, must be of the whole of the trusts.

Appeal from the Vice-Chancellor of the County Palatine Court of Lancaster.

By his will, dated the 26th of September, 1888, Samuel Lord appointed five gentlemen as executors and trustees of his will, and devised the whole of his estate to them upon trust to sell. The testator died on the 23rd of May, 1889, and his will was proved on the 15th of July, 1889, by three out of the five named executors, power being reserved for the other two, Samuel Lord (the son) and John S. Lyle, to come in and prove. Lyle, by deed, subsequently renounced probate and disclaimed all the trusts of the will. Lord, by deed poll, dated the 18th of February, 1890, declared that he had refused to act as trustee for any property situate without the bounds of the United States of America, he being then resident in the United States.

The three trustees who had proved the will contracted to sell part of the property to Hugh Fullerton on the 22nd of March, 1895. Objection was taken on the purchaser's part that a good title was not disclosed in the vendors, and that the concurrence of Samuel Lord, junior, was necessary.

After correspondence, a summons was taken out, by arrangement, under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), for the opinion of the court on the title. The Vice-Chancellor found, on the construction of Lord's disclaimer, that it amounted to a general disclaimer of the office of trustee; and that therefore a good title was disclosed in the vendors.

The purchaser appealed.

Farwell, Q.C., and *Norris*, for the appellant.—There is no distinction in law between property in one part of the world and property in another part. There is a clear statement on the disclaimer of Lord that he has intermeddled both as trustee and as executor as to the property situate in America. On the authorities this so-called disclaimer is absolutely nugatory. See *Ward* v. *Butler*, 2 Moll. 533; *Mucklow* v. *Fuller*, Jac. 198; *In re Gordon, Roberts* v. *Gordon*, 6 Ch. D. 531, 26 W. R. Dig. 281; *Cummins* v. *Cummins*, 3 J. & Lat. 64, at p. 92; *Urch* v. *Walker*, 3 M. & Cr. 702. There is a clear intention to disclaim the English estates, and to act in the trusts of the American estates. A trustee cannot get rid of part of his estate; he must disclaim the whole or none.

Warmington, Q.C., and *W. H. Cochrane*, for the respondents.—There is no evidence that this trustee has intermeddled. The exclusion of immovable real estate situate abroad will not help one way or the other; presumably it follows the law of the place where it is situate. The trustee does not claim administration to any property included in the probate. In form the disclaimer is a complete renunciation of the offices of trustee and executor, and the true construction of the deed is that Lord was in doubt as to the trust property situate in America, but had made up his mind not to intermeddle in the English estate. See *In re Birchall, Birchall* v. *Ashton*, 37 W. R. 387, 40 Ch. D. 436.

Farwell, Q.C., in reply, referred to *Upperton* v. *Nickolson*, 19 W. R. 733, L. R. 6 Ch. App. 436; *In re Hargreaves and Thompson's Contract*, 34 W. R. 708, 32 Ch. D. 454.

LINDLEY, L.J.—The point raised by this appeal is a short one, but it is important. [His lordship stated the facts, and referred to the deed of disclaimer of the 18th of February, 1890, and continued:—] The purchaser's position is this. He says: "Here is a devise of real estate to five persons. The property has been put up for sale by three of them. I require that all the five shall either concur, or that you three who are acting in this country shall produce, instead of the concurrence of the other two, such deeds of disclaimer as show that you three alone can deal with the property properly according to the trusts of the will." As to one of the absentees the purchaser is satisfied; but as to the other, Mr. Lord, the son, he is not satisfied, because he says this disclaimer of the 18th of February, 1890, is inoperative, and he puts the case in this way. First of all he says: "Upon the true construction of this document it cannot be regarded as a disclaimer of the office of trustee and executor generally, but must be read as a disclaimer of that office limited to such property as is without the bounds of the United States." Now, if this document could be fairly read as an absolute disclaimer of the office of trustee and executor, I think that the purchaser's objection would be untenable; and, as I understand the learned judge in the court below, he read this document as a general disclaimer of the office of trustee. But I think that that is not in accordance with the true construction of the language. It is obvious to me that when this gentleman says that he has refused to act as a trustee or executor of the will so far as the same relates to property real and personal without the bounds of the United States, and then goes on to disclaim and renounce the said office of trustee and executor and all interest in and power over the real and personal estate without the bounds of the United States, it is impossible to take the words "disclaim and renounce the office of trustee and executor" without the limiting words which confine it to the real and personal estate without the bounds of America. Therefore I do not think that the view of the construction taken by the learned judge is in accordance with the language.

Treating this therefore as a partial disclaimer—as a disclaimer of the office of trustee and executor so far as the property in this country is concerned—the point is reduced to this: Will that enable the three trustees who are the vendors to make a good title? Now, although the point so far as I know is new in species, I think the purchaser is right; that is to say, that, according to our law it is not competent for a trustee to execute or to rely on a partial disclaimer of the office, either of executor or of trustee. Let us consider what his condition is in this case. It is remarkable, because he is executor as well as trustee. What would be his position under the document if he remitted personal estate from America to this country? Would not he be responsible for it? Would this disclaimer by him affect him in any way? I should say obviously not. He would be clearly responsible for it as regards the duties of the office, if he accepts the office at all; in other words, from a purchaser's point of view, if he is not proved to have disclaimed he must be deemed to have accepted the office of the trust, and then the ordinary principle applies that it is not competent for a man to do that partially; he must either do it altogether or not at all. The cases which have been referred to by counsel for the appellant bear that out, so far as property within the jurisdiction is concerned.

But it is said that if a trustee disclaims his trusteeship of all the property in this country, that disclaimer will be operative, although he may still retain the administration of other property out of the country, and be responsible here for the rents of that property if he comes here. I do not think that can be so when the trusts of the real estate are so mixed up with the trusts of the personal estate as they are in this par-

ticular case. I do not see how it is possible to give effect to that argument, seeing that it would be absolutely clear according to our law that this disclaimer would not shield this gentleman from a suit here to make him liable as executor.

But, even if there were no mixing up of the personal estate and the real estate, I do not think that counsel for the respondent have given any sufficient answer to this objection. I do not think that anybody could say that a trustee, even of land, in this country could get rid of his duty as regards other lands vested in him as a trustee if he remained a trustee at all. A testator intends when he makes such a will as this that his *cestuis que trust* shall have the joint judgment of all the trustees upon all the property subject to the trusts of the will, whether it is in this country or abroad; and I think that it is not competent for a trustee to say, "I will attend to some of the trusts, and I will not attend to others." It is competent for him to say that he will have nothing to do with the trusts at all; otherwise, a testator would be able to saddle people with duties of an onerous description without their having any opportunity of getting rid of them.

But unless he protects himself to that extent I do not think it is competent for an executor or trustee to say, "I will accept the office as to some part of the estate, and not accept it as to the rest." I think that that principle applies here. It is said that that is rather hard and inconvenient, and leads to complication; and so it does, but the answer to that is that a testator who has property in the colonies or abroad and property here will, if he is a wise man, have two sets of trustees, and devise his colonial property to persons in the colony, and devise his English property to persons in this country. But if he says, as the testator in this case has said, "I intend to have five trustees, and I intend that they shall protect my *cestuis que trust*," I do not think it is competent for one of those trustees to say, "I will accept the office as to foreign or as to colonial property, and I will have nothing to do with it as regards English property." It appears to me, therefore, that the appeal must be allowed, that the purchaser's objection is a good one, and that the proper order to make is an order in the form of the order in *In re Hargreaves and Thompson's Contract*, that is to say, that the purchaser is to receive back his deposit and the costs of investigating title, and so on. [His lordship then dealt with a point raised by the vendor's counsel that the purchaser's objection was out of time, but this part of the case does not call for a report, the point being completely covered by *Upperton* v. *Nickolson*, 19 W. R. 733, L. R. 6 Ch. App. 436.]

A. L. SMITH, L.J.—I am of the same opinion. [His lordship stated the facts, and referred to the disclaimer of the 18th of February, 1890, and continued:—] The question arises whether this is such a disclaimer as would render it unnecessary that Mr. Samuel Lord should be made a party to the purchase. A great deal has been said about the construction of this disclaimer. I have not the slightest doubt upon the construction. Putting it as shortly as I can, the effect is this. Mr. Samuel Lord says: "With regard to the real and personal estate in England I disclaim, but I do nothing of the sort as regards the real and personal estate in America." That is the true reading of that document, and it shows that it was his intention, if he had not done so already, to intermeddle as trustee with the American affairs, but that it was not his intention to intermeddle with the matters which are in England.

The point remains: Can a trustee do that? The authorities that have been cited are all on one side. There are no authorities except those cited by the counsel for the appellant. A trustee cannot accept a portion of a trust, and disclaim the other portion. He must disclaim *in toto*, or he remains trustee as to all. The authorities are clear upon that. Putting this construction on the disclaimer of Mr. Lord, the younger, I think that he did not disclaim the whole of the trust which was committed to him in conjunction with the four other trustees. Therefore the purchaser is right in saying: "You have not shown me a good title, because you have not shown me that Mr. Samuel Lord, the younger, is out of the trust, and therefore he ought to be a party to the conveyance." It is said that this was a most important point to the public and to gentlemen living in Lancashire, many of whom have estates in Lancashire and also estates in America. I wish to point out that I do not think there is much in that observation, for the simple reason that a testator in the happy position of having real and personal estate both in Lancashire and America could, if he were so minded, obviate the difficulty which has arisen in this case by creating two sets of trustees, English trustees and American trustees. [His lordship then dealt with the objection as to time, and held that the appeal ought to be allowed.]

RIGBY, L.J.—I entirely agree with the reasons already given, and I will say nothing about those parts of the case which appear to be settled by authority, the authority being that you cannot disclaim in part. But it is said that there is a special circumstance here which comes within no decisions that have yet been arrived at by the court, and that is that there is a disclaimer of everything within the jurisdiction of this court—in fact of everything that is outside the bounds of the United States of America. It is said that that makes a broad distinction. I cannot see it. It is no doubt true that we have no jurisdiction over land in America, in the sense that we cannot make orders which of their own force will affect that land; but we have jurisdiction over the trustees in this country, and by service out of the jurisdiction we should be able to act upon a trustee out of the jurisdiction if the case were otherwise proper in respect of that land. Similarly the Court of Probate cannot of its own authority enable the executors who get probate here to get in the assets in America. Nevertheless the jurisdiction over the person of the executors remains, and the trustees and executors in this double capacity are responsible here equally in relation to the real estate and to the personal estate in America as in relation to real estate and personal estate within our own jurisdiction.

The argument of inconvenience really comes to nothing. I have known of many cases where that has been easily met; cases, for instance, where a testator is domiciled in France and has property in England. He may easily, if he chooses, have one will with regard to the French property, and one will with regard to the English property; or even, without having two wills, he might have one set of trustees as regards one property, and a separate set of trustees as regards the other. Then the difficulty which is supposed to exist is at once got over. I am not sure that in every case it would not be better to adopt that course—in some cases certainly it would be. I see no hardship, and I see no real difference between the ordinary cases of partial disclaimer and the case of trying to disclaim a part, and a part only, of the trust on the ground that the part disclaimed extends to everything within the jurisdiction of the court.

Appeal allowed.

Solicitors for the appellant, *Ford & Ford*, agents for *Richard Higham*, Manchester.

Solicitors for the respondents, *Field, Roscoe, & Co.*, agents for *Yates, Johnson, & Leach*, Liverpool.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 12, 1895.

SHELFER v. CITY OF LONDON ELECTRIC LIGHTING CO. MEUX'S BREWERY CO. v. THE SAME. (a.)

Practice—Injunction—Suspension of injunction by Court of Appeal — Further suspension — Court to which application should be made.

In an action commenced in the Chancery Division an injunction which was asked for was refused, and an inquiry as to damages was ordered. On appeal the Court of Appeal varied such order and granted an injunction, but suspended its operation for six months.

An application to further suspend the operation of the injunction was made to the court of first instance:

Held, that such application had been properly made to the court of first instance.

The trial of these actions was heard by Kekewich, J., in April, 1894 (42 W. R. 644), when he refused an injunction, but granted an inquiry as to damages. The Court of Appeal in December, 1894, granted an injunction (see 43 W. R. 238), but suspended its operation for six months so as to allow the defendants time to consider the advisability of an appeal to the House of Lords.

The appeal to the House of Lords having been abandoned, the defendants applied to Kekewich, J., for a suspension of the operation of the injunction for a further period, so as to enable them in the meantime to replace the engines which created the nuisance by others which, it was alleged, would cause no vibration. Kekewich, J., refused the application, on the ground that, as the Court of Appeal had granted the injunction, that court was the proper tribunal to grant a further stay.

The defendants appealed.

Moulton, Q.C., Renshaw, Q.C., and *W. C. Braithwaite*, for the appellants.

Warmington, Q.C., and *Waggett*, for the plaintiffs in the first action; *Warmington, Q.C.*, and *Badcock*, for the plaintiffs in the second action.

THE COURT (LINDLEY, LOPES, and RIGBY, L.JJ.) granted a further stay, and expressed the opinion that the application for an extension of time had been properly made to the judge of first instance, and might have been disposed of by him.

Solicitors for the appellants, *Ashurst, Morris, Crisp, & Co.*

Solicitors for the first respondents, *Parry & Gibson.*

Solicitors for the second respondents, *Hunters & Haynes.*

High Court of Justice.

Chan. Div. Chitty, J. Nov. 20, 21.

MURGATROYD v. OLD SILKSTONE, &c., COAL AND IRON CO.

Ex parte CHARLESWORTH. (b.)

Landlord and tenant—Agreement for lease of colliery—Action for specific performance—Tenant in possession—Order to give up possession—Entry under order—Right to distrain.

In an action by C. for specific performance of an agreement for a lease of a colliery the defendant company, who were in possession and actually working the colliery, were ordered to pay certain arrears of rent, and in default to give up possession to C. Default being afterwards made, the defendant company accordingly gave up possession to C. The question was raised whether C. was entitled to distrain on goods upon the colliery which were admitted to be the property of the debenture-holders of the defendant company, and in the possession of the debenture-holders' receiver.

Held, that C., by taking the above-mentioned order and insisting on his right of taking possession under it, had elected to treat the defendant company as purchasers, and had obtained an equitable remedy inconsistent with the continuance of the relation of landlord and tenant; that C. was now in possession as vendor, and not as landlord; and consequently that the principle of Walsh *v.* Lonsdale, 31 *W. R.* 109, 21 *Ch. D.* 9, *did not apply to the case, and C. was not entitled to distrain on the goods.*

Summons.

This was an application by the Messrs. Charlesworth, as intending landlords, and the defendant company, as intending tenants, under an agreement of the 5th of April, 1892, for a lease of a colliery.

At the time of this agreement the defendant company were in possession and working the colliery as sub-lessees under the original lessees from the applicants.

The substance of the agreement was that the defendant company were to have a lease for fifteen years from the 3rd of May, 1892, at certain annual rents, with a minimum rent of £1,200, and the original lessees were to be released from their obligations under their leases.

The original lessees were released on the 28th of May, 1892.

In March, 1893, the defendant company ceased working, and in June, 1893, went into liquidation. In the same month a receiver was appointed in the above action, which was a debenture-holder's action, and took possession of the mines and the defendant company's effects on behalf of the debenture-holders; working was resumed by him in November, 1893.

The applicants having brought an action for specific performance of the above agreement, an order was made in January, 1894, for the company to pay certain sums for arrears of rent, and, in default of such payment, for delivery of possession to the applicants (see 38 SOLICITORS' JOURNAL, 216). A portion of the arrears was paid, but, default having been made as to the remainder, the receiver, in October, 1894, duly gave up possession of the mines to the applicants in compliance with the order aforesaid.

A summons was afterwards taken out by the applicants for payment of the arrears or leave to distrain. The summons stood over from time to time, and proceedings in the specific performance action were also suspended, negotiations for transfer of the agreement of lease being stated to be pending. The summons now coming on for hearing, the application for payment of arrears of rent was treated as abandoned, and the question for the decision of the court was whether, under these circumstances, the applicants were entitled to distrain on the premises in respect of these arrears.

Farwell, Q.C., and *MacSwinney*, for the applicants. —The fact of our being in possession is immaterial.

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

(b.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

We are not in as on a re-entry under a lease, but under the order of the court, and we hold by way of security only under our equity as unpaid vendors. The relation of landlord and tenant between us and the company or its nominees is still subsisting. We have therefore the right to distrain as landlords. *Walsh* v. *Lonsdale*, 31 W. R. 109, 21 Ch. D. 9, shows that since the Judicature Act our right is the same as if a lease had been actually granted. What the right of distress depends on is privity of estate and continuance of the term, and it does not matter who is in possession.

They also referred to Bullen on Distress, ed. 1842, pp. 1, 33, 79; Woodfall's Landlord and Tenant, 13th ed., p. 420, and the cases of *Lowther* v. *Heaver*, 37 W. R. 465, 41 Ch. D. 248, p. 254, and *Allhusen* v. *Brooking*, 32 W. R. 657, 26 Ch. D. 559, p. 565.

Levett, Q.C., and *O. Leigh Clare*, for the debenture-holders.—There is no tenant in possession here, nor anyone claiming possession under the agreement. The applicants could have come forward as vendors or landlords originally, but having elected to act as vendors, and to insist on their rights as vendors, they will not now be allowed to exercise a right as landlords to distrain. After invoking their equity to turn us out, they now want to treat us in equity as tenants in possession. *Walsh* v. *Lonsdale* only applies where there is a tenant holding under an agreement for a lease, and here there is none.

Farwell, in reply.—The term remains. The order only interferes with the possession. [CHITTY, J., referred to Dart on Vendors and Purchasers, 6th ed., pp. 1217-19.]

CHITTY, J., after stating the above facts, and pointing out that the agreement was capable of specific performance, continued as follows:—The question, which I am now asked to decide is whether, under these circumstances, the applicants have a right to distrain. The argument for them is founded on the decision of the Court of Appeal in *Walsh* v. *Lonsdale*, Jessel, M.R., during the argument there stated that "a tenant holding under an agreement for a lease of which specific performance would be decreed stands in the same position as to liability as if the lease had been executed. He is not, since the Judicature Act, a tenant from year to year; he holds under the agreement, and every branch of the court must now give him the same rights" (21 Ch. D. at p. 14), and those propositions were expanded by him in his judgment. Mr. McSwinney said that there was a right to distrain apart from *Walsh* v. *Lonsdale*, on the ground of there being a tenancy from year to year at law, but that is inconsistent with the main argument for the applicants, and I need notice it no further than to say that, in my opinion, it cannot be supported consistently with *Walsh* v. *Lonsdale*. [His lordship then read the judgment of Jessel, M.R., down to the words "signed or sealed" (21 Ch. D. pp. 14, 15)]. The Master of the Rolls was expressly dealing with a case where possession was held under the agreement. In the circumstances there he treated the person in possession under an agreement capable of specific performance as lessee in equity for the term specified in and on the conditions of the agreement. Cotton, L.J., in *Lowther* v. *Heaver*, approved of the judgment of the Master of the Rolls in *Walsh* v. *Lonsdale*, and I am bound by that case.

The main argument for the applicants is that the relation of landlord and tenant subsists between the applicants and the company, and that the company are still to be treated as lessees in possession or entitled to possession by virtue of the agreement, and it is said that it is immaterial who is in actual possession, that under the old law the landlord can take the goods of strangers, and that therefore the applicants are entitled to distrain on goods which are admitted (and in my opinion rightly admitted) for the purpose of this application to be the property of the debenture-holders, and in the virtual possession of their receiver.

If a common law lawyer before—or, I think, since—the Judicature Act had been asked if a landlord in possession of demised premises could distrain on the goods of strangers there, he would not have known what to say. No authority has been discovered, in spite of full research by the applicants' counsel. The common law lawyer would have been at least as puzzled as was the Bruges professor who issued a challenge to dispute with any person *in omni scibili et de quolibet ente*, when Sir Thomas More, then a student on his travels, sent up this question referring to the law of distress, *Utrum averia carucæ capta in vetito namio sint irreplegibilia*, whether beasts of the plough taken in withernam (by way of reprisal) are incapable of being replevied: see 1 Steph. Comm., 1st ed., p. 523. It was needless to say that no answer was given to that question. So, too, if the question above referred to had been asked of a common law lawyer, he would have been at a loss to understand how the landlord could be in possession of demised premises with the tenancy still subsisting.

I think there is a necessary inconsistency in the question itself, by the fact of his possession being destructive of the relationship of landlord and tenant.

The real question is to be determined by thoroughly understanding the effect of the court's order in the specific performance action. By taking the order and asking and obtaining under it possession the applicants have asserted an equitable right founded on the relation of vendor and purchaser, the agreement for the lease being regarded in specific performance as an agreement for sale and purchase.

They have got a remedy inconsistent with the relation of landlord and tenant. Lawful entry by the landlord puts an end to the term. The order is not final, but is made by way of equitable relief to secure to the vendor the benefit of his contract, to enable him to get his money and prevent the purchaser from remaining in possession and wasting the inheritance in a case like this without paying the purchase-money. The effect of the order is to suspend the relations of landlord and tenant, and the vendor landlords are now in possession as vendors and not as landlords, and the representatives of the company or of those claiming under them have been turned out not as tenants but as purchasers. It may be that hereafter the vendors will have to restore possession to the purchasers, or the vendors may (as seems more likely at present) elect to rescind the contract. Having insisted on this right to which they were entitled as vendors, and that deliberately, by taking an order on motion, as described, they have elected for the present to treat the company as purchasers, and it would be inconsistent with their possession and the benefit which they have obtained from the order to allow them to apply *Walsh* v. *Lonsdale* to a case not within the purview of the Court of Appeal there.

For these reasons I think the application cannot be sustained.

Application dismissed.

Solicitors, *Prior, Church, & Adams*, for *Bury & Walker*, Barnsley; *Grundy, Kershaw, & Co.*

Chan. Div. North, J. Dec. 13.

HUDSON v. CRIPPS. (a.)

Landlord and tenant—Residential flats—Common scheme—Implied contract—Injunction.

A general scheme for the management of a set of residential flats conducive to the benefit and convenience of the tenants, and contained in the tenancy agreements, implies a contract on the part of the lessor not to alter the private residential character of the building, and a breach of such implied contract may be restrained by injunction.

Spicer *v.* Martin, 37 *W. R.* 689, 14 *App. Cas.* 12, *applied.*

Motion.

The plaintiff was lessee of a flat in a set of mansions.

The whole of the building, with the exception of a few business offices on the ground floor, had been originally let out in residential flats.

The defendant was the landlord of the mansions, and from time to time had entered into agreements with the various tenants. These agreements were in a printed form, and had been used for all the tenants alike. They contained a clause providing that the tenant should not use his flat for business or trade purposes or otherwise than as a dwelling-house or so as to cause a nuisance to the landlord or his tenants. Annexed to the agreements were certain regulations and conditions relative to the general management of the mansions, the user of the lift, the provision of latchkeys, &c., and the agreements provided that the tenant should observe and perform these conditions and rules. The agreements also contained a covenant on the part of the landlord for quiet enjoyment.

The mansions were built in the shape of a quadrangle, with only one entrance, but by means of a verandah staircase access to the top stories could be gained without the necessity of entering the intermediate floors. The defendant had begun recently to roof over the quadrangle up to the first floor and alter the unoccupied lower part of the building with the object of constructing smoking, billiard, and other rooms for the use of a club, and the evidence showed that he intended further alterations on the second and third floors for the purpose of providing the club with one hundred bedrooms. The plaintiff's flat was on the fourth floor, and her tenancy had several years to run. It was not proved that the entrance to her flat would be materially affected by the contemplated alterations. The plaintiff moved for an injunction against the continuance of the noise and vibration caused by the execution of the structural alterations and also to restrain the defendant from altering the character of the building.

Swinfen Eady, Q.C., and *Job Bradford*, for the plaintiff.—We say that the defendant's acts are a breach of his covenant for quiet enjoyment. We also contend that the terms of the tenants' agreements constitute a general scheme for the management of the mansions, and such scheme implies a contract on the part of both the landlord and tenants not to alter the character of the building.

They referred to *Spicer* v. *Martin*, 37 W. R. 689, 14 App. Cas. 12; *Davis* v. *Corporation of Leicester*, 42 W. R. 362 and 610, [1894] 2 Ch. 208; and *Ryan* v. *Mutual Tontine Westminster Chambers Association*, 41 W. R. 146, [1893] 1 Ch. 116.

Buckmaster, for the defendant.—Unless the defendant is committing a common law nuisance, or doing some act which affects the stability of the building, no action will lie on the covenant: *Jenkins* v. *Jackson*, 37 W. R. 253, 40 Ch. D. 71; *Grosvenor Hotel Co.* v. *Hamilton*, 42 W. R. 626, [1894] 2 Q. B. 836; and *Tucker* v. *Vowles*, 41 W. R. 156, [1893] 1 Ch. 195. The cases of *Spicer* v. *Martin* and *Davis* v. *Corporation of Leicester* do not apply, because in those cases there was an estate plan and a building scheme, and the property was subject to the covenants of the vendor.

Swinfen Eady, Q.C., replied.

NORTH, J.—In this case I will grant an injunction in the form hereafter expressed. The covenant for quiet enjoyment is not a covenant against noise, but a covenant for title. I think, however, that the plaintiff is entitled to relief, on the ground of an implied covenant on the part of the defendant not to alter the character of the building. I think the agreement is an agreement which shows on its face that it was made in respect of a certain part of a large set of flats which were all subject to similar agreements. [His lordship here read the form of agreement, and continued:—] This agreement contains a general scheme for the management of the buildings for the benefit and convenience of all persons who are tenants, and whether these flats were built originally with such a scheme as this seems to me to be immaterial. I think this is a case to which the principle in *Spicer* v. *Martin* applies. Now, what has the defendant done in this case that is inconsistent with such a scheme? He is converting the ground floor and roofing over the quadrangle, and it is evident that he intends to devote the upper floors to club purposes. What he proposes to do is, in reality, to convert the building into a large club to be occupied by members by day and night, and the plaintiff's flat, instead of being a private residence, is to be in the middle of what is to be a fashionable club. I will therefore grant an injunction restraining the defendant from using the premises, or permitting them to be used, as a club, or otherwise than as residential flats, or from making, or permitting to be made, any alteration of the same with a view to using the same for any of the purposes herein restrained; such injunction, however, is not to prevent the use of the offices on the ground floor as heretofore, nor to continue after the plaintiff's tenancy has determined.

Solicitors for the plaintiff, *Walter Webb & Co.*

Solicitor for the defendant, *A. Toovey.*

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law.

Chan. Div. North, J. Nov. 5.

In re PITCAIRN.
BRANDRETH v. COLVIN. (a.)

Will—Conversion—Reversionary interest—Discretion of trustees—Intention—Rule in Howe v. Lord Dartmouth.

Where a testator by his will has given his trustees power, if and when they consider it expedient, to sell all or any part of his estate, he has shown an intention that a conversion of his estate (which included a reversionary interest) shall take place at some time which need not be that at which the rule of the court, as laid down in Howe *v.* Lord Dartmouth, 7 *Ves.* 137, *would make conversion necessary, and the rule of the court has accordingly no application.*

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law.

In re Sewell, 19 *W. R.* 220, *L. R.* 11 *Eq.* 80, *followed.*

Originating summons taken out by the executor of the will of Mrs. Pitcairn, to which the executors and trustees of the will of C. C. Pitcairn (her son), were defendants, to have it determined whether the plaintiff was entitled to a payment out of the estate of C. C. Pitcairn in respect of income which Mrs. Pitcairn would have received had certain reversionary interests been sold immediately after the death of C. C. Pitcairn, and whether the amount of such payment was to be ascertained according to the rule laid down in *Chesterfields Trusts*, 32 W. R. 361, 24 Ch. D. 643.

C. C. Pitcairn by his will, dated the 3rd of November, 1876 (which is more fully set out in the judgment), gave the whole of his property to trustees upon trust to pay his debts, funeral expenses, and the expenses of the trust, and then to pay over to or allow his mother, Mrs. Walker Pitcairn, to receive the income during her life, and after her death to pay certain legacies, and to pay over the residue to charity.

The testator died on the 3rd of February, 1880. His estate consisted of a reversionary interest, expectant on his mother's death, in settled funds to the amount of about £30,000, of which his mother was tenant for life, and of a sum of about £13,000.

The mother died on the 17th of October, 1894.

Everitt, Q.C., and *Howard Wright*, for plaintiff.

Haldane, Q.C., and *R. Campbell*, for defendant.

Besides the cases noticed in the judgment the following were cited for the plaintiff: *Johnson* v. *Routh*, 6 W. R. 6, 27 L. J. Ch. 305; *Harrington* v. *Atherton*, 13 W. R. 62, 2 De G. J. & Sm. 352; and for the defendant: *Wright* v. *Lambert*, 26 W. R. 206, 6 Ch. D. 649; *Daniel* v. *Warren*, 2 Y. & C. Ch. 290; *Skirving* v. *Williams*, 24 Beav. 275, 6 W. R. Ch. Dig. 114; *Collins* v. *Collins*, 2 Myl. & K. 703; *Pickering* v. *Pickering*, 4 Myl. & Cr. 289.

NORTH, J.—The point in this case is a short one and interesting, and not free from difficulty. [His lordship stated the facts, and continued:—] The mother has recently died, and her representatives maintain, now that the reversion has fallen in, that they are entitled to so much of the proceeds of keeping the reversion, that is to say, so much of the proceeds of the settled fund as represents the income that would have been received if the reversion had been realized under the son's will, the proceeds of realization invested, and the income paid to the mother for life.

The question is whether her estate is entitled to have out of the settled fund something to represent the income of the reversion during the fourteen years which she survived her son.

The rule of the court is, I think, very clearly settled, and it will be sufficient if I refer, at first, at any rate, to the well-known case of *Howe* v. *Dartmouth*, where Lord Eldon says (7 Ves., at p. 148), speaking of the will: "It is given as all his personal estate; and the mode in which he says it is to be enjoyed is to one for life, and to the other afterwards. Then the court says it is to be construed as to the perishable part so that one shall take for life, and the others afterwards; and, unless the testator directs the mode so that it is to continue as it was, the court understands that it shall be put in such a state that the others may enjoy it after the decease of the first; and the thing is quite equal, for it might consist of a vast number of particulars—for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency perhaps." He might have taken the case of a policy on a life in being, or a reversion pure and simple, as it was here. The judgment proceeds: "If in this case it is equitable that long or short annuities should be sold, to give every one an equal chance, the court acts equally in the other case; for those future interests are for the sake of the tenant for life to be converted into a present interest, being sold immediately in order to yield an immediate interest to the tenant for life. As in the one case that in which the tenant for life has too great an interest is melted for the benefit of the rest, in the other that of which, if it remained *in specie*, he might never receive anything is brought in, and he has immediately the interest of its present worth." That deals shortly with a case in which there is a wasting security in which the tenant for life enjoying it *in specie* would receive more than his share, or a reversionary interest when the tenant for life would receive less than his share, if he received any income from it, while the reversion was still a reversion.

Then in the case of *Morgan* v. *Morgan*, 14 Beav. 72, Sir J. Romilly, M.R., says on page 81: "Now the rule of law as applicable to these cases is not, I think, open to doubt, although the application of the rule to particular cases may be, and frequently is, a matter of very considerable difficulty." Then he refers to the rule laid down in *Howe* v. *Dartmouth*. He then proceeds: "This rule has been since affirmed as often as it has been referred to, and is unquestionably the law. But the testator may take the case of any particular bequest out of the rule, and the effect of the latter cases has been to allow small indications of intention to prevent the application of the rule. The question here, as in similar cases, is one of construction, whether the testator has in this will expressed his intention that this rule shall not apply to this particular case. It is urged by the petitioners that the burden of proof does not lie upon them more than on the respondents, and that being a question of construction it is for the court to look into the will and discover the testator's real meaning. In one sense, this is certainly true; but still, in my opinion, the rule of law is that, unless there can be gathered from the will some expression of intention that the property is to be enjoyed *in specie*, the rule in *Howe* v. *The Earl of Dartmouth* is to prevail. It is therefore incumbent upon the persons contesting the application of that rule, and on the court which forbids the application, to point out the words in the will which exclude it, and if this cannot be done the rule must apply. The reported decisions on the subject are useful, as they form a guide to enable the court to ascertain what directions contained in a will are properly considered to be an expression by the testator of his intention that this rule is not to apply. In no case that I have been able to find has the mere absence of any direction to convert his property been construed to mean that it should be enjoyed *in specie* by the legatees in succession; and the contrary must have been decided, though not expressly so stated, in *Johnson* v. *Johnson*, 2 Coll. 441. There are several cases in which the court held that the rule was excluded where the testator has fixed the period of conversion; as, for instance, where he has given the property to one for life, and, after the death of that person, has directed the property to be sold and divided." And then, after referring to one or two cases, Sir J. Romilly, M.R., says (14 Beav., at p. 84): "I think, therefore, that the absence of this direction"—that is, a direction to

convert—"cannot be treated as an expression of intention on the part of the testator that his property was not ever to be converted; it would, I think, be unreasonable if it were so held. By law the property must be converted; a testator may not unreasonably be supposed to be cognizant of that law, and to have given no direction on the subject, because he may have supposed that it would be mere surplusage so to do."

Then there are two cases laying down the general rule. One of them is *Hinves* v. *Hinves*, 3 Hare 609. The judgment of Wigram, V.C., in that case refers to the rule of the court in the absence of any expression of intention; and then comes this passage (3 Ha., at p. 611), which seems to me very much in point: "But if the will expresses an intention that the property as it existed at the death of the testator shall be enjoyed *in specie*, although the property be not in a technical sense specifically bequeathed, to such a case the rule does not apply. The rule is settled with sufficient clearness; the difficulty arises only in its application to particular cases, where the intention of the testator is expressed with more or less distinctness."

Then in *Pickup* v. *Atkinson*, 4 Hare 624, the same learned judge puts it very shortly. He says on p. 628: "Cases calling for a decision on this question have arisen in each branch of the court within the last few years, and in each branch of the court the rule seems to have been stated in the same way. If the will manifests an intention that the general residue of the estate shall be enjoyed by different persons in succession, and there is nothing to qualify that simple intention, the court, in order to effectuate it, converts so much of the testator's estate as is of a perishable nature (under which head leasehold property falls) into investments of a permanent kind"; and, of course, although he does not state the alternative, it converts reversionary property on similar principles. Then he says: "But if the intention of the testator appears to be that the first taker shall enjoy the property in that state in which it exists at his death, the court is bound to give effect to that intention."

I take it, therefore, that it is clear from those and numerous other cases that the question is what the testator intends, and his intention must be gathered from his will. He has a right to say what is to be done, and his intention as expressed or to be deduced from the terms of his will must be followed.

Now, looking at the present will, the testator first of all devises to certain trustees whom he names "all and sundry my whole means and estate, heritable and movable, real and personal, wherever situated or addebted, presently belonging or which shall belong or be addebted to me at the time of my death. Together with the whole titles, writs, evidents, vouchers, and instructions of my estate and effects hereby generally conveyed. And I nominate and appoint my trustees to be my sole executors, but declaring always that these presents are granted by me in trust only, and for the uses and purposes aftermentioned." Then the testator proceeds to declare the trusts. It is apparent that this will was prepared by some one who was more familiar with Scotch forms than English, but there is no difficulty in following it. Then the testator directs, first, that "my trustees shall, from the produce of my means and estate, pay all my just and lawful debts and funeral expenses and the expenses of executing the trust." His "means and estate" there, of course, denote everything of which he died possessed—everything that came to the trustees under the will. Then it was argued that that direction was to be carried out at once. Of course, the debts and funeral expenses must be paid at once, and certain expenses of executing the trusts; although, of course, those expenses could not all be disposed of in the first instance. They would continue until the estate was wound up and distributed among the persons ultimately entitled. Then the next direction is this: "Second, that my trustees shall pay over to Mrs. Walker Pitcairn, my mother, in the event of her surviving me, during all the days of her life after my decease the whole interests, dividends, and other annual produce and profits of the trust estate under their management for her alimentary use; and that, half-yearly or as the same shall accrue and be received by them or otherwise, my trustees shall permit, or suffer or legally authorize and empower, my said mother to uplift and receive the said interests, dividends, and other annual produce and profits of the said trust estate during all the days of her life after my decease, in the event of her surviving me." [His lordship, after referring to various other directions in the will, which are not material, proceeded:—] The testator continues: "I hereby confer on my trustees the following powers and privileges, viz., . . . to enter into the possession and management of my said estate and effects." He is dealing with a trust to be exercised and executed by the trustees during the continuance of the trust, and here he uses this phrase, "of my said estate and effects," which is the same phrase used in the beginning of the will with reference to what his debts and funeral expenses were to be paid out of. There he calls it "my means and estate," here he calls it "my estate and effects." Then he gives power to the trustees "to enter into the possession and management of my said estate and effects, and to call, sue for, uplift, receive, and discharge the rents, maills and duties, interest, dividends, and annual profits arising from the same," and to make titles, and so on, and to employ factors, agents, or cashiers "for managing my said means and estate." That is referring to what is to take place during the continuance of the trust. Therefore they are to manage here what was clearly an unconverted estate. Then, further on, there is this power: "with full power to sell and dispose of all or any part of my said estate and effects hereby conveyed, and that either by public roup or private bargain, and at such price or prices as they may think proper." Then there is a direction as to the securities in which funds may be invested.

That clause which I read last seems to me to be the clue to the meaning of the will; and I think that this power given by the testator to his trustees to sell and dispose if and when they think it expedient means that they are to have the power of selling and disposing of it if they think it expedient, or when they think it expedient. If they have the power to do it if they think fit and when they think fit, there is necessarily the power not to do it unless they think fit; and that, in my opinion, is only an express power given to the trustees to convert the estate or not, as they think fit.

It seems to me, upon the authorities, that there are several cases which show that where a testator has intended that a conversion is to take place at some time other than that at which the rule of the court would make conversion necessary, he has dealt with the question of conversion, and the rule of the court has no application. I read the passage just now in *Morgan* v. *Morgan* in which that was pointed out. Now, in the present case the testator has not fixed the period in the sense of that passage, but he has given the option to some other person of saying when the conversion is to take place, which seems to me to be equally effective in negativing what is called

the rule of the court, requiring conversion to take place immediately or as soon as possible after the death of the testator. No doubt, in the illustration given in that case, a time is fixed at the death of a particular person, but there are two or three cases in which the same rule has been applied where a particular time is not fixed. One of those was *Alcock* v. *Sloper*, 2 Myl. & K. 699, where the testator gave the residue of his estate to executors upon trust for his wife "to receive the rents, profits dividends, and annual proceeds thereof," and after her death "then upon trust to sell my freehold house in Oxford-street, and also my leasehold house, by auction, and it is my desire that Mr. Edward Abbott be employed as auctioneer to convert the whole of my estate and effects into money, and to distribute the same in equal shares and proportions." Then, in the judgment, Sir John Leach, M.R., says (2 Myl. & K., at p. 702), after referring to *Howe* v. *The Earl of Dartmouth*: "It is with a view to this principle that the present will is to be examined. The testator gives the residuary estate to trustees 'upon trust to permit his wife to receive the rents, profits, dividends, and annual proceeds thereof, to and for her own sole use and benefit, during her life.' There is here no intimation of an intention that any part of the property should be immediately converted by the trustees; but the inference rather is that the trustees during the life of the wife were to be merely passive; and the term 'dividends' has reference to the long annuities. After the death of his wife he directs his trustees to sell his freehold house in Oxford-street, and also his leasehold houses, by auction. The leasehold houses, like the long annuities, were a wasting property; and he has plainly expressed his intention that they should not be sold during the life of his wife; and that is manifestly inconsistent with the general notion on his part that the wasting portion of his residuary estate was immediately to be converted into permanent property." Then he quotes a passage relating to the employment of Mr. Abbott, and says: "The testator could not have meant that Mr. Abbott should convert the whole of his property after the death of his wife, if he had intended that any part of it should be converted during the life of his wife. The widow is therefore entitled to enjoy for her life the income of the long annuities."

Then, in *Burton* v. *Mount*, 2 De G. & Sm. 383, there was a general gift of the testator's real and personal estate to trustees upon trust to pay the income to his son for life and after his death for his children, and the testator empowered his trustees, notwithstanding the devise and bequest of his freehold and leasehold estates respectively, at any time or times, or from time to time, at their discretion to make sale and dispose of the freehold and leasehold estates, or any of them, or any part or parts thereof (other than and except the dwelling-house in Newington-place during his wife's estate and interest therein) by public auction or private contract, and so on. There Knight Bruce, V.C., came to the conclusion that, as there was this discretion given to the trustees as to the time at which they were to sell, it was inconsistent with any intention of the testator that the property should be sold immediately under the rule of the court, and he decided the point both as to the leaseholds and the long annuities in favour of the tenant for life.

The case of *In re Sewell* seems to me to be exactly in point as to this: that when the time of sale is fixed either by reference to a given number of years after the testator's death, or by reason of the falling in of a life, or anything of that kind, or when it is left to the discretion of somebody else to say when the sale is to take place, the testator has by his will provided for that sale, and therefore there is no rule of the court requiring the sale in a different way, or under different circumstances than those indicated by the testator's will.

I find here a direction that the trustees are to have full power if and when they consider it expedient to sell or dispose of all or any part of the estate and effects; and it seems to me that that gives them a discretion, in the exercise of that power, to regulate the time of sale, which is inconsistent with and negatives any intention that the court should realize the reversion in the way in which it would do if there had been no such direction.

In my opinion, therefore, the trustees did in fact allow the reversion to remain unsold, and the tenant for life is not entitled to any part of the proceeds of sale.

Solicitors, *Freshfields & Williams; Nicholl, Manisty, & Co.*

Chan. Div. } Dec. 5, 6, 7, 8, 11, 12, 1894;
North, J. } Aug. 9, 1895.

CRICHTON v. CRICHTON (*a*.)

Satisfaction—Advancement—Breach of trust.

A father obtained the control of a trust fund in which his sons had an interest in remainder, and made considerable advances to his sons.

Held, that such advances were no satisfaction of the father's liability to account for the trust funds.

Where the proceeds of securities, part of the trust fund, were traced to the hand of one of the sons, it was held that he could not claim that sum over again, but must be treated as having received that amount.

There is no resulting trust in favour of a father, of land purchased by him in his son's name to qualify the son to act as a justice of the peace, because beneficial occupation is necessary for such qualification.

Action.

By a settlement dated the 8th of February, 1832, on the marriage of W. J. Crichton and Ann Clutterbuck, £10,857 13s. 7d. 3 per cent. Reduced Annuities and £9,746 13s. 4d. Consols were vested in trustees upon trust to pay the income to the wife for life for her separate use without power of anticipation, with remainder to her husband, and after the death of the survivor, as the husband and wife by deed, or the survivor by deed or will should appoint, and in default of appointment for the children of the marriage in equal shares.

There were two children of the marriage, Arthur William Crichton, born 1833, and Henry Benyon Crichton, born in 1835.

Two of the four trustees of the settlement died soon after 1852, and the third in 1863. John Clutterbuck, the surviving trustee, died in 1863, having appointed his widow and the said W. J. Crichton his executors. The widow consented to the realization of the whole of the trust funds and the receipt of the proceeds by W. J. Crichton.

On the 25th of August, 1863, one of the sons, Henry Crichton, was married to a Miss Llewellyn, and W. J. Crichton transferred to the trustees of the settlement £4,100 India 10½ per cent. Stock, which he had purchased with his own money.

On the 19th of February, 1864, the Consols subject to the settlement of 1832 were sold for

(*a*.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

£8,869 9s. 6d., which was invested in the purchase, in the names of W. J. Crichton and his wife, of £2,500 India 5 per cent. Stock and £5,000 Russian 5 per cent. Stock, costing £8,871 5s.; W. J. Crichton providing the difference. On the 29th of July, 1865, the Reduced Annuities were sold, and realized £9,744 12s. 1d., which was invested in £3,000 Brazilian 4½ per cent. Bonds, costing £2,403 15s., in the names of W. J. Crichton and his wife; £4,000 India 5½ per cent. Stock, costing £4,459 1s. 11d., and £4,000 London and St. Katharine's Dock Stock, costing £2,885, in the names of W. J. Crichton and Arthur Crichton. On the 4th of August, 1864, W. J. Crichton transferred £5,000 Russian 5 per cent. Bonds, purchased with his own moneys, into the joint names of himself and Arthur Crichton. The dividends were received by Arthur Crichton, as also of the £4,000 India Stock, as part of an allowance of £300 a year made to each son. In 1879 the £4,000 India Stock was sold, and the proceeds received by W. J. Crichton.

In May, 1867, on the marriage of the other son, Arthur Crichton, £5,500 India 3 per cent., £7,500 London and St. Katharine's Dock Stock, £2,500 4½ per cent. Preference Stock of the same company, and £3,600 in shares of the Grand Junction Canal Co., worth in all £15,490, were transferred to the trustees of Arthur Crichton's settlement.

W. J. Crichton originally intended to settle £10,000 only on Arthur, but after correspondence had passed agreed to increase the amount. There was no evidence that Arthur Crichton knew the source from which the price of the stocks was derived.

W. J. Crichton transferred various sums to his son Henry jointly with himself, and some to Henry's wife jointly with Henry and himself; but the total amount was less than half the value of the Consols and Reduced Annuities included in the settlement of 1832.

In April, 1870, W. J. Crichton drew up a document headed "Instructions to my executors," giving particulars of his dealings with the funds.

Arthur Crichton died in 1882, and Mrs. Crichton, the tenant for life, in 1887. In 1886 W. J. Crichton conveyed to Henry an estate called Broadwood Hall, in Shropshire, to qualify him to act as a justice of the peace, in consideration of "natural love and affection." After Henry's death this was sold for £7,000.

In July, 1888, W. J. Crichton married again, and Henry Crichton died in 1889.

In July, 1891, the executors of Arthur and Henry Crichton brought an action against W. J. Crichton for administration of the trusts of the settlement of 1832 and for an account of the proceeds of the sale of Consols and Reduced Annuities. W. J. Crichton died on the 8th of December, 1891, and the action was continued against his executors.

Everitt, Q.C., and *Stock*, for the plaintiffs.—As W. J. Crichton received the trust funds, his estate is answerable for them. There is no satisfaction when the amount given is less than the debt. Moreover, Henry's settlement was made before there was any debt. The amount transferred to Arthur was given under circumstances sufficient to rebut the presumption of satisfaction. The doctrine of satisfaction by advancement only applies for the benefit of children: *Lee* v. *Head*,, 3 W. R. 591; *Meinertzhagen* v. *Walters*, 20 W. R. 918. The conveyance of Broadwood Hall cannot be treated as a trust for W. J. Crichton. 18 Geo. 2, c. 20, requires the ownership to be beneficial, and to presume a resulting trust would be a fraud on the policy of the law: *Curtis* v. *Perry*, 6 Ves. 739; *Brackenbury* v. *Brackenbury*, 2 Jac. & W. 391.

They also cited *Plunkett* v. *Lewis*, 3 Hare 316; *Tolson* v. *Collins*, 4 Ves. 483; *Bellasis* v. *Uthwatt*, 1 Atk. 426; *Batstone* v. *Salter*, 23 W. R. 816, L. R. 10 Ch. App. 431; *Davys* v. *Boucher*, 3 Y. & C. Ex. 397; *Lee* v. *Head*, 3 W. R. 591, 1 K. & J. 620; *Ford* v. *Tynte*, 2 H. & M. 324, 13 W. R. Ch. Dig. 4; *Noel* v. *Walsingham*, 2 Sim. & St. 99.

Cozens-Hardy, Q.C., *Swinfen Eady, Q.C.*, and *Micklem*, for the executors of W. J. Crichton.—W. J. Crichton on making the settlement upon Henry's marriage contemplated the receipt of trust funds. It was all one transaction. The instructions to executors are admissible as being a declaration against interest, and show this. As to Arthur, the circumstances do not rebut the legal presumption of satisfaction. The sons acquiesced, and cannot ask for the money over again: *Seed* v. *Bradford*, 1 Ves. Sen. 501. At all events they cannot claim over again what actually went into their hands: *Evans* v. *Benyon*, 37 Ch. D. 329, 36 W. R. Dig. 208. The interest of the sons under the settlement of 1832 are portions, and a gift of a less amount is a satisfaction *pro tanto*: *Kirk* v. *Eddowes*, 3 Hare 509. There is a resulting trust in favour of the father of the estate in Shropshire, or in the alternative it is a part satisfaction: *Bengough* v. *Walker*, 15 Ves. 507; *Lawes* v. *Lawes*, 30 W. R. 33, 20 Ch. D. 81; *Vickers* v. *Vickers*, 36 W. R. 545, 37 Ch. D. 525.

S. Hall, Q.C., and *Curtis Price*, for another executor of W. J. Crichton.

Everitt replied.

Cur. adv. vult.

Aug. 9, 1895.—NORTH, J., after dealing at length with the facts of the case, said:—

So far as Arthur is concerned, the question of satisfaction rests on the settlement made upon his marriage, and the investments in £5,000 Russian Bonds and £4,000 India 5½ per cent. Stock made in 1864 and 1865. As regards the two latter, I do not see how the dealings with those can possibly amount to a satisfaction of the liability of W. J. Crichton.

There are numerous cases which show that the debt of a father to a child may be satisfied by an advance to the child of an equal or greater amount, whether in the father's lifetime or by will: *Plunkett* v. *Lewis*, a case of a debt being satisfied by a marriage portion; *Talbot* v. *Shrewsbury*, Prec. in Ch. 394, a case of satisfaction by a legacy. But there is a leaning against any presumption of satisfaction in such cases, and there are many exceptions to this general rule.

If, for instance, the amount advanced is less than the debt, as in the present case, there is no satisfaction even *pro tanto*: *Cranmer's case*, 2 Salk. 508; *Graham* v. *Graham*, 1 Ves. Sen. 263; *Thynne* v. *Glengall*, 2 H. L. Cas. 131.

Each of these sums was less than the liability; therefore, even if they had been advanced to Arthur irrevocably, they would not have been any satisfaction. Again, there is another exception to that rule within which the present case falls—namely, where the debt is certain and the alleged satisfaction is contingent or uncertain, even though of greater amount than the debt—*a fortiori*, I may add, if the contingency does not take place.

There are many illustrations of this in cases where a legacy made payable after the death of a testator is held not to be a satisfaction of a debt payable on the testator's death, as to which see the recent decision of Stirling, J., in *In re Horlock*, 43 W. R. 410, [1895] 1 Ch. 516, and the cases there cited. I also desire to refer to *Mathews* v. *Mathews*, 2 Ves. Sen. 635, and *Talbot* v. *Shrewsbury*. These authorities, with many others, seem to me conclusive upon the present ques-

tion. I cannot understand how the father's debt or liability to the son could be satisfied by investments in the joint names, which ultimately came not to the son, but to the father, the debtor; nor how the son's certainty of succeeding ultimately to a moiety of the settled funds in default of an appointment which never was, and which the father contemplated never would be, made could be satisfied by giving him a chance of succeeding to something else of a smaller amount.

But, though I think it clear that Arthur's settlement was not a satisfaction in whole or in part of the father's liability, the fact that £4,000 of the London and St. Katharine's Dock Stock settled arose from the investment of £2,885, part of the proceeds of the Reduced Annuities is not immaterial. The sons Arthur and Henry, and their representatives, complaining of the conversion and appropriation by their father of the proceeds of the securities originally settled, are entitled to follow the proceeds of the conversion, and, so far as such proceeds cannot be traced, to recover from the father's estate the loss arising from their misappropriation; and as it has been proved that this part of the proceeds of the improper conversion came to Arthur's hands, his representatives cannot claim it over again from the father's estate, but must be treated as having received that amount: *Nail* v. *Punter*, 5 Sim. 555; *Evans* v. *Benyon*.

[His lordship, after giving his reasons for holding that the transfers of stocks into the joint names of W. J. Crichton, Henry, and Henry's wife did not effect satisfaction, proceeded:]

There is one other important matter to which I have not yet alluded. On the 29th of September, 1886, after the death of his son Arthur, the father conveyed to his son Henry an estate called Broadwood Hall, in Shropshire, for the purpose of giving him a qualification to act as a justice of the peace. After Henry's death, the estate was sold by his executors, with the father's concurrence, for £7,000, which the executors of Henry claim to retain. The defence alleges that this estate was held by Henry as a trustee of his father, and that any part of the proceeds of sale which the executors can retain must be taken in satisfaction or part satisfaction of any claims of Henry under the original settlement. The deed recited the father's desire to convey the fee, and the consideration was expressed to be "natural love and affection." This latter circumstance, though not conclusive, is entitled to serious consideration when the value of the property is not shown to exceed the amount of the debt alleged to be satisfied by the transaction: *Plunkett* v. *Lewis*, *Lawes* v. *Lawes*. Again, there is no memorandum in writing, and no evidence of any express trust, which would indeed be somewhat at variance with the terms of the deed, and on a voluntary conveyance by a father to a son no trust results by operation of law. Again, in order to confer a qualification to act as justice of the peace a beneficial occupation is necessary, and not merely a legal title, and the defendant's counsel have admitted that Henry did have such beneficial occupation. Under these circumstances, the creation of such a trust as is alleged would have been a fraud upon the law, and the father could not be heard to aver its existence: *Curtis* v. *Perry*, *Brackenbury* v. *Brackenbury*, *Cecil* v. *Butcher*, 2 Jac. & W. 565, and *Childers* v. *Childers*, 5 W. R. 586, 3 K. & J. 310, though that case was reversed on appeal, on the ground that for the qualification then in question a beneficial occupation was not requisite.

It is hardly necessary, therefore, to consider the point whether a conveyance of land could be presumed to be a satisfaction of a debt. As regards the difficulty of ascertaining the value of the land, it was said that this was no greater than in the case of a residue, and the defendant's counsel relied on the cases of *Bengough* v. *Walker*, *Lawes* v. *Lawes*, and *Vickers* v. *Vickers*; but those cases were all as to the satisfaction, not of debts, but of portions, which stand on a different footing. I have referred to a great many authorities in connection with this case, but have not found one in which a debt has been treated as satisfied, in whole or in part, either by a conveyance of land or by a gift of residue. The result is that the gift of Broadwood Hall was not a satisfaction, and that no part of the purchase-money can be taken into account in discharge or reduction of the liability of the father's estate.

I must, therefore, declare that the father's estate is liable to make good to the estates of each of his sons the sum of £4,873 6s. 8d. Consols, with interest thereon at the rate of 2¾ per cent., being the Consols rate of interest from the 8th of December, 1891, the date of his death.

Before the father's death Reduced Annuities had been paid off, or converted at par, and ceased to exist, so I must further declare that the father's estate is liable to make good to the estate of Henry Crichton the sum of £5,428 16s. 9d., with interest thereon at 4 per cent. from the 8th of December, 1891, and is liable to make good to the estate of Arthur W. Crichton the sum of £2,214 6s. 10d., with like interest. This sum is the value at par of one moiety of the Reduced Annuities, after deducting therefrom the £3,214 10s. Reduced Annuities realized to raise the £2,885 cash invested in the purchase of £4,000 London and St. Katharine's Docks Stock forming part of that transferred to the trustees of Arthur's settlement. The costs must follow the event.

Solicitors, *Mullens & Bosanquet; Nield & Stronts; Nye & Moreton.*

Q. B. Div.
(Lord Russell of Killowen, C.J., Grantham and Vaughan Williams, JJ.)

Nov. 11, 12; Dec. 7.

SOUTTER v. RODERICK. (a.)

Election law—Parliamentary franchise—Registration—Occupation elector — Claim for vote in borough—Description of qualification—Two dwelling-houses—Omission in claim of the word "successive"—Power to amend—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *ss.* 24, 28 (13)—*Registration Order*, 1895, *Schedule* 3, *Part I., paragraph* 17 (b).

A notice of claim to have claimant's name inserted in the list of occupation electors for a borough was in the following terms:—"(third column) Nature of qualification — Dwelling-house: (fourth column) Description of qualifying property—69, Richmond-road; 3, Hamilton-square." The claimant had in fact occupied during the qualifying period in immediate succession the two houses set out in the fourth column. The claim was objected to on the grounds, first, that it was not a claim for successive occupation, the word "successive" not being inserted in the third column; and, secondly, that the revising barrister had no power to amend the claim by inserting the word "successive." The barrister overruled the objections, and amended and allowed the claim.

Held, (1) (Vaughan Williams, J., dubitante) *that*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the notice of claim, on the reasonable construction of its terms, must be taken to be a claim for successive occupation; (2) *that having regard, however, to the Registration Order*, 1895, *Schedule* 3, *Part I., paragraph* 17 (i) (b), *the qualification was not sufficiently described in the claim, which ought to have contained the word* "(*successive*)" *in the third column; and* (3) *that the barrister had power under section* 28, *sub-section* (13), *of the Registration Act*, 1878, *to amend the claim by inserting therein the word* "(*successive*)."

Quære, *whether there is any power to amend a claim which, on the reasonable construction of its terms, is equivocal.*

Hitchins *v.* Brown, 2 *C. B.* 25; Foskett *v.* Kaufman, 34 *W. R.* 90, 16 *Q. B. D.* 279; *and* Plant *v.* Potts, [1891] 1 *Q. B.* 261, 39 *W. R. Dig.* 142, *discussed.*

Appeal by the plaintiff (the party objecting to the claims of A. Le Blonde and others, claiming to be placed on the list of occupation electors) from a decision of the the revising barrister for the Borough of Southwark (Bermondsey Division), allowing the claims.

The facts and arguments are sufficiently stated in the judgments of the court.

By the registration order of the 8th of March, 1895 (made under the power conferred by section 76, sub-section (7), of the Local Government Act, 1888 (*51 & 52* Vict. c. 41), it is (*inter alia*) provided in schedule 3, part 1, paragraph 17 (*i*), as follows: "The nature of the qualification should be entered" —(in the voters lists and in the claim lists)—"as nearly as possible in accordance with the words of the statute conferring the franchise; for instance—(*b*) the nature of a household qualification should be stated thus: 'dwelling-house,' or in the case of successive occupation 'dwelling-house (successive).'"

Costello, for the appellant.

R. Heber Jones, for the respondent.

Cur. adv. vult.

Dec. 7.—Lord RUSSELL OF KILLOWEN, C.J.—This is an appeal from the revising barrister of Southwark, who had allowed the name of the claimant, Alfred George Le Blonde, and those of seventeen other voters to be inserted in the list of occupiers for the borough. His claim was in the following form: (first column), Name of claimant in full, surname being first—Le Blonde, Alfred George; (second column), place of abode—3, Hamilton-square; (third column), nature of qualification—dwelling-house; (fourth column), description of qualifying property—69, Richmond-road, Stamford-hill; 3, Hamilton-square. It was proved that the claimant had occupied the two dwelling-houses set out in the fourth column in immediate succession and for the qualifying period. It was objected by the appellant that the claim was invalid by reason of the omission of the word "successive" in the third column, and that the revising barrister had no power to amend the claim by inserting the word "successive," because, it was contended, it gave another and a different qualification. The revising barrister overruled both objections, and from that decision this appeal is brought.

The first question, therefore, is whether the claim as it originally stood was sufficient. The appellant contended that by reason of the instructions to overseers in the registration order of the 8th of March, 1895, schedule 3, part 1, paragraph 17 (*b*), the qualification should have been stated as "dwelling-house (successive)." The respondent relied on the case of *Hitchins* v. *Brown*, 2 C. B. 25, as establishing the sufficiency of his claim. In that case "house" only appeared in the third column, but in the fourth column both were fully described with the word "previously" before one of them. The barrister in that case amended the claim by inserting "houses occupied in immediate succession"; and the court held on appeal that the claim was originally sufficient, but that the amendment made it more accurate. Since that case, however, was decided the registration order above referred to has been issued, and I think, having regard to the instructions it contains, that the qualification was not sufficiently described.

The real question in the case is the second one—viz., Had the barrister power to amend the statement of the qualification as he did? It was contended on behalf of the appellant that he had not, because it gave the claimant a different qualification from that stated. If that really is the result of the amendment, then the barrister clearly had not the power to make the amendment, and for authority on this point it is sufficient to refer to the cases of *Bartlett* v. *Gibbs*, 5 M. & G. 81, and *Foskett* v. *Kaufman*. But is that the effect of the amendment? To answer this question it is important to see what was exactly the qualification stated. It seems to me that, giving to it a reasonable construction, the qualification stated must be taken to be for successive occupation. The claimant could not qualify by occupation of two houses except by reason of successive occupation, and therefore the fair interpretation of the claim seems to me to be that it is one for successive occupation. It was contended that the claim might be regarded as being for occupation of one or other of the two houses during the qualifying period. But, even if that be so (which I do not think), then one or other of the two houses is surplusage, and the barrister would have to amend by striking out one or other, so as to make it clear in respect of which the qualification was claimed. The highest at which the appellant's argument can, in my judgment, be put is that the nature of the qualification is insufficiently stated, and in that case the barrister had power, as it seems to me, under section 28 (13) of 41 & 42 Vict. c. 26, to amend the description of the qualification "for the purpose of more clearly and accurately defining the same." I do not think that the case of *Foster* v. *Kaufman* assists the appellant on this point, because on the face of the claim in that case there was no ambiguity. It was a claim for occupation of one house, and it was sought to amend it into a claim for successive occupation of two houses. The case of *Hitchins* v. *Brown*, which I have already mentioned, closely resembles the present case, the only difference being the insertion of the word "previously" in the fourth column in the claim in that case. It was argued that this made an important difference, but I do not think so. The idea of "successive" occupation is not necessarily conveyed by the statement that another house was occupied "previously," and it might have been argued in that case, too, that the claim was susceptible of being regarded as a claim for occupation of one or other of the two houses. I think that case was rightly decided, but my conclusions in this case would have been the same apart from it. I think the revising barrister ought freely to exercise the very ample powers of amendment given to him by section 28 of the Registration Act of 1878 to correct any *bonâ fide* mistake made in the list or in any claim or notice of objection; and while (apart from section 24 of that Act) he cannot so alter a claim as to make the qualification a new or different one from that in the claim, he ought, following the words of section 28 (13), to make such change in the description of the claim as may be necessary "for the purpose of more clearly and

accurately defining the same." I think the amendment made in the present case falls within that description. For the reasons I have given I think this appeal must be dismissed with costs.

GRANTHAM, J.—In this case we are asked to say whether the revising barrister was right in amending the claim of the respondent where, in a claim for successive occupation, the respondent had omitted to add the word "successive" after the word "dwelling-house," though he properly inserted the names of the houses of his successive occupation in the fourth column.

In my judgment the barrister was right in so amending. What is the nature of the qualification for which the respondent claims? It is "occupation" as distinguished from "ownership" or any other qualification, and it is still more definitely described as occupation of a dwelling-house. The respondent has described all that gives him the right to vote—namely, the "occupation" of a dwelling-house, and the dwelling-house which he occupied. First one dwelling-house and then the other during the prescribed period.

By the statutory rules and orders of March, 1895, recently published, it is apparent that it is correct to speak of the qualification derived from the successive occupation of two or more dwelling-houses as the occupation of a "dwelling-house" in the singular, and as the respondent has so claimed in the third column, and has in the fourth column correctly described the qualifying property—namely, the two houses—it seems to me that he has done all that the Act requires him to do, and that the word "successive" is really surplusage; but, whether so or not, the absence of the word cannot disqualify, and if it is necessary to be inserted to comply with the rules, then the revising barrister was justified in adding it by way of amendment for the purpose of more accurately describing the qualification.

I am aware that the Court of Appeal in *Plant* v. *Potts*, the case most relied on by the appellant did not agree with the liberal construction I had put in that case upon the amending clauses of the Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, and I loyally bow to their better judgment; but the judgments of the Court of Appeal in that case do not compel me to apply a still narrower construction than has yet been given to the Act, to a case differing essentially from that one.

Prior to *Plant* v. *Potts* no one had suggested that the decision of the court in *Hitchins* v. *Brown*, decided in 1847, was incorrect; and as that case was not mentioned by the Court of Appeal in *Plant* v. *Potts*, and as the facts in the case of *Hitchins* v. *Brown* are almost identical with the present case, and not with *Plant* v. *Potts*, I cannot consider, in dealing with the present case, that *Hitchins* v. *Brown* has been overruled. In fact, if I am wrong in that view, then it seems to me that the special power of amendment given in the Registration Act, 1878, will be a dead letter. If we examine the judgment of the Court of Appeal in *Plant* v. *Potts*, I think their lordships clearly intended to exclude such a case as this from the effect of their decision. On p. 262, [1891] 1 Q. B., the Master of the Rolls says: "In other words, a revising barrister can only amend an insufficient description of the qualification, but cannot alter the description into a description of another qualification." Again, Lopes, L.J., says, at p. 264: "After careful consideration, I have come to the conclusion that they (sub-sections (12) and (13) of section 28 of the Act of 1878) empower a revising barrister to correct an insufficient or inaccurate statement of qualification in the third column, provided such a correction does not involve a change or alteration of the qualification as it appears in the list."

On authority, therefore, of previous decisions, as well as on what I believe to be a proper construction of the Act, my judgment must be in favour of the respondent.

VAUGHAN WILLIAMS, J.—In this case Lord Russell, C.J., and Grantham, J., have arrived at the conclusion that, giving to the qualification stated a reasonable construction, it must be taken to be for successive occupation, and that it cannot reasonably be read as being for occupation of one or other of the two houses. I am not at all sure myself that many a reasonable man would not read this qualification as being a qualification by occupation of a dwelling-house at 69, Richmond-road, Stamford-hill, by a person occupying at the date of the claim 3, Hamilton-square. I cannot but think that if the evidence had shown a sufficient qualification by reason of occupation of 69, Richmond-road, and no sufficient successive occupation of the two houses mentioned to give a qualification in respect of successive occupation, the statement of qualification would have been properly argued to have been a reasonably clear statement of a qualification by occupation of a single dwelling-house. If so, the qualification as stated might reasonably be read as referring to either one of two different qualifications, and in that case I should doubt the power of the revising barrister to amend. He would in such case, by amending, not merely be more clearly and accurately defining the qualification stated; he would by the amendment exclude from the statement one of the qualifications possibly included, and therefore would be altering the description of the qualification, while the equivocal claim capable of meaning either one of two qualifications would have been unfair to the objector as throwing on him the necessity of making two set of inquiries. Fairness to the objector seems to be a matter which should be taken into consideration. [See the judgment of Lord Esher, M.R., in *Dashwood* v. *Ayles*, 34 W. R. 53, 16 Q. B. D. 298.]

If the claim could equally well describe either franchise, I should say it ought not to be amended. But inasmuch as both my learned brothers think the qualification stated, reasonably read, means "successive occupation" and not a claim for occupation of one dwelling-house for the requisite period, I am not prepared to differ as to the construction of this particular claim, which is not a matter of principle or of any importance except to this particular claimant and objector. But I wish to record my dissent from the proposition that where the description of the claim is equally applicable to one qualification as to another, the revising barrister has power to amend or ought to amend. Subject to these observations, I concur in the result and judgment.

Appeal dismissed. Leave to appeal granted.

Solicitor for appellant, *Chalton Hubbard.*

Solicitors for the respondent, *Franks & Timbrell.*

Q. B. Div. Commercial Causes. (Mathew J.) Dec. 3, 5.

TYSER AND OTHERS *v.* THE SHIPOWNERS' SYNDICATE (REASSURED) AND OTHERS. (*a.*)

Insurance — Marine insurance — Syndicate of under-

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

writers — Policy signed by manager of syndicate — Joint or several liability of members—Partnership.

The manager of a syndicate of underwriters, which had been formed under an agreement, entered into a policy of reinsurance on ships valued at £79,300. The subscription form was signed by the manager as manager for the syndicate, and the proportion which each member underwrote was written opposite his name. The agreement authorized the manager to sign policies on behalf of the syndicate, and under it no liability was to attach to any member beyond his own proportion set opposite to his name, and the profits or losses were to be divided amongst or to be borne by the members in proportion to the amounts subscribed by each.

Held, that the liability on the policy was not a joint, but a several liability, and that the agreement did not constitute the members partners in the business.

Action tried by Mathew, J., in the Commercial Court.

The action was brought to recover a total loss upon a policy of marine insurance effected by the defendants upon the steamship *Brunswick* for £500, and for return of premiums.

The plaintiffs were underwriters at Lloyd's, and the defendants were a syndicate of underwriters, consisting of twenty members—not members of Lloyd's—of which John M. Corderoy was the manager, and he underwrote for the members of the syndicate.

The syndicate was formed under an agreement, dated the 28th of February, 1894, between John M. Corderoy, insurance broker, called the manager, Thomas R. Miller, manager of certain mutual insurance clubs, and the several persons whose names were written in the schedule to the agreement, and who formed the syndicate.

This agreement was to last for twelve months, and at the end of that time it was renewed for another twelve months.

By a policy dated the 4th of March, 1895, the manager, on behalf of the syndicate, reinsured a risk which the plaintiffs had underwritten for £79,300, on the hulls and machinery of certain ships, of which the *Brunswick* was one, valued as per original policies or policy. This policy of the 4th of March, 1895, was in the ordinary form of a Lloyd's policy, and contained this special clause: "The Shipowners' Syndicate (Reassured)—special clause: It is specially agreed that the assured are hereby entitled, by way of further security for the performance of the obligations of the subscribing underwriters, and of each and every of them, to the benefit by way of first charge of the policies of reinsurance effected or to be effected, and all moneys received thereunder.—John M. Corderoy, manager." Then the subscription to the policy was: "The Shipowners' Syndicate (Reassured)—John M. Corderoy, manager: John M. Corderoy, 6½ thirtieths, Thomas R. Miller, 1½ thirtieths," and the names of the other members of the syndicate followed, with the amounts in thirtieths set opposite the name of each, making in all thirty thirtieths on the £79,300. The subscription form ended: "The Shipowners' Syndicate (Reassured)—John M. Corderoy, manager."

By clause 11 of the agreement the manager was bound forthwith as risks were accepted to reinsure the whole of the total loss risks, and by clause 16 "all policies of reinsurance and all moneys received thereunder shall be held in trust by the manager and the said T. R. Miller, and such third party as they may appoint, primarily as security as the assured under each policy the risk of which is reinsured, and by way of further security the following special clause is to be inserted in every policy": [This special clause was the same as that set out in the policy.] Under this provision Mr. Corderoy forthwith reinsured in the present case in two clubs—namely, the Uniform Line Steamship Insurance Association and the New Marine Mutual Insurance Association.

There was a total loss of the vessel while this policy was in force, and the present claim having been brought, the following were the questions to be tried: (1) Whether the liability of the members upon the policy was a joint or several liability; (2) whether, in the event of a loss and any individual members being unable to pay, the assured are entitled to recover from the trustees the proportion of reinsurance actually received from the clubs to which such individual member is entitled, or whether the whole amount received from the club is to be applied to cover the assured against any deficiency through default of any member or members; (3) whether the policies of reinsurance are to be retained by the trustees or handed over to the assured.

The clauses of the agreement relied on by the parties are referred to in the judgment.

Herbert Reed, Q.C., and *Scrutton*, for the plaintiffs.

Joseph Walton, Q.C., and *Manisty*, for the syndicate.

Warmington, Q.C., *Lewis Thomas*, and *W. de B. Herbert*, for the defendant Hedges, a member of the syndicate.

Gore-Browne, for the defendant Pattenden, a member of the syndicate.

Scott Fox, for the defendant Wheatley, a member of the syndicate.

Cur. adv. vult.

Dec. 5.—MATHEW, J., read the following judgment:—This action was brought to recover for a total loss of the ship *Brunswick*. The plaintiffs were underwriters at Lloyd's, who had reinsured with other underwriters, described in the writ as the "Shipowners' Syndicate (Reassured)." The writ was issued on the 22nd of November, and an application was made for an early trial on the ground that several actions were pending, and that it was of great importance that the rights of the parties should be speedily ascertained. It was arranged that statements of the points in dispute should be exchanged and the cause entered.

The trial took place on the 3rd of December, and I have now to deliver judgment. The defendants are a group of underwriters, not members of Lloyd's, who, under the terms of an agreement which will be more fully referred to hereafter, had authorized a manager named Corderoy to underwrite policies of marine insurance on account of the several persons forming the syndicate. The plaintiffs' policy had been effected with Corderoy as manager. It was in the ordinary form of a Lloyd's policy, and was described as a reinsurance on ships to the amount of £79,300, valued as per original policies. The usual clause provided that the assurers promised and bound themselves, each one for his own part, for the true performance of the contract in the policy, confessing the consideration paid. At the end of the policy the subscription was in the following form: [His lordship then read from the subscription form of the policy as stated above.] The first point raised with reference to this policy was whether the liability of the members of the syndicate was joint or several. For the plaintiffs it was contended that the syndicate was in point of fact a firm or partnership; that the name "syndicate" imported combination for purposes of profit, and that there was therefore a joint liability upon the policy. The question was stated to be of great importance because the operations of the syndi-

cate had been very extensive, and had resulted in considerable losses, and if each member of the syndicate were liable for the whole of the losses the result might prove most disastrous to individuals. For the defendants it was argued that upon the face of the policy the liability was several, and not joint.

It was said to be in the ordinary course of business that one underwriter should act for a number of other underwriters at Lloyd's, and should subscribe policies for each member of the group; and in support of that position, which was really not disputed, attention was called to the original policy effected by Tyser & Co. at Lloyd's, from which it appeared that insurances had been effected for eight gentlemen whose names, as in this case, were stamped on the policy, and who insured in different proportions a sum of £100. It was said when the terms of the subscription to this policy were examined that the same principle was followed, and that each member of the syndicate made himself responsible in the same way for the proportion which he underwrote of the amount insured.

Then the plaintiffs' counsel called attention of the special clause in the policy under which "the assured became entitled to the benefit, by way of first charge, of the policies of reinsurance effected or to be effected by the subscribing underwriters and all moneys received thereunder." It was said that if it were left in doubt by the form of the subscription whether the liability were joint or several, this clause showed an intention to enter into a joint undertaking, for it provided that there should be a "further security for the obligations of the subscribing underwriters and of each and every of them." This proved, it was said, that "syndicate" meant something equivalent to firm, company, or partnership. But, on the other hand, the word "syndicate" does not indicate in what way the members are acting together, and they are described in the clause as "subscribing underwriters." I see no ground for thinking that it was intended by this provision in the policy to enlarge the obligations of the underwriters or to extend the security which this special clause was intended to afford. If each underwriter was responsible onlyfor the obligation created by his own subscription, it was unlikely that he should extend his liability to the obligations of his fellows; and the reasonable construction seems to me to be that each underwriter undertook that the benefit of any reinsurance to which he was entitled should be available for the assured. The clause seemed to be intended to prevent the loss of the security by the insolvency of any of the underwriters, and the suggestion that the object was to provide against a possible loss of the security by bankruptcy seems to me improbable.

I am therefore of opinion that the liability upon the policy is several, and not joint. If this view be correct, the case would seem to be concluded. But the case was further argued for the plaintiffs on the ground that the agreement under which the syndicate was formed and carried on business, of itself constituted a partnership; and, as this point was discussed at considerable length, it may be desirable that I should express my opinion upon it. The syndicate was originally formed on the 28th of February, 1894, and was to last for a year. At the end of that time the syndicate was continued for another year, the members being the persons whose names appeared at the foot of the plaintiffs' policy. The agreement was between John Matthew Corderoy, the manager, Thomas Robson Miller, the manager of certain mutual reinsurance clubs, and the several persons whose names appeared in the schedule thereto, thereinafter called the syndicate. After reciting that the syndicate had arranged with the manager that he should be authorized to underwrite policies in the names of the persons forming the syndicate, power was given to the manager to insure steamers by time policies, either on the terms of Lloyd's policies or on club terms. Clause 4 provided as an inducement to insurers that the manager should be at liberty to return 20s. per cent. on the amount covered in the event of the vessels incurring no accident during the currency of the policy. Clause 5 provided that the manager was empowered to sign policies on behalf of the syndicate, and in the individual names of the members thereof, the manager affixing opposite the name of each member on each and every policy the respective proportions of risk taken by such individual member. Clause 6 provided that no liabilities should attach to any member of the syndicate beyond his own proportion of the risk accepted in his name, the members not being liable for one another or in any way guaranteeing the solvency the one of the other. Upon these clauses there would seem to be no foundation whatever for the argument of the existence of a partnership, but great reliance was placed on the clauses that follow. By clause 7 the manager's remuneration was to be 5 per cent. upon the gross premiums and 10 per cent. upon the profits, if any, available for distribution among the members. By clause 8 the manager was at his own expense to keep proper books for the syndicate accounts and the accounts of the members thereof. He was to provide offices and necessary staff for the conduct of the business in the City, and to issue accounts of the working thereof to the members. By clause 9 the manager was to debit against the syndicate account the necessary subscription to Lloyd's. These clauses, it was said, showed that a joint business was contemplated, with a common fund for expenses and an ultimate distribution of the net profits among the members. But all these provisions are analogous to the arrangements that might be made with the manager of an underwriting account at Lloyd's for several underwriters. The provision for the creation of a fund out of moneys belonging to all the underwriters is in no way inconsistent with the obligation of each underwriter to subscribe *pro rata* for any expenses incidental to insuring.

Very great reliance was placed by the plaintiffs' counsel on clause 11, by which the manager was bound, as risks were accepted on behalf of the members of the syndicate, to reinsure the whole of the total loss risks. It was said that what was contemplated was a reinsurance on behalf of the members of the syndicate jointly; and it was said that in compliance with that provision a reinsurance had been effected with two clubs—the Uniform Line Steamship Insurance Association and the New Marine Mutual Insurance Association, and when the policies came to be examined it appeared that they had been issued by name to the "Shipowners' Syndicate (Reassured)" in each case. But the effect of these reinsurances is perfectly clear. The assured were the members of the syndicate. The title of the syndicate was descriptive only; and if it had been necessary to proceed against the clubs on their policies the interest must have been averred in the members individually, and for contribution to losses the individual members would have been liable (see *Great Britain* 100 *A* 1 *Steamship Insurance Association* v. *Wyllie*, 37 W. R. 407, 22 Q. B. D. 710). It is difficult to see how a joint insurance could be effected, for each underwriter must reinsure his own risk. A policy by all to cover the risk of one would not be a valid contract of insurance, from the absence of interest in all but the one. An insurance by all to cover the risk of each is open to the same observation. The true meaning of the clause seems to me to be that where

the manager accepted risks on behalf of the members he was bound to reinsure each of them. Thus construed, the clause works easily. Upon the plaintiffs' construction it would give rise to considerable difficulty. The fact that for convenience' sake the name of the syndicate was used for the purposes of reinsurance with the clubs does not, and could not, alter the real nature of the contract. Clause 12 was also relied upon by the plaintiffs, for it enabled the manager, on behalf of the syndicate, to undertake the management of collision and salvage cases, &c., and also to make advances to owners to meet average expenses, &c. But this was doing no more than permitting the manager to do what the Salvage Association does for the underwriters at Lloyd's, and is no more inconsistent with the several liabilities of the members of the syndicate than is the employment of the Salvage Association with the several liabilities of the underwriters who employ it. Clauses 13 and 14 and the final clause 15 strongly favour the contention of the defendants that the agreement was not intended to create a partnership; and my judgment, therefore, upon the construction of the agreement, as well as upon the construction of the policy, is for the defendants. The further question was raised as to whether the syndicate jointly or the individual members were bound to return premiums for short interest. I am of opinion that it is in each case a liability of the individual members in the proportion of the amounts subscribed by each of them. Mr. Reed also contended, though not very strenuously, that, even though there was no partnership in fact, the members had held themselves out as partners, and he relied upon the fact that an office had been opened where the name "Shipowners' Syndicate (Reassured)" appeared upon the door; also that the same name was stamped on the paper used by the manager.

These, with the other facts in the case, were relied upon. They are clearly insufficient to justify me in coming to any such conclusion.

Judgment for defendants.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the syndicate generally, *W. A. Crump & Son.*

Solicitor for the defendant Hedges, *W. H. Herbert.*

Solicitor for the defendant Pattenden, *A. J. Oliver.*

Solicitors for the defendant Wheatley, *Steavenson & Couldwell.*

Court of Appeal.

From Chan. Div. (Lord Herschell; and A. L. Smith and Rigby, L.JJ.) Nov. 22.

In re KINGSTON COTTON MILL CO (LIMITED). (*a.*)

Company — Winding up — Auditor — Misfeasance — "Officer" of company—Table A—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

Where the articles of association of a company, so far as they relate to the auditing of accounts, are substantially the same as those contained in Table A, and as the articles relating to audit in In re London and General Bank, 43 *W. R.* 481, [1895] 2 *Ch.* 166, *the auditor is an "officer of the company" within the meaning of section* 10 *of the Companies (Winding-up) Act*, 1890.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Appeal from the decision of Vaughan Williams, J.

A summons was taken out against the directors and auditors of the Kingston Cotton Mill Co. (Limited) by the official receiver and liquidator for a direction that they were liable to pay certain sums of money which were alleged to have been improperly applied in payment of dividends upon certain preference shares, and that they were guilty of misfeasance or breach of trust in relation to the company in that they authorized, sanctioned, participated, or recommended, or permitted the issue of, reports and statements of accounts containing false and misleading entries with respect to the value of the company's property, stock-in-trade, and reserve fund.

The auditors moved to stay all proceedings under the summons as against the applicants on the ground that they were not officers of the company within the meaning of section 10 of the Companies (Winding-up) Act, 1890. That section provides that "where, in the winding-up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained, or become liable or accountable for, any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the court thinks just."

The articles of association dealing with auditors were as follow:—

"129. Once at least in every year the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors.

"130. The first auditors shall be appointed by the directors. Subsequent auditors shall be appointed by the company in general meeting.

"131. If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

"132. The auditors may, but need not, be members of the company, but no person shall be eligible as an auditor who is interested otherwise than as a member in any transaction of the company, and no director or other officer of the company shall be eligible during his continuance in office.

"133. The appointment of the auditors shall be made by the company at their ordinary meeting in each year.

"134. The remuneration of the first auditors shall be fixed by the directors, and of subsequent auditors shall be fixed by the company in general meeting.

"135. Any auditor shall be re-eligible on his quitting office.

"136. If no auditor shall be appointed at any ordinary meeting, or if any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith appoint an auditor to act until the next ordinary meeting.

"137. If no appointment of auditors is made in manner aforesaid, the Board of Trade may, on the application of not less than five members of the

company, appoint an auditor to act until the next ordinary meeting, and fix the remuneration to be paid to him by the company for his services.

"138. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

"139. Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company. He may, unless he himself is an accountant, employ accountants or other persons at the expense of the company to assist him in investigating such accounts, and he may, in relation to such accounts, examine the directors or any other officer of the company.

"140. The auditors shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet, containing the particulars required by these articles and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs; and in case they have called for any explanation or information from the directors, whether such explanation or information has been given by the directors, and whether the same has been satisfactory; and such report shall be read together with the report of the directors at the ordinary meeting."

Article 124 provided that the accounts of the company should be kept "in such manner and upon such principle as shall be decided by the auditors."

Vaughan Williams, J., held that the auditors were "officers of the company" within the meaning of section 10 of the Companies (Winding-up) Act, 1890.

The auditors appealed.

Swinfen Eady, Q.C., and *Eve, Q.C.*, for the appellants.—It may be that if auditors are guilty of negligence in the performance of their duty, an action will lie against them as against any other professional person who is guilty of negligence, but they are not amenable to the summary jurisdiction conferred by the Act of 1890. An auditor is not an "officer of the company" within the meaning of section 10 of that Act. That section is levelled at those persons who conduct the affairs of the company and have control of its funds. "Misfeasance" in the section means misfeasance in the nature of a breach of trust, and an auditor is not a person who can be guilty of misfeasance of that kind: *In re Canadian Land Co., Coventry and Dixon's case*, 28 W. R. 775, 14 Ch. D. 660. It is not compulsory to have an auditor at all, if the articles exclude the obligation imposed by Table A; and except in the case of a bank, the officer aimed at by section 10 must be an officer *ejusdem generis* with those enumerated. In *In re Great Western (Forest of Dean), &c., Co., Carter's case*, 34 W. R. 516, 31 Ch. D. 496, it was held that a solicitor was not an officer of the company, and in *In re Imperial Land Co. of Marseilles, In re National Bank*, 18 W. R. 661, L. R. 10 Eq. 298, that a banker was not. [RIGBY, L.J., referred to *In re Patent Bread Machinery Co., Ex parte Valpy and Chaplin*, 20 W. R. 347, L. R. 7 Ch. App. 289.] [*Cozens-Hardy, Q.C.*—That is over-ruled by *Wright v. Horton*, 36 W. R. 17, 12 App. Cas. 371.] The cases were referred to in *In re Liberator Permanent Benefit Building Society*, 71 L. J. N. S. 406, 43 W. R. Dig. 43. *In re The London and General Bank*, 43 W. R. 481, [1895] 2 Ch. 166, was decided upon the special circumstances of the case and the Act of Parliament, and Kay, L.J., was careful to guard himself from holding that in every case of a joint-stock company the auditor is an officer of the company. [Lord HERSCHELL.—If we hold in your favour in this case, we should do so on a very thin and narrow distinction from that case. His lordship referred to *In re Native Iron Ore Co.*, 24 W. R. 503, 2 Ch. D. 345, and *In re South Durham Iron Co., Smith's case*, 27 W. R. 845, 11 Ch. D. 579, where *Valpy's case* was discussed.] It was also discussed in *In re International Pulp and Paper Co., Knowles' Mortgage*, 25 W. R. 822, 6 Ch. D. 556.

Cozens-Hardy, Q.C., and *W. D. Rawlins*, for the official receiver.—This case has really been decided by the Court of Appeal in *In re London and General Bank*. That case was decided under the Companies Act, 1879, which, by section 7, introduced provisions with regard to audits which are practically identical with those contained in Table A, and in the present case it is admitted that the articles of association dealing with auditors are substantially the same as those of Table A. That case, therefore, cannot be distinguished.

Lord HERSCHELL.—In this case an application is made under the 10th section of the Companies (Winding-up) Act, 1890, to proceed against the directors and the auditors of the company on the ground that they have been guilty respectively of misfeasance within the meaning of that section. We have not here to determine whether they have been guilty of such misfeasance. We have not the facts before us. We have not even to determine whether the allegations in the summons show a *primâ facie* case of what would be misfeasance under the statute. All that we have to determine is whether the auditors in the present case are persons in such a position, coming within the meaning of the word "officers" in section 10, as to entitle the liquidator to proceed against them.

Now, a question very similar to this came before the Court of Appeal in the case of *In re London and General Bank*. The question there was whether the auditors of the London and General Bank were "officers" within the meaning of the section in question. This court held that they were, and I can see no substantial distinction between that case and the present. I will allude in a moment to the distinctions which have been suggested, but it seems to me that it would be frittering away the case altogether if we were to rest our determination upon any of the distinctions which alone can be made in the present case.

Now, I desire to express no opinion whatsoever whether the *London and General Bank case* was rightly or wrongly decided. It may be that the reasoning in that case is open to criticism. It may be that some considerations which bear upon the question were not referred to or had not full effect given to them. Upon all that I express no opinion at all. I desire to retain absolute liberty of action, in case it should hereafter become necessary, on the question whether *In re London and General Bank* was rightly decided.

Now let us see what *In re London and General Bank* did decide. It decided that the auditors appointed in that case were "officers" within the meaning of the section. On what ground? Under the Act of 1879 certain articles contained in Table A, which it had been open to companies either to adopt or to reject as they pleased, became by statute absolutely binding on banking companies. They had to appoint auditors, and certain provisions were made applicable to them which were in substance the provisions of Table A, so far as auditors are concerned, in the Act of 1862. I say "in substance," and so far as it is material to the present case. Now, that company —the banking company—besides what I may call

these compulsory articles, had also articles of its own. The reasoning in *In re London and General Bank* was rested largely, I may say mainly, on this, that the auditors were by the provisions of the Act of 1879, which were made applicable to the bank, made officers of the company. The language of those provisions was dwelt upon as showing that they were officers of the company. It is true, and here comes the distinction suggested, that in that case they were so denominated in an indemnity clause in the articles, whereas in the present case they are not so denominated; and an argument might be based on the indemnity clause with the view of supporting the contention that they are not officers. But it would be far too narrow a distinction upon which to rest any difference of decision.

In the present case the articles are, in substance, the same. The auditors are created officers, if they are officers, in precisely the same way in the present case as in the *London and General Bank case*. I can see no substantial distinction between the two. If misfeasance of officers extended to the auditors in that case, it seems to me that no substantial reason can be given why misfeasance of officers should not extend to auditors in the present case. That really is all I need say. I cannot in substance distinguish the two cases. The reasoning which led to the conclusion in the one case seems to me logically and necessarily to lead to it in the other.

But, of course, all that we decide is that in a case identical with the *London and General Bank case*, as I take this to be in substance, the auditor is an "officer." We decide that, as bound by the *London and General Bank case*. Beyond that our decision does not go. I say this because some general observations were made by the learned judge in the court below, and I am not going to express any opinion at all on any of the points to which allusion was made. Those are not determined by the present case. All that is determined is this, that where the facts in substance are identical (and I have shown that I think them identical here) between the *London and General Bank case* and any case that arises the *London and General Bank case* must be treated as an authority. For these reasons I think that this appeal must be dismissed.

A. L. Smith, L.J.—I am of the same opinion. There cannot be a doubt that we are bound by the *London and General Bank case*, and the real question to-day is whether or not the present case can be distinguished from the *London and General Bank case* in substance, and from the reasoning which was given by the learned Lords Justices in coming to the conclusion that the auditor was an "officer" of the company. There are three points, I understand, which are alluded to. The first is that in the *London and General Bank case* the auditors were "officers" by statute. It was pointed out by Mr. Cozens-Hardy that, although that was so, Table A was in substance incorporated in that case in the articles of the bank. The next thing that was pointed out was that in the *London and General Bank case* there was a definition clause which alluded to auditors as "officers," which is not present here; and the third distinction which was pointed out was that in the indemnity clause "auditor" was mentioned, in the present case "officer" is mentioned and not "auditor." Except those three distinctions that have been pointed out, the rest of the case is absolutely identical. In my opinion we should be frittering away the judgment in the *London and General Bank case* altogether if we were to try and distinguish the present case. Being bound by the *London and General Bank case*, I say that in any case which comes within the terms of it the auditor is an "officer" of the company, and further than that I am not prepared to go on the present occasion.

Rigby, L.J.—I arrive at the same conclusion—that is to say, that we are in this case bound by the decision in the *London and General Bank case*. I cannot see any substantial distinction between those clauses with regard to auditors that were made compulsory on the company by the Act of 1879 and the clauses in the present case, although in the articles of association there are minor differences. I do not think they are sufficient to differentiate the two cases, and we are bound loyally to follow that case. I give no kind of opinion one way or the other whether in support of or against the general question, and especially I give no kind of opinion with regard to other questions which are raised in the judgment of Vaughan Williams, J., which might seem to have a more general effect than the decision in the *London and General Bank case*.

Solicitors, *Collyer-Bristow, Russell, Hill, & Co.*; *Robbins, Billing, & Co.*

From Q. B. Div. (Lord Esher, M.R., and Lopes, and Kay, L.JJ.) Nov. 21.

Colonial Securities Trust Co. v. Massey. (a)

Practice—Appeal—Action tried without jury—Issues of fact—Rule of Court of Appeal.

Per Lord Esher, M.R., *and* Lopes, L.J.—*Where an action is tried by a judge without a jury, the presumption is that his decision on the facts was right, and that presumption must be displaced by the appellant, and unless he can satisfactorily make out that the decision of the judge was wrong, the appeal will be dismissed; and this rule applies also to the case where the witnesses have not been examined before the judge in the court below.*

Per Kay, L.J.—*The appeal being in the nature of a rehearing, it is the duty of the Court of Appeal, where the witnesses have not been examined before the judge in the court below, to try the case itself, and to pronounce the judgment which it thinks that the judge ought to have pronounced.*

Appeal of the defendants from the judgment of Day, J., at the trial of the action without a jury.

The questions at the trial were questions of fact, the material evidence being that taken on commission. The case is only reported for the observations of the court with regard to appeals on questions of fact from the decisions of judges when trying actions without juries.

C. A. Cripps, Q.C., Edward Pollock, and *P. Rose-Innes,* for the defendants.

Bompas, Q.C., and *T. W. Chitty,* for the plaintiffs.

Lord Esher, M.R.—We must first consider what is the rule of conduct of this court when hearing an appeal on the facts from the decision of a judge trying an action without a jury. It must be based upon the rule of conduct of the old Court of Appeal in Chancery. In Chancery the appeal was called a rehearing, because the Court of Appeal could set aside the decree of the Vice-Chancellor and pronounce the decree that he ought to have pronounced on the facts. At common law no such thing as a rehearing was known. The Court of Appeal in Chancery, however, acted on this rule of conduct, that they would

(a.) Reported by W. F. Barry, Esq., Barrister-at-Law.

not allow the appeal unless they were satisfied that the judge below was wrong. If they were left in doubt whether he was right or wrong, they would say that the appellant had not discharged the burden that was upon him of proving that the judge was wrong, and would dismiss the appeal. The Court of Appeal would be more unlikely to disturb the judgment if the witnesses had been before the judge than if they had not. Still the same rule applies, though not so strongly in the latter as in the former case; and this court will not set aside the judgment unless it is satisfied that it is wrong. I have often expressed this view, and it has been well expressed by Lopes, L.J., in *Savage* v. *Adam*, W. N. (1895) 109: "Where a case tried by a judge without a jury comes to the Court of Appeal the presumption is that the decision of the court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then, inasmuch as the appeal is in the nature of a rehearing, the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the court below." [His lordship then reviewed the evidence, and came to the conclusion that the appeal should be dismissed.]

LOPES, L.J., concurred.

KAY, L.J.—This is an appeal from a judge sitting without a jury. By ord. 58, r. 1, the appeal is in the nature of a rehearing. Some of the witnesses were examined before the judge, but the case does not depend upon their evidence at all, but upon the evidence taken on commission. So far as this latter evidence is concerned, we have the same means of judging of it as the learned judge, and we must see whether we take the same view of the evidence as he does; and if we do not, we must respectfully differ from him, and pronounce the judgment that we think he ought to have pronounced. We must, in fact, try the case ourselves. I quite agree that in a case of difficulty, where this court cannot come to the conclusion that the judge was wrong, it must give full weight to the decision of the judge. But I conceive it to be the duty of the Court of Appeal to try the case and to pronounce the judgment which it thinks that the judge ought to have pronounced. [His lordship then reviewed the evidence, and said:] I agree that in a case of such doubt and difficulty great importance should be given to the decision of the learned judge, but having done so I have arrived at a different conclusion, and feel it my duty to express it.

Appeal dismissed.

Solicitors for the plaintiffs, *Bompas, Bischoff, & Co.*

Solicitors for the defendants, *Ingle, Holmes, & Son.*

From Prob. Div. & Adm. Div. (Lindley, Lopes, and Rigby, L.JJ.) } June 28; July 1, 2; Aug. 7, 1895.

RUSSELL *v.* RUSSELL (*a*.)

Divorce—Cruelty—Husband charged by wife with committing an unnatural offence—Charge persisted in after verdict of jury acquitting husband—Restitution of conjugal rights—Judicial separation—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.

Per Lindley *and* Lopes, L.JJ.—*To constitute legal cruelty there must be danger to life, limb, or health bodily or mental, or a reasonable apprehension of it.*

Per Rigby, L.J.—*There may be exceptional cases in which, without bodily injury or threat of it, the injury to mental feelings may be legal cruelty.*

Where a wife persisted in charging her husband with having committed an unnatural offence of which he had been acquitted by the verdict of a jury,

Held (Rigby, L.J., *dissenting*), *that such conduct on the part of the wife did not amount to legal cruelty, and formed no ground for granting the husband a decree of judicial separation; but,*

Held also (*by* Lindley, Lopes, *and* Rigby, L.JJ.), *that the wife's conduct disentitled her to a decree for restitution of conjugal rights, inasmuch as, since the Matrimonial Causes Act*, 1884, *the court, by necessary implication, had power to refuse a decree for restitution wherever the result will be to compel the court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case.*

Appeal of the Countess Russell, the petitioner, from an order of Pollock, B., made on the 24th of April, 1894.

In 1890 the petitioner brought a suit against the respondent for judicial separation, and therein charged him with having committed an unnatural offence.

The jury in that suit found a verdict in favour of the respondent, and the suit was dismissed.

The petitioner subsequently, in conversation, in letters, and in an interview with the editor of a newspaper called the *Hawk*, repeated the charge against her husband.

In the present suit the petitioner sought restitution of conjugal rights, and the respondent counterclaimed for judicial separation on the ground of cruelty on the part of the petitioner in making and persisting in such charges.

At the trial of the suit before Pollock, B., the jury found that the petitioner had been guilty of cruelty, and also that in her conduct and correspondence since the former trial she had not acted *bonâ fide*.

Upon these findings Pollock, B., dismissed the petitioner's suit, and decreed judicial separation in favour of the respondent.

The petitioner appealed.

Murphy, Q.C., and *Barnard*, for the appellant.—There is no evidence of legal cruelty, and the judge misdirected the jury. That being so, there is no answer to the wife's petition. To constitute legal cruelty there must be injury to health, present or proximate. There is an unbroken line of authorities in favour of that proposition; and if the courts are once driven off that ground, where are they to stop? The Divorce Court must administer the ecclesiastical law, and under that law the only answer to an action for restitution is the commission of a matrimonial offence.

They referred to *Holmes* v. *Holmes*, 2 Lee 116; *Evans* v. *Evans*, 1 Hagg. Cons. 35; *Milner* v. *Milner*, 4 Sw. & T. 240, 10 W. R. Div. Dig. 16; *Paterson* v. *Paterson*, 3 H. L. Cas. 308; *Otway* v. *Otway*, 2 Phil. 95; *Barlee* v. *Barlee*, 1 Add. 301; *Westmeath* v. *Westmeath*, 2 Hagg. Ecc. Supp. 1, 57; *Bray* v. *Bray*, 1 Hagg. Ecc. 163; *Dysart* v. *Dysart*, 3 Notes of Cas. 324; *Furlonger* v. *Furlonger*, 5 Notes of Cas. 422; *Gale* v. *Gale*, 2 Rob. Ecc. Rep. 421; *Curtis* v. *Curtis*, 1 Sw. & T. 192; *Burroughs* v. *Burroughs*, 9 W. R. 680, 2 Sw. & T. 303; *Pichard* v. *Pichard*, 13 W. R. 188, 33 L. J. P. & M. 158; *Scott* v. *Scott*, 34 L. J. P. & M. 22; *Cousen* v. *Cousen*, 4 Sw. & T. 164, 13 W. R. Dig. 13; *Milford* v. *Milford*, 15 W. R. 319, L. R. 1 P. & D. 295; *Forth* v. *Forth*, 15 W. R. 1091,

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

36 L. J. P. & M. 122; *Stace* v. *Stace*, 16 W. R. 1176, 37 L. J. P. & M. 51; *Kelly* v. *Kelly*, 18 W. R. 767, L. R. 2 P. & D. 59; *Birch* v. *Birch*, 21 W. R. 463, 42 L. J. P. & M. 23; *Rippingall* v. *Rippingall*, 24 W. R. 967; *Mytton* v. *Mytton*, 35 W. R. 368, 11 P. D. 141; *Henderson* v. *Broomhead*, 7 W. R. 492, 28 L. J. Ex. 360; *Seaman* v. *Netherclift*, 24 W. R. 884, 1 C. P. D. 540; *Oliver* v. *Oliver*, 1 Hagg. Cons. 361; *Neeld* v. *Neeld*, 4 Hagg. Ecc. 263; *Greenway* v. *Greenway*, 6 Notes of Cas. 221; *Tomkins* v. *Tomkins*, 1 Sw. & T. 168, 6 W. R. Div. Dig. 12; *Duplany* v. *Duplany*, [1892] P. 53, 40 W. R. Dig. 77; *Sullivan* v. *Sullivan*, 2 Add. 299; *Miles* v. *Chilton*, 6 Notes of Cas. 636; *Andrews* v. *Rose*, 37 W. R. 239, 14 P. D. 15; and *Mackenzie* v. *Mackenzie*, [1894] A. C. 384, 43 W. R. Dig. 161.

Robson, Q.C., and *Bargrave Deane*, for the respondent.—There can be no offence of a more serious character than this, to make deliberately a false allegation with the ulterior motive of getting money. The cases cited merely refer to cruelty of the ordinary character. In *Bray* v. *Bray* the parties were living together, and it was a mere domestic quarrel. [LOPES, L.J.—Is there any case in the books in which mere words have been held to amount to cruelty?] *Milner* v. *Milner* and *Kelly* v. *Kelly* [LOPES, L.J.—There what was done injured the lady's health.] The violence was not the substance of the case. [LOPES, L.J.—Can you produce any case in which there was not some violence and injury to health.]

They referred to *D'Aguilar* v. *D'Aguilar*, 1 Hagg. Ecc. 775; *Saundars* v. *Saundars*, 5 Notes of Cas. 408 at pp. 418, 419; *Stace* v. *Stace*; *Forth* v. *Forth*; *Woodey* v *Woodey*, 23 W. R. 386, 31 L. J. N. S. 647; *Paterson* v. *Paterson*; and *Mackenzie* v. *Mackenzie*.

Murphy, Q.C., in reply, referred to *Otway* v. *Otway*, 13 P. D. 141, 37 W. R. Dig. 84, and *Weldon* v. *Weldon*, 32 W. R. 231, 9 P. D. 52.

Cur. adv. vult.

LOPES, L.J., read the following judgment, in which LINDLEY, L.J., concurred.—This is a most important case, and admittedly one of first impression; it is, therefore, with anxious care that the court approaches its consideration and determination. It is a suit by the wife for the restitution of conjugal rights, which the respondent resists on the ground of his wife's cruelty. The jury found that the petitioner had been guilty of cruelty towards the respondent, and that in her conduct and correspondence since the first trial she had not acted *bonâ fide*—which means that she did not believe the charge made against her husband. The cruelty set up may be thus stated—viz., that the wife, who had for two years been living apart from her husband, persisted in charging him with the commission of an unnatural offence, of which he had been acquitted by the verdict of a jury, and which charge she had refused to apologize for or retract.

Two questions arise—(1) Was legal cruelty established? If it was, the respondent is entitled to a judicial separation, and the wife fails in the suit for restitution of conjugal rights. (2) If it was not, is the petitioner, in the circumstances of this case, entitled to a decree for restitution of conjugal rights? The facts of the case, so far as concerns the present inquiry, are not largely, if at all, in dispute. It is necessary, however, to state some of them, in order to make the judgment of the court intelligible. The petitioner and respondent were married in February, 1890, and they separated in the following May. They then lived together again for a short time, but in June they separated again for a period of three months. The three months went by, and they never cohabited again. In November, 1890, the wife filed her petition for a judicial separation, charging her husband with many acts of cruelty towards her, and amongst them with having committed an unnatural offence.

In December, 1891, that petition was tried. The jury, after a long trial, acquitted the husband of the cruelty alleged, and his character was thereby completely vindicated. Then commenced the course of conduct on the part of the wife of which the respondent now complains. It may be thus described—that she deliberately persisted in charging him with the criminal offence of which the jury had acquitted him. She did this on several occasions by word of mouth, and by letters addressed to members of his family and others, and would not retract or apologize. In an interview which the petitioner had with the editor of the *Hawk* she reiterated her charge against her husband, and intimated that had the opportunity been afforded her she could have established it. The jury have found that the petitioner did not believe the charge to be true. If she did not, her repeating it is the more reprehensible. If she did, her desire now expressed to return to cohabitation with her husband is incredible. However, that she conducted herself in the way we have described is indisputable. Is this legal cruelty? This is the question the court has to determine. The learned judge in the court below has not defined legal cruelty, and has left it somewhat at large to the jury. The court, in our judgment, ought to define it—we will not say exhaustively, but, at any rate, sufficiently for the purposes of this case. We define it thus: There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty.

We propose to test the definition by some of the more important cases that have been decided on the subject. Section 22 of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), says: "In all suits and proceedings other than proceedings to dissolve any marriage the court shall proceed on principles and rules which, in the opinion of the court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have hitherto acted, but subject to the provisions herein contained and to the rules and orders under the Act." It is material, therefore, to consider what, in the view of the ecclesiastical courts, constituted legal cruelty for which a divorce *a mensa et thoro* could be obtained. *Evans* v. *Evans*, decided by Lord Stowell in 1790, is the leading case on the subject. As we read that case, no husband could be found guilty of legal cruelty towards his wife unless he had either inflicted bodily injury upon her, or had so conducted himself towards her mental or bodily health as to raise a reasonable apprehension that he would either inflict actual bodily injury upon her or cause actual injury to her mental or bodily health. In a word, he must so have conducted himself towards her as to render future cohabitation more or less dangerous to her life, or limb, or mental or bodily health. There are some expressions in that most admirable judgment of Lord Stowell to which we would wish to refer. At p. 38 (1 Hagg. Cons.) the learned judge says: "What merely wounds the mental feelings is in few cases to be admitted, when they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, and a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly—not innocent, surely, in any state of life—but they are not that cruelty against

which the law can relieve." At p. 39 the learned judge sums up what he had previously said thus: "These are negative descriptions of cruelty, they show only what is not cruelty; and yet, perhaps, the safest definitions which can be given under the infinite variety of possible cases that may come before the court. But if it were at all necessary to lay down an affirmative rule, I take it that the rules cited by Dr. Bever from Clarke and the other books of practice are a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it; and I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because, assuredly, the court is not to wait till the hurt is actually done; but the apprehension must be reasonable." This was the state of the law in 1790, and we venture to say that the doctrine there enunciated as to what constituted legal cruelty has never been materially altered. At that time no amount of want of civility, rudeness, insult, or abuse, however gross, which did not affect life, limb, or mental or bodily health, or where there was not a reasonable apprehension of its so doing, was considered by the ecclesiastical tribunals to amount to legal cruelty, and that though the parties were at the time cohabiting. So far as we can ascertain, the authority of the case of *Evans* v. *Evans* has never been questioned. It would be superfluous to cite the long course of decisions with regard to cruelty which have been decided since *Evans* v. *Evans*. Before the Divorce and Matrimonial Act, 1857, and since the passing of that Act, the same rule with regard to what constitutes legal cruelty has been maintained, and has been followed by Sir Cresswell Cresswell, Lord Penzance, and Sir James Hannen; and Sir Charles Butt, in December, 1891, at the trial of the case of *Russell* v. *Russell*, when the present petitioner sued for a judicial separation on the ground of cruelty, said, in laying down the law to the jury, that cruelty had been very often defined as injury causing danger to life, or limb, or health, or causing reasonable apprehension of danger to life, or limb, or health; and it is, generally speaking, where the continuation of the conduct charged would be likely to produce injury, either bodily or physical, or injury to health without any physical violence, that this court interposes to protect the wife. There is no case in the books where words alone, however violent, however galling, and even if imputing a crime of the most disgraceful kind, have been held *per se* to constitute legal cruelty, and this when the parties were cohabiting as husband and wife.

The case of *Bray* v. *Bray* is a case which, so far as we can discover, has never been cited or followed as an authority, and is contrary to *Gale* v. *Gale*, subsequently referred to. *Bray* v. *Bray* was a decision only with regard to adultery. In *Milner* v. *Milner* the assault was quite sufficient to show that the husband was unable to control himself, and could not be trusted not to break out into violence towards his wife. In *Popkin* v. *Popkin*, 1 Hagg. Ecc. 765*n*, a husband's attempt to debauch his own female servants, and in *Durant* v. *Durant*, 1 Hagg. Ecc. 733, the bringing by him of groundless and malicious charges against his wife's chastity were only held to be acts of legal cruelty to the extent that it was said of them that they would weigh with the court in conjunction with other charges. In *Popkin* v. *Popkin* it was said: "The attempts to debauch his own women servants was a strong act of cruelty; perhaps not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings." And in *Durant* v. *Durant* the court said: "If a person who had ill-treated his wife, and had been guilty of acts of violence and words of menace, and finally made a charge of misconduct and criminality which he had not attempted to allege nor to prove, and under that pretence had shut his door against her, it cannot be doubted that such conduct would be admissible matter in a suit for separation by reason of cruelty." By some authorities in the civil law this was held to be a distinct ground of separation, and passages were quoted in the argument to that effect, which it is unnecessary again to state. These courts, and the law of this country, have not gone the length of recognising it as a substantive ground, but it is a fact amongst others *per quod consortium amittitur*. In *Oliver* v. *Oliver* it is said: "Words of menace importing the actual danger of bodily harm will justify the interposition of the court, as the court ought not to wait until the mischief is actually done. But the most innocent and deserving woman will sue in vain for the interference for words of mere insult, however galling." Again, in *Gale* v. *Gale* a charge of incest *per se* was held to be insufficient to constitute legal cruelty. Sir John Dodson, in his judgment, said: "Undoubtedly the charge of having committed incest is not *per se* sufficient to constitute legal cruelty; but coupled with other averments of a substantial character, I think, on the authority of the cases cited, that charge may form a part of the libel." *Birch* v. *Birch* is worthy of notice. It was the petition of the wife for dissolution of the marriage on the ground of adultery coupled with cruelty, and was decided by Sir James Hannen in 1873. The cruelty relied on was of this nature. The husband frequently beat one of the children with great violence in the wife's presence, swore at and abused her, and refused her delicacies which her state of health required. She did not allege that she had ever been struck by her husband, or that any act of violence had been committed by him towards her. Sir James Hannen says: "I cannot hold consistently with the authorities that legal cruelty is established. I must hold to those views which seem to have been taken by my predecessors, that the cruelty must be of such a character as to endanger the life, the limbs, or the health of the party claiming relief. In saying this it must be such as to endanger the health of the complaining party; it does not follow that it should be such as actually to reach that point so as to cause injury to health. If there be reasonable ground to believe that it will be persevered in so as to cause mischief, then the compaining party may bring it before the court as constituting legal cruelty, for it is not necessary that he or she should wait until the mischief is done. But I cannot come to the conclusion in this case that the wife had any apprehension of personal violence."

We proceed to deal with the cases upon which the respondent relies. We select the strongest of them: *Paterson* v. *Paterson*, has been mainly relied upon by the respondent. It was a Scotch case, and, although it was said that the general principle of the law as to divorce *a mensa et thoro* was the same in England and Scotland, Lord Brougham, at the end of his judgment, says: "I will not say that the law of Scotland, as far as decided cases go, may not extend somewhat further than our laws in favour of the remedy." Lord Brougham at p. 337 (3 H. L.) says:—

"Suppose a man were continually charging his wife with every sort of immorality and criminal conduct and there were not a shadow of foundation for those charges, made before her family, her friends, relatives, and servants, and in face of the world, there is little doubt that what now rests only upon opinions would ultimately assume the form of decisions, and that to such injurious treatment, making the marriage state impossible to be endured and rendering life almost unbearable, the courts of the country would extend the remedy of a divorce *a mensa et thoro*." These, however, were *obiter dicta*, and were not necessary for the decision, and it is to be observed that the House of Lords, the Court of Session having pronouncedf or a divorce, reversed the interlocutor. Again, at p. 318, Lord Brougham says: "That the ground of the remedy is confined to personal violence is not the law of England, and certainly not the law of Scotland. The law is nearly, if not altogether, the same in the two countries. It is not true that the law of England either requires actual injury to the person or threat of such injury." We presume that this means that a reasonable apprehension of danger to life, limb, or health, bodily or mental, will suffice without any actual personal injury or the threat of it, because at p. 309 Lord Brougham had said: "Separation of married persons is not justified by conduct on the part of the husband rendering the wife's life miserable and uncomfortable, unless such conduct is accompanied by violence, actual or menaced, to her life, limb, or health, or by cruelty and maltreatment rendering it impossible for her to live with him." We cannot think this case can be relied upon as a decision making the conduct of the wife in this case sufficient to constitute legal cruelty. Nor do we find in subsequent cases that it has been cited or allowed to prevail as establishing such an extension of the remedy. Then there is the case of *Kelly* v. *Kelly*, which has gone as far as any case has gone in the direction contended for by the respondent. It was decided by the Judge Ordinary, Lord Penzance, and was in 1870 appealed to the full court, consisting of Channel, B., and the Judge Ordinary. And it was held that if force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health and render a serious malady imminent, although there be no actual physical violence such as would justify a decree, it is legal cruelty, and entitles her to a judicial separation. Previous cases were carefully considered, and Channel, B., after reviewing the evidence, says at page 71 (L. R. 2 P. & D.): "In conclusion, we have no doubt whatever that the law was correctly laid down on the hearing of this case, that the evidence warranted the conclusion of legal cruelty drawn from it; and, satisfied as we are of the extreme peril to which Mrs. Kelly's health was exposed without any adequate fault of her own, we think that the interference of this court was justified and necessary, and the appeal should be dismissed." The Judge Ordinary, at p. 72, says: "These, then, are the grave misdeeds which, according to the argument of the appellant, are to warrant this court in deciding that Mrs. Kelly is to return to her husband and be subject again to that discipline which, in the opinion of all who saw her when she last escaped from it (an opinion, be it remembered, that Mr. Kelly does not even in argument question), would end in her paralysis or madness." Again, at p. 76: "The health and safety of the wife is no doubt the leading consideration," and "so much injustice, so much perversion of mind, such abiding rancour for so trifling a cause, so much deliberate oppression under provocation so slight, moral chastisement so severe, administered with so much system, maintained with such tenacity up to the brink of so perilous a danger to health, with so utter a disregard of consequences, and all to extort confession of motives of which there is no proof, and force repentance without consciousness of wrong, will probably never be exhibited again." That the decree proceeded on the ground of the great danger to the health of Mrs. Kelly is beyond controversy.

In the case we are now considering no injury to health or reasonable apprehension of it is alleged, or proved, or even suggested. If the point had been raised, the jury ought to have dealt with it, and it should have been left to them. This court cannot now say that there must be injury to the husband's health, and act upon any such inference. *Kelly* v. *Kelly*, therefore, cannot be relied upon by the respondent. We do not know of any other case to which it is necessary to refer. The present case is a case where the cruelty alleged is cruelty by the wife towards the husband. The difference of the sexes makes no essential difference in the principles applicable to the case. Dr. Lushington said, in *Furlonger* v. *Furlonger*: "Generally speaking, that would be cruelty if practised by a wife towards her husband which would be held to be cruelty if done by him towards her. I say generally speaking, for I think there must be some distinctions necessarily founded on the great difference between the sexes, and the power of the husband in ordinary circumstances to protect himself from the wife's violence; still the same great rule of danger to life or limb must prevail. In these as in all other cases of the same genus necessary protection is the foundation of all separation."

Mr. Deane in his very able argument for the respondent ventured on a definition of legal cruelty. He said the test was "whether the spouse complained of had so treated the complaining spouse and so manifested his or her feelings towards her or him as to cause a reasonable apprehension that the duties of married life could not be discharged, but married life must be unbearable if an order was made that married life should be resumed." Mr. Deane admitted that there was no case in the books which had so far extended the doctrine of legal cruelty. We are not prepared in the face of such a consistent body of authority arrayed against it, proceeding from the most eminent judges who have ever adorned the tribunals dealing with the subject, to authorize such a departure. If such an extension of the remedy is to be allowed, it seems to us that it is for the Legislature, or at any rate for the ultimate court of appeal, to take this important step in advance.

It is said this is an exceptional case, and so it may be; but if it is held that the conduct of the wife here constitutes legal cruelty, it would be difficult logically to say that any spouse who leaves the other spouse and charges him or her, and persists in so doing, with any serious criminal offence—viz., murder or larceny—without any justification for so doing, was not guilty of legal cruelty for words used without any suggestion of danger to life, limb, or health, and thereby entitled to a divorce *a mensa et thoro*, and, if coupled with the adultery of the husband, to a divorce *a vinculo*. Adhering to the definition of legal cruelty which, for the purposes of this case, we have laid down—viz., that there must be danger to life, limb, or health, present or proximate, by which we mean a reasonable apprehension of it, to constitute legal cruelty, we come to the conclusion that there was in this case no evidence of legal cruelty which ought to have been left to the jury, and that the respondent is not therefore entitled to the decree

for a judicial separation which he prays in his answer.

We come now to the question of the wife's right to a decree for restitution of conjugal rights. Her case is simply this—viz., that, unless her husband is entitled to a decree for divorce or separation, she is entitled, as a matter of course, to a decree for restitution. She contends that the court has no discretion in the matter, and cannot by law refuse her relief in the case supposed, however detestable her conduct may have been, and although it is plain that her real object is not to live with her husband, but to procure a separation from him, and to compel him to make her an allowance. These are startling propositions, and they require careful examination. It will be convenient, first, to ascertain the ecclesiastical law on the subject before the passing of the Divorce Act, and then to inquire what modifications in that law were introduced by that Act, or have been made since. By the ecclesiastical law of this country, which was founded on the canon law, marriage has long been considered indissoluble. But judicial separation could be obtained by either party for adultery or cruelty on the part of the other. Unless, however, a judicial separation could be pronounced, the obligation of both husband and wife to live together was invariably recognized and was vigorously enforced. There are numerous cases in the books in which restitution of conjugal rights has been decreed at the instance of sometimes a husband and sometimes a wife whose conduct was unbearable, though falling short of cruelty in the technical sense of the word. (See, *inter alia*, *Holmes* v. *Holmes*, *Oliver* v. *Oliver*, *Dysart* v. *Dysart*, *Simmons* v. *Simmons*, 1 Robertson 566; *Hayward* v. *Hayward*, 1 Sw. and Tr. 81; *Rippingall* v. *Rippingall*.) The law on this subject will be found carefully investigated in *Dysart* v. *Dysart* and in a case which arose in Ireland in 1846, and to which we will refer. It is *Seaver* v. *Seaver*, 2 Sw. and Tr. 665, which was decided first in the Consistory Court of Dublin, and afterwards, on appeal, in the Court of Delegates. In this case both husband and wife had committed adultery. Neither, therefore, could obtain a divorce *a mensa et thoro* from the other, and it was held that the wife was entitled to a decree for restitution of conjugal rights. All the older authorities were there examined, and it was laid down in the clearest language that the ecclesiastical law of England recognized no middle state in the relation of husband and wife between that of *consortium vita* and *divortium a mensa et thoro*. It was in vain contended that in such a case as that before it the court ought not to interfere at the instance of either party against the other. The court held that, although the wife had committed adultery, yet she was entitled to a decree for restitution of conjugal rights so long as the relation of husband and wife subsisted and no decree for separation could be pronounced against her. Such we take to have been settled law previously to 1857, when the Divorce Act was passed. Cases were referred to in which the court allowed facts to be pleaded in answer to a suit for restitution of conjugal rights, although those facts would not have justified a decree for separation (*Moore* v. *Moore*, 3 Moore P. C. 84; *Stace* v. *Stace*, *Woodey* v. *Woodey*). But, although there are expressions in the judgments in those cases which point to a difference between suits for restitution and suits for separation, as regards particularity and certainty of pleading, and even cogency of evidence (*Simmons* v. *Simmons*), those cases do not warrant the inference that the court could or would refuse to decree restitution by reason of conduct falling short of adultery or cruelty in the technical sense. The question whether the ecclesiastical court had a discretion to refuse a decree for restitution on the ground of misconduct short of adultery or cruelty sufficient to warrant a decree for separation has been more than once considered, and we can find no case in which the court ever did refuse a decree for restitution where there was no sufficient ground for separation. In *Seaver* v. *Seaver* the court considered it had no discretion. (See also *Westmeath* v. *Westmeath*, *Simmons* v. *Simmons*, *Rippingall* v. *Rippingall*). In *Dysart* v. *Dysart* Dr. Lushington would not go so far as to say that extraordinary and unforeseen combinations of circumstances might not justify the court in holding its hand and not assisting either party, but he said in effect that such a course could only be justified on the improbability of safe cohabitation. Improbability of peace and happiness would not be sufficient. In none of the cases to which we have alluded did the question arise as to the right of husband or wife to a decree for restitution where the petitioner did not *bonâ fide* desire to resume cohabitation. The observations of Dr. Lushington in *Simmons* v. *Simmons* and in *Dysart* v. *Dysart* on the motives of the petitioner do not touch this point, which we pass over for the present, although we shall return to it. We pass now to the Divorce and Matrimonial Causes Act, 1857. Sections 2 and 6 transfer the jurisdiction previously exercised by the ecclesiastical courts in matrimonial matters to the new court created by that Act, and called the Court for Divorce and Matrimonial Causes. A new ground for separation—viz., desertion without cause for two years and upwards—was introduced by section 16 and by section 17. The new court is empowered upon petition to make a decree for restitution of conjugal rights or judicial separation on being satisfied of the truth of the allegations contained in the petition and that there is no legal ground why the same should not be granted. The use of the words "may decree," and not "shall degree," suggests an intention on the part of the Legislature to confer on the court a discretion as well as a power; but section 22 shows, we think, that no discretion which was not possessed by the ecclesiastical courts was intended to be conferred on the new court. The effect of that section is that the principles and rules acted on by the old courts in cases of restitution and separation are to be followed by the new court, subject to the creation of the new ground for separation by section 16, and to the new procedure by petition introduced by section 17, and to any rules which may be made under the authority of the Act. This construction of the sections is in accordance with *Julius* v. *The Bishop of Oxford*, 28 W. R. 726, 5 App. Cas. 214, and with decisions since the Act in suits for restitution of conjugal rights. In *Burroughs* v. *Burroughs*, Sir Cresswell Cresswell, and in *Scott* v. *Scott*, Lord Penzance, held that in a suit for restitution nothing short of a ground for separation afforded a defence to the respondent. In the recent Scotch appeal of *Mackenzie* v. *Mackenzie*, Lord Herschell expressed great doubt whether the rule not to refuse a decree for restitution of conjugal rights where no separation could be decreed was as inflexible and free from exception as the ecclesiastical courts held it to be. But, having regard to the numerous and weighty decisions in those courts, and to section 22 of the Divorce Act, and to the decisions upon it, we are not prepared to say that the law can be judicially held to be less rigid than we have stated, except in some cases which will be noticed presently. The only other alterations which have been made in the old law relating to suits for restitution of conjugal rights have been made by the Judicature Acts and by 47 & 48 Vict. c. 68. The effect of the Judicature Acts has been indirect, but at the same

time very important. It is, however, confined to separation deeds. These, as is well known, were treated as illegal and void by the ecclesiastical courts. (See *Westmeath* v. *Westmeath*.) But when it was settled, as it ultimately was (see *Besant* v. *Wood*, 12 Ch. D. 605, 27 W. R. Dig. 95), that the Court of Chancery would restrain a suit for restitution of conjugal rights if brought contrary to a covenant not to institute such a suit, and when the Judicature Acts made the Divorce Court a division of the High Court and abolished injunctions to stay actions, and substituted in all branches of the High Court defences instead of such injunctions, it followed that a separation deed containing a covenant not to sue for restitution of conjugal rights became a defence to a suit for such restitution. (See *Marshall* v. *Marshall*, 27 W. R. 399, 5 P. D. 19; *Clark* v. *Clark*, 33 W. R. 405, 10 P. D. 188.) The Judicature Acts, however, have not altered the general principles on which the ecclesiastical courts acted in suits for restitution except in the particular to which we have alluded; and the alteration in the law as to separation deeds has really no bearing on the present case. We have alluded to it simply to show that we have not overlooked it.

There remains for consideration the Act of 1884 (47 & 48 Vict. c. 68), which was passed expressly to amend the law as to the restitution of conjugal rights in England. The Act in terms relates only to the consequences of not obeying a decree of restitution when made; it does not in terms refer in any way to the grounds upon which such a decree can be refused. The old process of attachment for enforcing obedience to such a decree when pronounced is abolished (section 2). In lieu of that process the court is empowered, if the respondent refuses to obey the decree, to order a proper provision to be made for the wife if she is the petitioner (section 2), or for the husband if he is petitioner (section 3). In addition, however, to this, it is enacted by section 5 that a respondent who refuses to obey the decree shall be deemed guilty of desertion without reasonable cause, and that a suit for separation may be forthwith instituted, although two years may not have elapsed since failure to comply with the decree. It becomes most important, therefore, to consider what is the effect of section 5 of the Act of 1884. In our judgment it has materially altered the old law as to restitution of conjugal rights, and has given the court a power to refuse a decree which it had not before.

By section 16 of the Matrimonial Causes Act of 1857 desertion is the first time made a ground for judicial separation, and is not governed by the old ecclesiastical law; but it is no ground for a sentence of judicial separation unless the desertion is without cause. If the wife were petitioning for a judicial separation here on the ground of desertion against her husband, her conduct towards him would disable her from contending that the desertion was without cause, and she would fail in the suit.

By section 5 of the Act of 1884 disobedience to a decree for restitution of conjugal rights is made equivalent to desertion without cause. If, therefore, the petitioner obtains a decree for restitution of conjugal rights, she will be at once entitled to institute a suit for judicial separation for the statutory desertion created by the Act of 1884, although she could not, under section 16 of the Matrimonial Causes Act, 1857, have obtained such a decree unless it had been desertion without cause. We cannot think that such a result was ever intended, or that the necessity of proving absence of reasonable cause was intended to be taken away. It seems to us that since 1884, and by necessary implication, the court must have power to refuse a decree for restitution wherever the result will be to compel the court to treat one of the spouses as deserting the other without reasonable cause contrary to the real truth of the case. The practical consequence of this view of the Act of 1884 is that neither party obtains relief. Not the wife, because her conduct justifies the husband in saying that he has reasonable cause for refusing to live with her; not the husband, because his wife's conduct, bad as it has been, does not amount to cruelty in the legal sense of that term when speaking of grounds for divorce or separation. This state of things is anomalous, for before 1884 it was well settled that a respondent to a petition for restitution of conjugal rights was entitled to a separation if the petitioner failed to obtain relief. But this was because the only ground for failure was cruelty or adultery by the petitioner.

Now there is another ground introduced by necessary implication from the language of the Act of 1884, and analogy to the principles on which the ecclesiastical courts acted at first sight requires us to hold that as the petitioner fails in her application the respondent ought to succeed in his. The language of the Act of 1884 does not, however, warrant the inference that such a consequence as this was intended, and to hold that a respondent to a petition for restitution of conjugal rights is entitled to a judicial separation whenever the petitioner is refused relief would be so seriously to enlarge the grounds for separation that we do not feel justified in going so far. We are satisfied that such a result as that was never intended by Parliament. The court is bound to see that the Act is not used for a purpose for which it was never intended, and this principle, although it introduces an anomaly, compels us to refuse relief both to the wife and to the husband, even at the risk of being thought somewhat illogical.

The petition of the wife for restitution of conjugal rights and the counter-claim of the husband praying for a judicial separation must both be dismissed with costs, the costs of the one to be the set off against the costs of the other in the court below, and there will be no costs of appeal.

RIGBY, L.J.—The alleged cruelty in the case consists of charges of criminal offences of an infamous kind, persisted in after they had been found by the verdict of a jury to be untrue, and, as to the most important of them, brought forward and maintained under such circumstances as to preclude the belief that it was really thought by the wife to be true. No such case has ever before been brought before a court. For myself I can imagine no case of repeated insult or indignity more atrocious, and the question is whether it constitutes a case of legal cruelty. The judgment of Sir William Scott in *Evans* v. *Evans* is the leading authority on the subject. It has been quoted and relied upon from time to time, and, so far as I know, its accuracy has never been questioned as to any part of it, but it must be taken as a whole, and no one part can safely be left out of consideration. Sir William Scott begins by declining to define cruelty, and stating that it is the duty of the courts to keep the rule extremely strict; that the causes must be grave and weighty, and such as to show an absolute impossibility that the duties of married life can be discharged; that in a state of personal danger no duties can be discharged, "but what falls short of this is with great caution to be admitted." It is important to notice that he does not say that personal danger is absolutely necessary, and that nothing short of it can be admitted, but only that what falls short is to be admitted with great caution. It is clear that he thinks that there may be

cases where there is no personal danger, though such cases would be very exceptional. Lower down he says: "What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced." This involves that, in his opinion, there may be exceptional cases in which, without bodily injury or threat of it, the injury to the mental feelings may be legal cruelty. He does not, of course, attempt to indicate those cases, but I cannot doubt that he would have included a case like the present, since I am unable to imagine a case where the injury to the mental feeling could possibly be greater. Further on he refers to the case of wounding, not the natural feelings, but the acquired feelings arising from particular rank and situation, and states that, though the courts will not absolutely exclude considerations of that sort where they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed. He made no such statement with reference to the wounding of ordinary mental feelings, and the difference of treatment of the two classes of cases is, in my judgment, significant and important. He then refers to the decided cases, saying: "In the older cases of this sort which I have had an opportunity of looking into I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has always been jealous of the inconvenience of departing from it, and I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt." Now, as a description of the cases actually decided, this may be, and doubtless is, an accurate description. But it is certain that Sir William Scott did not intend to define legal cruelty; he expressly disclaims such an intention. If, indeed, there had been any decided case in which such charges as in the present case or verbal outrages of a similar nature had been considered before his time and treated as not constituting legal cruelty, the words used in this part of the judgment might be considered as a withdrawal of what he had before said. But no such case has been cited, and, indeed, since the time of Sir William Scott there have been, so far as I can find, only two cases in which verbal outrages of a nature at all comparable to those charged and proved in this case have been dealt with. I mean the cases of *Bray* v. *Bray*, decided by Sir John Nicholl in 1828, and *Gale* v. *Gale*, in which verbal charges of incest were made by a husband against a wife. In the first case Sir John Nicholl says: "It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation (of incest) made by this husband against his wife." Here it is important to observe that the reference to great personal violence makes it impossible to contend that Sir John Nicholl was not using the word "cruelty" in the sense of legal cruelty. In *Gale* v. *Gale*, which was, like *Bray* v. *Bray*, a case for divorce *a mensa et thoro* brought by a wife against a husband, where a charge of incest with a stepfather was made by the husband, Sir John Dodson said that "the charge of having committed incest is not *per se* sufficient to constitute legal cruelty," unless coupled with substantial acts of violence. I am altogether unable to reconcile that case with *Bray* v. *Bray*, and, for myself, I consider the earlier case as more in accordance with *Evans* v. *Evans* than the later. Of course there are numerous cases, including some decided by Sir William Scott himself, in which a general rule appears to have been laid down involving the necessity of violence or injury to health reasonably to be apprehended as a *minimum* for the establishment of legal cruelty, and there cannot be the slightest doubt that, as a general rule, covering the great—it may be the overwhelming—majority of cases, this is so. It appears to me that the existence of this general rule, which is pointed out by Sir William Scott as a good general outline of the canon law, as distinguished from a definition, accounts sufficiently for all the decisions and judgments referred to which must be considered with reference to the nature of the cases before the court. Nowhere do I find that a single judge has denied in direct language the possibility of extreme cases arising as pointed out in *Evans* v. *Evans*. I do not think that it is necessary for me to mention more than two other cases. The first is *Paterson* v. *Paterson*. This was a Scotch case; but, although it was said that in some decided cases the Scotch courts might have gone somewhat further than the English, the courts of both countries apply the same principles of the canon law, and I see no reason to question the statement of Lord Brougham that the law of both countries, so far as it is material for the present purpose, is the same. Lord Brougham's own opinion is plainly show by his observations (3 H. L. C., at pp. 328-9) to the effect that "if a husband, without any violence or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, to utter constant insults, vituperation, scornful language, charges of gross offences (utterly groundless) . . . if such a case were to be made out, or even short of such a case—viz., injurious treatment which would make the married state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule, at present somewhat vague, as to extend the remedy of a divorce *a mensa et thoro* to a case such as I have put." But I wish particularly to call attention to the actual order of the House. The Lord Ordinary had dismissed the action "in respect the libel is laid upon a series of insults and indignities said to have been offered by the defender to the pursuer, unaccompanied with personal violence, or any menace thereof; and that, without an allegation to that effect, it appears to be settled, on authorities which the Lord Ordinary is not entitled to question, that a libel at the instance of a wife against a husband founded on such averments as those now urged is not relevant." Lord Brougham said, with reference to this: "That, my lords, is not the law of Scotland; it is not the law of England; it is an inaccurate statement of the law in both countries; though I will not say that the law of Scotland, as far as decided cases go, may not extend somewhat further than our law in favour of the remedy." The words quoted were ordered to be struck out of the finding of the Lord Ordinary, which was otherwise confirmed. They appear to me to raise the very question whether there may not be a series of insults and indignities, independently of violence or the menace thereof, capable in themselves of amounting to legal cruelty. The other case to which I wish to refer is *Milner* v. *Milner*, decided by Sir C. Cresswell in 1852. There, no doubt, there had been an assault, but not one of an aggravated nature such as to create pain or injury to health. The gravamen of the charge was the indignity to the wife of treating her publicly as a prostitute, and it is this, to my mind, which Sir C. Cresswell characterizes as "gross and abominable cruelty." That gross and abominable insult

can only be called "cruelty" when it is accompanied by an assault not in itself sufficient to constitute legal cruelty appears to me so revolting a conclusion that I am glad that I do not feel myself constrained by authority to support it. In words taken from the judgment of Sir W. Scott in *Evans* v. *Evans*, I say that the charges established are grave and weighty, and such as to show an absolute impossibility that the duties of married life can be discharged. Disputes would inevitably arise between this ill-assorted pair, and I have no confidence or belief that, under provocation, a wife of the temper of the petitioner for restitution would not repeat, while I feel certain that the husband would be under the constant and reasonable apprehension of the repetition of, the infamous charges already made. I see no possibility under such circumstances of the duties of married life being fulfilled. It is about as clear as anything future can be that this husband and wife will never live together, even though a decree for restitution were granted. But the only hypothesis on which such a decree can be granted is that they are to do so, and I see no possibility of that taking place with safety to either the one or the other. I go further, and say that to force the husband and wife into the intimacy of married life with such charges existing, and not unlikely to be repeated—for I give no weight to withdrawals by counsel at the crisis of a case—would raise a state of personal danger to one or the other of the parties, it matters not which.

I think that the jury had good ground for the conclusion at which they arrived, that there was cruelty on the part of the wife entitling the husband to a judicial separation.

Solicitors, *Valpy, Chaplin, & Peckham; Vandercom, Hardy, Oatway, & Doulton.*

High Court of Justice.

Q. B. Div.
(Lord Russell of Killowen, C.J., Pollock, B., and Wright, J.)

Aug. 1; Dec. 7.

BUCKLER (*Appellant*) *v.* WILSON (*Respondent*). (*a.*)

Adulteration—Margarine—Sale contrary to section 6—Article not purchased for test purposes—Delivery to purchaser in borough—Jurisdiction of county justices—Time for service of summons—Margarine Act, 1887 (50 & 51 *Vict. c.* 29), *ss.* 6, 17, 12—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 12, 14, 20, 21, 28—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 10—*Poor Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 106), *s.* 27—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 154.

B. contracted to supply the Guardians of the Poor of the Louth Union with "good fresh butter," and on the 10th of December, 1894, *delivered, under such contract, butter at the union workhouse. On the following day it was examined by the committee, and, in the absence of the defendant, one pound of it was divided into three parts, of which one part was sent to an analyst, one part was kept by the Guardians, and one part was taken to B.'s shop, and left there with a letter notifying what had been done. Both B. and the purchasers resided within the borough of Louth, which is one of the parishes in the Louth Union, and does not possess a separate court of quarter sessions.*

The analyst to whom one part of the butter was sent certified that it contained 25 per cent. of margarine. An information was preferred against B. for selling margarine otherwise than as prescribed by section 6 of the Margarine Act, 1887. *The case was heard and determined by the county justices, who convicted B.*

Held, that as the article in question was not purchased "with the intention of submitting the same to analysis," but was sold and delivered for consumption under a contract, compliance with section 14 *of the Sale of Food and Drugs Act*, 1875, *was not necessary as a condition precedent to the prosecution under the Margarine Act*, 1887.

Held also, that the county justices had jurisdiction to hear and determine the case under 30 & 31 *Vict. c.* 106, *s.* 27, *and* 5 & 6 *Will.* 4, *c.* 76, *s.* 111 (*now in substance section* 154 *of* 45 & 46 *Vict. c.* 50); *and that section* 20 *of the Food and Drugs Act*, 1875, *merely says that the person "may" take proceedings "in the place where the article or drug sold was actually delivered to the purchaser."*

Held further, that as the justices had found as a fact that margarine is not a perishable article, and that it was not purchased for test purposes, it was not necessary that the summons should have been served under section 10 *of the Food and Drugs Act*, 1879, *within twenty-eight days from the time of the purchase.*

Parsons *v.* Birmingham Dairy Co., 30 *W. R.* 748, 9 *Q. B. D.* 172, *dissented from.*

Guardians of Enniskillen *v.* Hilliard, 14 *L. R. Ir.* 214, *approved.*

Case stated by justices.

At a court of summary jurisdiction at Louth, in the county of Lincoln, on the 23rd of January, 1895, an information dated the 18th of January, 1895, preferred by Porter Wilson, clerk to the Guardians of Louth, and who is the respondent in this case, against H. Buckler, a grocer, the appellant, was heard and determined.

The information stated "that the appellant, on the 8th of December, 1894, did unlawfully sell margarine by retail otherwise than in a packet duly branded or durably marked in the manner prescribed by section 6 of the Margarine Act, 1887, and did not deliver the same to the purchaser in or with a paper wrapper on which was printed . . . 'Margarine' contrary to the form of the statute in such case made and provided."

The appellant was convicted, and fined £5 and costs.

The facts of the case as set out in the judgment are as follow:—

Upon the hearing of the information it was proved that the appellant had entered into a contract with the Guardians of the Poor of the Louth Union for the supply of "good fresh butter, English"; that on Saturday, the 8th of December, 1894, the appellant, under his contract, delivered 39lb. of butter (or margarine) at the union workhouse in Louth; that on the following Monday, the 10th of December, 1894, the butter (or margarine) was examined by the workhouse visiting committee, and 1lb. of it was on the same day, in the absence of the defendant, divided into three parts, each part being wrapped in a separate paper. One part was taken by the master of the workhouse to the appellant's shop at Louth, and, the appellant not being there at the time, the master left it with a letter, of which the following is a copy: "December 10, 1894.—At a meeting of the house committee of the Louth Union this morning the butter supplied by you was examined, and a pound of it cut into three parts; one of such parts will be

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

sent to an analyst, one will be kept by the Guardians, and the third I have been instructed to bring to you. I am, sir, most respectfully yours, John T. Crowson, Master." The butter or margarine was sold by retail otherwise than in a package duly branded or durably marked in the manner prescribed by section 6 of the Margarine Act, 1887, and the appellant did not deliver the same to the purchaser in or with a paper wrapper on which was printed in capital letters, not less than a quarter of an inch square, "Margarine." It was also proved that by the directions of the Guardians one of the sealed samples of butter (or margarine) was sent by post (registered) to Dr. Muter, public analyst for the administrative county, and a certificate from him was produced in which he stated that the sample of butter received from the Guardians of the Louth Union for analysis, in his opinion, contained seventy-five parts of butter and twenty-five parts of margarine.

It was contended before the justices on the part of the appellant that they, being county justices, had no jurisdiction to hear and determine the case on the ground that the workhouse of the Louth Union and the place where the goods were supplied from and delivered to the purchasers and the places where the defendant lived and carried on business were situated within the borough of Louth, and that the proceedings should have been commenced before the magistrates for the borough of Louth, and that section 20 of 38 & 39 Vict. c. 63 applied.

On the part of the respondent it was contended that the justices had jurisdiction on two distinct grounds: (1) that the borough of Louth being one of the parishes comprised in the Louth Union, section 27 of 30 & 31 Vict. c. 106 applied to these proceedings; and (2) that as no separate court of quarter sessions had been granted to the borough of Louth the county justices had concurrent jurisdiction (5 & 6 Will. 4, c. 76, s. 111). [Now section 154 of 45 & 46 Vict. c. 50.]

It was also contended on the part of the appellant that the summons had not been legally issued, and that the Margarine Act, 1887, required the same steps to be taken as were required in proceedings under the Food and Drugs Acts, 1875 and 1879—namely, the service of the summons within twenty-eight days from the time of the purchase for test purposes—and that this had not been done, as the alleged offence was committed on the 8th of December, 1894, and the summons was issued and served on the 18th of January, 1895, and returnable and heard on the 23rd of January, 1895.

On the part of the respondent it was contended (1) that section 10 of 42 and 43 Vict. c. 30 (Food and Drugs Act, 1879) did not apply to proceedings under the Margarine Act, 1887; (2) that butter is not a perishable article within the meaning of the Food and Drugs Acts; and (3) that the butter (or margarine) the subject of the proceedings was not purchased for "test purposes."

It was also contended on the part of the appellant that it was necessary to the proceedings that there should be notification forthwith as required by section 14 of 38 & 39 Vict. c. 63 (Food and Drugs Act, 1875), and also that there ought to have been an offer to divide in the presence of the defendant or his agent then and there, that each part should be marked and sealed, and that the letter of the 10th of December, 1894, was not a sufficient notification as to analysis.

On the part of the respondent it was contended (1) that section 14 did not apply to these proceedings, inasmuch as the butter (or margarine) was not purchased "with the intention of submitting the same to analysis."

The justices were of opinion (1) that as justices of the peace acting in and for the Parts of Lindsey, in the county of Lincoln, they had concurrent jurisdiction with the borough justices in the borough of Louth (such borough not having a separate court of quarter sessions); (2) that jurisdiction was given them to adjudicate in this case by section 27 of 30 & 31 Vict. c. 106; (3) that the Margarine Act, 1887, does not require the same steps to be taken as are required in proceedings under the Food and Drugs Acts, 1875 and 1879; (4) that butter is not "a perishable article" within the meaning of the Food and Drugs Act; (5) that the butter (or margarine) was not purchased for "test purposes"; (6) that section 14 of the Sale of Food and Drugs Act, 1875, does not apply to these proceedings for the reason that the article was not purchased "with the intention of submitting the same to analysis."

The questions for the opinion of the court were:—

(1) Whether the county justices had jurisdiction to hear and determine the case.

(2) Whether the Margarine Act, 1887, requires the same steps to be taken as are required in proceedings under the Food and Drugs Acts, 1875 and 1879.

(3) Whether section 14 of 38 & 39 Vict. c. 63 (Food and Drugs Act, 1875) is applicable, the article not having been purchased with the intention of submitting the same to analysis.

H. D. Bonsey, for the appellant.

Stanger, Q.C., for the respondent.

The arguments sufficiently appear in the judgment.

Cur. adv. vult.

Dec. 7.—Lord RUSSELL OF KILLOWEN, C.J., after stating the facts of the case, read the following judgment:—The first point raised by the appellant was that the justices, being county justices, had no jurisdiction to hear and determine the case, on the ground that under section 20 of the Food and Drugs Act, 1875, the proceedings should have been commenced before the magistrates for the borough of Louth, in which was situate the workhouse "where the article sold was actually delivered to the purchaser." The section runs thus: "When the analyst, having analyzed any article, shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner." It should first of all be noticed that the section merely says "may take proceedings," but, further, I think that under section 27 of 30 & 31 Vict. c. 106, and section 111 of 5 & 6 Will. 4, c. 76* the justices clearly had jurisdiction.

The second point raised by the appellant was that margarine was a perishable article within the meaning of section 10 of the Food and Drugs Act Amendment Act, 1879, and that under that section the summons should have been served within twenty-eight days from the time of the purchase for test purposes. The magistrates, however, have found as facts that margarine is not a perishable article, and that the purchase was not made for test purposes. We cannot set aside these findings, as there is no evidence before

*5 & 6 Will. 4, c. 76, has been repealed, but the substance of section 111 has been re-enacted in section 154 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

us on which we could say they were wrong. It follows that the summons need not have been served within twenty-eight days under section 10, and no contention was made before the magistrates that it was not served within a reasonable time. It is, moreover, at least doubtful whether section 10 of the Act of 1879 applies to proceedings under the Margarine Act.

I now come to the substantial question raised by the appellant—viz., whether compliance with section 14 of the Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), is necessary as a condition precedent to a prosecution under the Act. Proceedings under the Margarine Act, 1887, are by section 12 of that Act to be the same as prescribed by sections 12 to 28 inclusive, of the Food and Drugs Act, 1875. Section 14 of the latter Act is as follows: "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller, or his agent selling the article, his intention to have the same analyzed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent." Now it is clear that if that section is applicable to this case its provisions were not complied with, and the conviction by the magistrates is wrong. But is it so applicable? I think not, for the magarine in question was not purchased by the Guardians "with the intention of submitting the same to analysis." It was delivered to them, as the case states, under a contract for the regular supply to them of good fresh butter. But the appellant's contention is that a prosecution for an offence against the Act can only be maintained where a sample has been purchased, whether by an officer under the Act or by a private individual, with a view of submitting the same to analysis. With this contention I do not agree, though it must be confessed the question is by no means free from the difficulty which constantly arises in construing many Acts of Parliament—namely, the difficulty of reconciling several different and loosely drawn sections. I cannot think, having regard to the scope of the Margarine Act and of the Food and Drugs Act and to the offences set out in section 6 of the latter and sections 6 and 7 of the former Act, that it was the intention of the Legislature that a prosecution should be confined within such narrow limits as those contended for. For example, by section 7 of the Margarine Act, "every person dealing with, selling, or exposing, or offering for sale, or having in his possession for the purpose of sale any quantity of margarine contrary to the provisions of the Act shall be liable to conviction for an offence against the Act." Could anything be wider than this? And yet can it in reason be said to be necessary that, for the purposes of a prosecution for "exposing, or offering for sale, or for having in his possession for the purpose of sale," a sample shall have been purchased for the purpose of analysis and analyzed as described in the Food and Drugs Act, 1875 (section 14)? The Act does not limit the initiation of a prosecution to the purchase of a sample with a view to analysis; and, having regard to the offences the Margarine Act was aimed at and to its preamble, I cannot think it was so intended. The chief difficulty is raised by sections 20 and 21 of the Food and Drugs Act, 1875, which, dealing generally with proceedings under that Act, certainly at first sight seem to imply that the formalities prescribed by section 14 have taken place. It seems to me, however, that the effect of section 21 is merely to make the production of a certificate of an analysis under section 14 of itself sufficient evidence of the facts therein stated. There is nothing in the Act to prevent the proof of an offence by other satisfactory evidence, nor is it necessary that the purchaser should obtain the certificate of the "public analyst" except where he purchases "with an intention" of submitting to analysis. Section 12 merely gives him the right on certain payments to claim an analysis from the public analysts. Finally, it may be pointed out that by section 28 of the Food and Drugs Act, 1875, nothing in the Act is to "take away any other remedy against an offender under this Act." On this part of the case two decisions were cited to us—one, *Parsons* v. *Birmingham Dairy Co.*, 30 W. R. 748; 9 Q. B. D. 172, in which Field and Cave, JJ., not expressly, but inferentially, decided that section 14 applies to every purchaser, whether purchasing with the intention obtaining an analysis or not; the other, *Guardians of Enniskillen* v. *Hilliard*, 14 L. R. Ir. 214, 33 W. R. Dig. 6, in which Dowse, B., and Andrews, J., expressly dissented from that decision. I wish to say that I agree with the reasoning of the learned judges in the Irish case, and I entirely adopt the view of the Act expressed by them. It seems to me that to adopt the contention of the appellant in this case would be to largely restrict the operation of a salutary Act, and to exclude that class of cases of which the present is an example, where there is a contract for the delivering of provisions within the Act which may extend over a considerable period of time, and also the class of cases in which provisions are purchased from time to time in small bulk without any suspicion at the time of purchase of any deceit being practised by the seller. I cannot think this is the true construction of the Act.

The appeal will therefore be dismissed, with costs.

POLLOCK, B., and WRIGHT, J., concurred.

Appeal dismissed with costs.

Solicitors for the appellant, *E. H. Wyles*, for *John Barker*, Great Grimsby.

Solicitors for the respondent, *Kime & Hammond*, for *Wilson & Sons*, Louth.

Q. B. Div.
Commercial Causes.
(Mathew, J.)

Nov. 27, 28; Dec. 2.

FRANCIS *v.* BOULTON. (*a*.)

Insurance—Marine insurance—Goods—Partial or total loss—How partial loss calculated—Costs of conditioning—Average.

A cargo of rice on board a lighter was insured by a policy wherein the rice was valued at £450. *While the policy was in force the lighter was sunk by perils insured against, and the rice damaged. The damaged rice was afterwards kiln-dried at a cost of* £68, *and sold as damaged rice for* £111, *being almost one-third of its sound value.*

Held, that the rice was not a total loss, but a partial loss only; and that the mode of ascertaining the partial loss was to obtain the difference between the sound value and the price which the damaged rice actually fetched, without deducting the cost of the kiln-drying; the proportion of this loss to the sound value is the proportion of the value in the policy to which the assured is entitled.

Commercial cause.

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

The following statement of the facts is taken from the written judgment of the learned judge.

The action was an action brought against an underwriter on a policy of marine insurance, dated the 18th of May, 1892, to recover for a loss of goods occasioned by the sinking of a lighter in the River Thames.

The plaintiff, who was a lighterman, had effected a policy at Lloyd's on goods, as interest might appear, to cover the risks of transit in his lighters between Tilbury and Hammersmith. The policy contained the following clause: "Warranted free from particular average, unless the vessel or craft is stranded, sunk, on fire, or in collision. The collision to be of such a nature as may reasonably be considered to have occasioned damage to cargo. Each cargo on lighter to be deemed a separate insurance, but to pay warehousing, forwarding, and special charges if incurred, as well as partial loss arising from transhipment."

On the 30th of January, 1893, the plaintiff's barge, the *Intent*, took on board 630 bags of rice to be carried to Hammersmith, and a declaration was made upon the policy, and the rice valued at £450.

The lighter in the course of her transit to Hammersmith, and while the goods were covered by the policy, came into collision with the steamer *Ulleswater*, and was in danger of sinking. An attempt was made to beach her, but she filled and sank, and the rice remained under water for two tides. Notice was at once given to the underwriter, and Mr. Frost, the representative of the Salvage Association, was employed to attend to the matter on his behalf.

The lighter was floated, and, after temporary repairs, proceeded to her destination, where the cargo was tendered to the owners. They refused to accept it. An offer was made to purchase the damaged rice for about £50, but this offer was refused; and under the advice of Frost, and with the approval of the underwriter, it was determined that the rice should be kiln-dried and sold.

The kiln-drying cost £68 11s. 8d., and the rice was sold as "river-damaged, kiln-dried, rough, broken rice," and fetched £111 4s. 2d.

The present action was brought to settle disputes which arose between the plaintiff and his underwriter (1) as to whether there had been a total loss of the goods or only a partial loss; (2) as to the mode in which the partial loss should be ascertained. (There was also a third question as to the costs of an unsuccessful action by the plaintiff against the *Ulleswater*).

Lawson Walton, *Q.C.*, and *C. C. Scott*, for the plaintiff.—The rice was completely damaged and had lost its merchantable character as rice. There was therefore a total loss, and not a partial loss merely: *Asfar* v. *Blundell*, *ante*, p. 130; *Roux* v. *Salvador*, 3 Bing. N. C. 266; *Lidgett* v. *Secretan*, 19 W. R. 1068, L. R. 6 C. P. 616. As to the second point, how the partial loss, assuming that there was only a partial loss, is to be estimated, our contention is that we are entitled to deduct the cost of conditioning the rice—namely, the £68, and the partial loss is to be estimated on the basis of contrasting the sound value with the damaged value of the rice, that is, its value on arrival in its then damaged condition. We have to contrast the sound value of the goods upon their arrival with what the goods would have actually fetched if sold on arrival in their damaged condition, without taking into account the cost of conditioning. The rice, after being conditioned, was sold for £111. We have to deduct the cost of the kiln-drying, and we get about £40 odd, which we say is the damaged value.

Joseph Walton, *Q.C.*, and *J. A. Hamilton*, for the defendant.—There was a partial loss only of the rice, and not a total loss. The case of *Asfar* v. *Blundell* entirely supports the view that there was here only a partial loss. There it was held that there was a total loss of the goods, which were dates, upon the ground that the dates had completely lost their merchantable character as dates, and that that character could not have been restored by any conditioning. Here the rice was still rice, although damaged, and it arrived *in specie* as rice, which is the test whether the loss is total or partial: *Roux* v. *Salvador*; Arnould on Marine Insurance, p. 1011; *Glennie* v. *The London Assurance Co.*, 2 Man. & S. 371. The second point is as to the mode of calculating a partial loss, assuming that there was a partial loss only. We submit that the true principle for estimating a partial loss is that laid down in *Johnson* v. *Sheddon*, 2 East 581, which has ever since been followed by average adjusters in practice. That principle is to contrast the sound value of the goods with the value which the goods have actually fetched when sold in their damaged condition. In this case we have, according to that principle, to contrast the sound value with the £111, which the damaged rice was actually sold for; and the cost of conditioning ought not to be deducted. The difference between the sound value and the damaged value so estimated, without deducting the cost of the kiln-drying, is the proportion of the value in the policy which is payable by the underwriter: Arnould, p. 930.

Lawson Walton, *Q.C.*, replied.

Cur. adv. vult.

Dec. 2.—MATHEW, J., read the following judgment. [Having stated the facts his lordship proceeded:—] It was agreed by counsel that the principles upon which the claims in this action should be dealt with should be decided by me, and that the figures should be settled in accordance with the judgment by the average adjusters for the plaintiff and defendant respectively. With respect to the first question—namely, whether there was a total loss of the goods, reliance was placed on the evidence of the plaintiff and Mr. Frost, who described the rice after it had been immersed for two tides as unmerchantable as sound rice, smelling offensively, and as unfit for food. But as against this the defendant relied on the fact that the offer for the purchase of the damaged rice had been refused, and that Frost and the plaintiff had sanctioned the kiln-dying of the rice as the best course to be taken in the interest of all concerned. The plaintiff relied upon the judgment of Lord Esher, M.R., in *Asfar* v. *Blundell*, and on the cases of *Roux* v. *Salvador*, and *Lidgett* v. *Secretan*; while on the other hand, reliance was placed for the defendant on the class of cases of which *Glennie* v. *The London Assurance Co.* most closely resembled the present. I am of opinion that there was not a total loss of the rice, and that the loss was partial only. The case is distinguished from *Asfar* v. *Blundell* by the fact that the rice was capable of being conditioned, and that when kiln-dried it was sold as rice and fetched about a third of its sound value.

The second question—namely, the principle upon which the amount of the partial loss was to be ascertained, gave rise to considerable argument. The plaintiff's case was that his claim in respect of the partial loss amounted to 77 per cent. of the sum insured, while the underwriters assessed the claim at about 57 per cent. It was hardly disputed that the right mode of ascertaining the percentage of liability in this case was by contrasting the sound

value with the damaged value at the date of loss; and it was said for the plaintiff that the damaged value was the amount which the goods would fetch if sold on arrival in their then condition. In other words, that the damaged value should be taken to be what the goods would have fetched, less the costs and charges of kiln-drying, which would work out at about £40. The defendant relied on the principles laid down in *Johnson* v. *Sheddon*, and insisted that the correct mode of calculating the partial loss was by ascertaining the percentage of difference between the gross value of the goods when sound and when damaged, and that the sound value in this case should be compared with £111 4s. 2d., the sum which the damaged goods actually fetched. Three gentlemen of experience as average adjusters gave evidence that this was the method of adjusting such a loss invariably adopted; and I am satisfied that in principle the practice of average adjusters in this respect is right. It is to be borne in mind that under the suing and labouring clause the underwriter is liable for costs reasonably incurred in conditioning the damaged goods, and therefore it would not be just, as between him and the assured, to calculate the loss for which he was liable on the value of the goods when unconditioned. Thus, suppose the sound value of the goods to be £1,000, their damaged value unconditioned £500, and their value when conditioned £750; as the underwriters would have to pay the cost of conditioning, the loss to the owners would be 25 per cent. of the insured value; but if the argument for the plaintiff was right, the loss would be 50 per cent. Upon this second question my judgment is therefore in favour of the defendant.

Judgment for defendant.

Solicitors for the plaintiff, *Drake, Son, & Parton.*

Solicitors for the defendant, *Thomas Cooper & Co.*

Q. B. Div.
(Pollock, B., and Wright, J.)

July 29, 1895.

THE BRITISH INSULATED WIRE CO. (LIMITED) *v.* THE PRESCOT URBAN DISTRICT COUNCIL. (*a.*)

Local government—Illegal contract—Contract with local authority — No penalty clause — Right of action—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 174 (2).

The Public Health Act, 1875, *s.* 174 (2), *enacts that with respect to contracts made by an urban authority under that Act the contract shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed.*

Held, that this provision is not directory, but is peremptory. An action will therefore not lie against a local authority for money due under a contract which does not contain a penalty clause.

Special case stated in an action, and raising questions of law for the opinion of the court.

On the 12th of November, 1892, an agreement was entered into between the Local Board for the district of Prescot, in the county of Lancaster, and the plaintiff company, whereby it was agreed that the plaintiff company should efficiently, by means of electricity, for the period of five years from the 1st of January, 1893, light the streets, courts, alleys, and places in the said district theretofore lighted by means of gas. The agreement provided for the number of lamps to be supplied by the plaintiff company, and the payment to be made by the Local Board therefor, and the agreement further provided that if the Local Board desired to extend the lighting of the streets in any part of their district theretofore not lighted by gas, the plaintiff company should provide the light in consideration of an additional annual payment to be agreed upon, or in default of agreement to be fixed by arbitration. The agreement provided that all disputes arising thereunder should be settled by arbitration.

The agreement was sealed by both parties thereto with their respective seals, but the agreement contained no penalty clause.

The plaintiff company carried out the agreement by supplying electric light from the 1st of January, 1893, until the 31st of March, 1895, and were paid the amounts payable in accordance with the terms of the agreement for the supply of light to the end of the quarter ending on the 30th of June, 1894. The amount so paid was £553 1s. 3d. in all.

This action was brought to recover the sum of £278 9s. 9d. claimed to be payable under the agreement for the supply of electric light from the 1st of July, 1894, to the 31st of March, 1895. The plaintiff company had duly supplied the lights, &c., stipulated for by the agreement, and also the extra lamps claimed for; and if the contract was valid and binding upon the defendants and enforceable against them, the plaintiff company would be entitled to the said sum of £278 9s. 9d.

The Prescot Local Board was an urban authority under the Public Health Act, 1875, and the agreement was a contract made under that Act.

By virtue of sections 21 (1) and 85 (5) of the Local Government Act, 1894, the defendants were the same corporate body as the Prescot Local Board, under a new name.

The question for the opinion of the court was whether the agreement was void or not binding upon or not enforceable against the defendants by reason that the agreement did not specify some pecuniary penalty to be paid in case the terms of the agreement were not duly performed. It was agreed that the court should give judgment in the action in accordance with its opinion on this question of law.

The Public Health Act, 1875, s. 174, enacts that "with respect to contracts made by an urban authority under this Act, the following regulations shall be observed—namely: (2) Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed."

Arkle (*Lawson Walton Q.C.*, with him), for the plaintiff company, contended that the provisions of section 174 (2) of the Public Health Act, 1875, were merely directory, and not peremptory. The intention of the Legislature was that the contract should contain some provision for the purpose of liquidating damages. That was provided for in this case by the arbitration clause.

He referred to *Melliss* v. *Shirley Local Board*, 34 W. R. 187, 16 Q. B. D. 446; *Nowell* v. *Mayor, &c., of Worcester*, 9 Ex. 457, 2 W. R. Dig. 190; *Young* v. *Mayor, &c., of Royal Leamington Spa*, 31 W. R. 925, 8 App. Cas. 517.

WRIGHT, J., referred to *Attorney-General* v. *Gaskell*, 31 W. R. 135, 22 Ch. D. 537.

Danckwerts, for the defendants, was not called upon to argue.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

POLLOCK, B.—I am of opinion that in this case our judgment must be for the defendants. The provisions in sub-section 2 of section 174 of the Public Health Act, 1875, are not merely directory, but are essential to every contract entered into by an urban authority. No valid reason has been shown why when the Legislature has expressly required certain things to be done we are to construe that as a voluntary matter. It is quite true that it has been held that sub-sections 3 and 4 of section 174 are directory only. But there is a distinction between these sub-sections and sub-section 2, for they relate to the things to be done before any contract is entered into, and done by the urban authority only the contractor having nothing to do with the matters mentioned.

WRIGHT, J.—I am of the same opinion.

*Judgment for the defendants.**

Solicitors for plaintiff company, *Morris, Allens, & Chapman*, for *F. J. Leslie & Co.*, Liverpool.

Solicitors for defendants, *Chester, Mayhew, Broome, & Griffiths*, for *Henry Cross*, Liverpool.

House of Lords.

From C. A. (England). Dec. 5.

TREGO AND ANOTHER *v.* HUNT. (*a.*)

Partnership — Goodwill — Vendor and purchaser — Making list of customers with view to use after expiration of partnership—Injunction.

Although a person who has sold the goodwill of his business is not thereby precluded from starting a similar business, yet he is not at liberty to solicit custom from the old customers specifically. And this is equally so when partners have agreed that the goodwill shall on the expiration of the partnership belong exclusively to one of the partners.

Labouchere *v.* Dawson, 20 *W. R.* 309, *L. R.* 13 *Eq.* 322, *followed.*

Pearson *v.* Pearson, 32 *W. R.* 1006, 27 *Ch. D.* 145, *overruled.*

Decision of the Court of Appeal, 43 *W. R.* 371, [1895] 1 *Ch.* 462, *reversed.*

This was an appeal by the plaintiffs from the Court of Appeal (43 W. R. 371, [1895] 1 Ch. 462) affirming a decision of Stirling, J. (reported 43 W. R. 263).

The facts were shortly as follows. The appellants, Mrs. Trego, W. W. Smith, and the respondent were partners under a partnership agreement, dated the 13th of February, 1889, which provided that the appellants and the respondent should carry on the business under the old style of Tabor, Trego, & Co. for a term of seven years, and also that the goodwill should nevertheless be and remain the sole property of Mrs. Trego.

In December of last year it came to the knowledge of the appellants that the respondent had employed a clerk of the firm, out of office hours, to copy for him the names, addresses, and businesses of all the firm's customers.

The appellants brought this action, and moved for an injunction to restrain the respondent from making copies of or extracts from the partnership books for any purpose other than the business of the partnership.

It was admitted by the respondent that his object in having the copy made was to acquire information which would enable him to canvass the customers of the firm for his own rival business when the partnership came to an end.

Stirling, J., and the Court of Appeal refused the injunction, following *Pearson* v. *Pearson*, 32 W. R. 1006, 27 Ch. D. 115, which was binding upon them.

Graham Hastings, Q.C., and *H. H. Cozens-Hardy, Q.C.* (*O. Leigh Clare* with them) for the appellants.—*Labouchere* v. *Dawson*, 20 W. R. 309, L. R. 13 Eq. 322, is good law, and *Pearson* v. *Pearson*, 32 W. R. 1006, 27 Ch. D. 145, is wrong: *Labouchere* v. *Dawson* was approved in *Ginesi* v. *Cooper*, 14 Ch. D. 596, 28 W. R. Dig. 109; *Leggott* v. *Barrett*, 28 W. R. 962, 15 Ch. D. 306; *Mogford* v. *Courtenay*, 29 W. R. 864; *Walker* v. *Mottram*, 30 W. R. 165, 19 Ch. D. 355.

They also cited *Shackle* v. *Baker*, 14 Ves. 468; *Cruttwell* v. *Lye*, 17 Ves. 335; *Kennedy* v. *Lee*, 3 Mer. 452; *Churton* v. *Douglas*, 7 W. R. 365, Johns. 174; *Cook* v. *Collingridge*, Jac. 607, Collyer on Partnership, 2nd ed., p. 209; and *Johnson* v. *Helleley*, 13 W. R. 220, 2 De G. J. & S. 446.

Sir R. E. Webster, Q.C., and *Buckley, Q.C.* (*G. Henderson* with them), for the respondent.—*Pearson* v. *Pearson* is in accordance with *Cruttwell* v. *Lye* and the earlier authorities. *Labouchere* v. *Dawson* went far beyond what had previously been held.

They also cited *Dawson* v. *Beeson*, 31 W. R. 537, 22 Ch. D. 504, and *Hall* v. *Barrows*, 12 W. R. 322, 4 De G. J. & S. 150.

Cozens-Hardy replied.

The House took time for consideration.

Cur. adv. vult.

LORD HERSCHELL.—A very important question, which has given rise to much difference of judicial opinion, presents itself for decision in the present case. For some years prior to 1876 William Henry Trego, the husband of the appellant Anna Trego, had carried on business as a varnish and japan manufacturer, at Bow and in London, under the name of Tabor, Trego, & Co. In that year he took the respondent into partnership, but upon the terms that the goodwill of the business should be and remain the sole property of William Henry Trego. The partnership continued until his death. In February, 1889, a partnership agreement was made between the appellants and the respondent that they should carry on the business under the old style of Tabor, Trego, & Co., for a term of seven years. The agreement provided that the goodwill should nevertheless be and remain the sole property of Anna Trego. In December of last year the appellants found that the respondent had employed a clerk of the firm, out of office hours, to copy for him the names, addresses, and businesses of all the firm's customers. The respondent admits that his object in having the copy made was to acquire information which would enable him, when the partnership comes to an end, to canvass these persons, and to endeavour to obtain their custom for himself. The appellants accordingly brought this action, and moved for an injunction to restrain the respondent from making copies of or extracts from the partnership books for any purposes other than the business of the partnership.

Stirling, J., in the course of his judgment, said: "It has been admitted in the argument, and for the

* Aug. 9.—The plaintiffs appealed, but after the appeal had been opened the court suggested a settlement, and the case was accordingly settled.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

purposes of it, that the defendant intends, in the event of the partnership coming to an end at the beginning of next year, to use this list for the purpose of soliciting the customers of the present firm. He proposes then to engage in a business of a similar nature to that carried on by the firm, and the question which I have to decide is whether he is entitled to make such a use of the list." It seems clear, therefore, that the point in contest before the learned judge who heard this motion was whether the respondent was entitled to make use of the list of the customers of the firm which he had obtained in order to canvass them when he started business on his own account. I mention this because it may have been open to contention on behalf of the respondent that he was at all events entitled, whilst he remained a partner, to make copies of the partnership books, and that it was premature to come to the court to restrain the use of these copies, even if he were not entitled when he ceased to be a partner to canvass the customers of the firm; but in view of the fact that the respondent threatened to use the list for the purpose of canvassing the persons named therein, and having regard to the course taken before the learned judge, I think it would have been open to him to grant an injunction, though not in the terms prayed for, if the canvassing of those customers would be a wrongful act on the part of the respondent. Stirling, J., and the Court of Appeal had, I think, no alternative but to refuse to grant any injunction. They were bound by the decision of the Court of Appeal, in the case of *Pearson* v. *Pearson*, that even though the goodwill belongs to one of the partners, it is lawful for the other, on the termination of the partnership, to canvass the customers of the firm. Consistently with that decision, I think it would have been impossible to hold that the appellants were entitled to an injunction; that case is, however, open to review by your lordships, and the real question in the present case is whether it was well decided.

The question whether a person who had sold the goodwill of his business was entitled afterwards to canvass the customers of that business came first before the courts for decision in the case of *Labouchere* v. *Dawson*. Lord Romilly, M.R., answered in the negative. He was of opinion that the principles of equity must prevail, and that persons are not at liberty to depreciate the thing which they have sold. He considered that the defendant was not entitled personally, or by letter, or by his agent or traveller, to go to any one who was a customer of the firm, and to solicit him not to continue business with the old firm, but to transfer it to him—that this was not a fair and reasonable thing to do after he had sold the goodwill. He accordingly granted an injunction to restrain the defendant, his partners, servants, or agents, from applying to any person who was a customer of the old firm prior to the date of the sale, privately, by letter, personally, or by a traveller, asking such customers to continue to deal with the defendant, and not to deal with the plaintiffs.

In the case of *Ginesi* v. *Cooper* Sir George Jessel, M.R., followed the decision in *Labouchere* v. *Dawson*, and expressed in very strong terms his concurrence with it. He granted an injunction restraining the defendants, their clerks, servants, agents, workmen, or others from soliciting or in any way endeavouring to obtain the custom of or orders for goods similar in character to those dealt in by the old firm from such of the customers as were customers of the old firm, or from attempting to take away any portion of the business bought by the plaintiff. This was all the plaintiff in that case asked for; but the learned judge went further, and expressed a strong opinion that a man who sold the goodwill of his business must not only refrain from soliciting the old customers to deal with him, but must not deal with them. It was not, he said, necessary to decide it on that occasion, but he stated it because he thought what the meaning of selling the goodwill of a trade or business is should be thoroughly understood. In the case of *Leggott* v. *Barrett*, which came before the same learned judge shortly afterwards, he acted upon the same view, and extended the injunction to restrain the defendant from dealing with the customers of the old firm. From the judgment in that case there was an appeal; but the appellant confined his appeal to that part of the order which restrained him from dealing with the customers of the old firm. He made no objection to the injunction so far as it restrained him from canvassing those customers. The Court of Appeal dissolved that part of the injunction of which the appellant complained. They thought they could not on any just principle prevent the defendant from supplying a man with goods if he applied to him; that there was no implied obligation upon him either legal or moral to shut his door against a customer who came to him of his own free will; that a sale of goodwill did not involve an implied contract not to deal with any customers of the old business the goodwill of which was sold. The case is chiefly important for present purposes in so far as it discloses the view taken by the learned judges who on that occasion constituted the Court of Appeal on the point now under consideration. In the case of *Pearson* v. *Pearson*, to which I shall have occasion to refer immediately, Cotton, L.J., stated that the decision in *Labouchere* v. *Dawson* was doubted in *Leggott* v. *Barrett* by James, L.J., and himself. This is no doubt correct so far as Cotton, L.J., is concerned; but I am unable to find any very clear indication that this was the view of James, L.J. It is quite true that in an early part of his judgment he said: "I do not like going much into the case because what I should say might, perhaps, be considered to mean that the injunction which is submitted to is too wide." But in a later part of the judgment he says: "At first it did appear to me that we might, from the equity view of the case, say that the defendant should be prevented from dealing with any customer or customers whom he had so solicited; but it appears to me that was too vague and too wide." He pointed out that a man might give the order afterwards without any reference to previous solicitation. Further on, when discussing the effect of the agreement, and showing that there was no implied obligation not to deal with the customer, he says: "It means that you are not to solicit customers." The impression produced upon my mind by the whole of the judgment is that the learned judge had not arrived at the conclusion that *Labouchere* v. *Dawson* was wrong. Brett, L.J., expressed a decided approval of that decision. He was of opinion that on the sale of a goodwill for a valuable consideration there was an implied contract that the vendor would not solicit former customers, who were really the people who formed the goodwill.

The next case in which the matter was brought under consideration of the Court of Appeal was that of *Walker* v. *Mottram*. In that case the goodwill of the business carried on by a bankrupt had been sold by his trustees in bankruptcy. It was sought afterwards to restrain the bankrupt from soliciting the customers of that business. Sir George Jessel, M.R., refused to grant an injunction, on the ground that the doctrine laid down in *Labouchere* v. *Dawson* did not apply to the case of a bankrupt whose business had been sold by his trustees. This judgment was affirmed by the Court of Appeal. Of the Lords

Justices who then constituted the court, Baggallay, L.J., expressed a strong doubt as to the correctness of the decision in *Labouchere* v. *Dawson*. He said that it appeared to him as at present advised that it went far beyond what any of the previous decisions would have sanctioned. Lush and Lindley, L.JJ., the other members of the court, said that the rule laid down in *Labouchere* v. *Dawson* had, it was believed, been recognized and acted upon in practice, and, whatever else might be said of it, the rule was in accordance with the general opinion of what was fair and right, and was easily applied in practice.

In the case of *Pearson* v. *Pearson* the question came again before the Court of Appeal. The facts were there less favourable to the plaintiff than in the case of *Labouchere* v. *Dawson*, and Baggallay and Lindley, L.JJ., both considered that, even if *Labouchere* v. *Dawson* were rightly decided, the case then before them was not governed by it. Baggallay and Cotton, L.JJ., however, distinctly rested their judgments on the ground that the decision in *Labouchere* v. *Dawson* was wrong, and ought to be overruled. Lindley, L.J., on the other hand, was of opinion that it was rightly decided. The reason of Baggallay, L.J., for dissenting from *Labouchere* v. *Dawson*, so far as it is disclosed by the report of his judgment, appears to be that it went beyond a number of decisions of a higher court, and, as he thought, without sufficient reason. Even assuming that the decision in *Labouchere* v. *Dawson* went beyond previous decisions, this does not seem to me to afford any indication that it was wrong, unless it can be shown that it was in conflict with the principles involved in those earlier decisions. Cotton, L.J., examined the earlier decisions, and arrived at the conclusion that Lord Eldon was against the notion that the vendor of the goodwill of a business was, in the absence of express contract, to be restrained from carrying on a similar business in the way in which he might lawfully carry it on if there had been no sale of the goodwill. The learned lord justice pointed out that Lord Romilly rested his decision in *Labouchere* v. *Dawson* on the principle that a man could not derogate from his grant. "But," he said, "it is admitted that a person who has sold the goodwill of his business may set up a similar business next door, and say that he is the person who carried on the old business; yet such proceedings manifestly tend to prevent the old customer from going to the old place. I cannot see where to draw the line. If he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on 'goodwill' as would give a right to such an injunction as has been granted in the present case."

I propose now to examine the older authorities. I may state at once, however, that I can find nothing in them inconsistent with the decision in *Labouchere* v. *Dawson*. It no doubt went beyond them, inasmuch as it dealt with a question not determined by them, but this seems to me to be no demerit, nor to afford any indication that it was wrong. The earliest case which has any bearing upon the point is that of *Cruttwell* v. *Lye*, before Lord Eldon. The business of a bankrupt, who was a carrier between Bristol and London, had been sold by his assignees in bankruptcy. He afterwards commenced carrying on the trade of a carrier between Bristol, Bath, and London, but though the termini were the same the route employed was different. He addressed direct solicitation to the public for the carriage of their goods, stating that he had been reinstated in his business, and there was further, in the opinion of the Lord Chancellor, so much probability of direct solicitation to the customers of the old concern, in some few instances, that the fact might fairly be assumed. Under these circumstances, the purchaser of the bankrupt's business applied for an injunction. The case was therefore the same as *Walker* v. *Mottram*, where Sir George Jessel, than whom no one has more strongly insisted upon the propriety of the decision in *Labouchere* v. *Dawson*, was of opinion that no injunction should be granted. The bankrupt was no party to the contract of sale; there could, therefore, be no implied contract on his part to be derived from it. It is most material also to observe what was the nature of the injunction then in question. It was whether the bankrupt was to be restrained from carrying on the trade which he was pursuing of carrying goods between Bristol, Bath, and London. The Lord Chancellor held that he could not be so restrained, and I think it must now be taken as settled that the sale of the goodwill of a business, even when the vendor himself is a party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same nature as before. But Lord Eldon certainly did not decide that such a vendor was entitled to solicit the customers of the old firm. He was not asked for an injunction to restrain the defendant from so doing. It was sufficient for the decision of that case that, in the opinion of the Lord Chancellor, there was no principle arising out of the provisions of the bankruptcy law upon which the court could hold that the bankrupt ought not to engage in the same trade and by the same road as before, though I think that, so far, the opinion of the Lord Chancellor would have been the same if the sale of the business had been effected by the bankrupt himself, and not by his assignees. The importance of the case consists in the definition which Lord Eldon gave of the goodwill there sold. He said: "The goodwill which has been the subject of the sale is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration; but if that effect was prevented by no other means than those which belong to the fair course of improving a trade in which it was lawful to engage, I should in imposing it carry the effect of my injunction to a much greater length than any decision has authorized or imagination ever suggested." These observations were much relied on by Cotton, L.J., in *Pearson* v. *Pearson*. If the language of Lord Eldon is to be taken as a definition of goodwill of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord Eldon as an exhaustive definition. "'Goodwill,' I apprehend," said Wood, V.C., in *Churton* v. *Douglas*, "must mean every advantage, every possible advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." The learned Vice-Chancellor pointed out in this connection that it would be absurd to say that when a large wholesale business is conducted the public are mindful whether it is carried on in Fleet-street or in the Strand. The question, What is meant by "goodwill"? is, no doubt, a critical one. Sir George Jessel, discussing in *Ginesi* v. *Cooper* the language of Wood, V.C., which I have just quoted, said: "Attracting customers to the business is a matter connected with the carrying on of it. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of good-

will." He pointed out that in the case before him the connection had been formed by years of work. The members of the firm knew where to sell the stone, and he asks: "Is it to be supposed that they did not sell that personal connection when they sold the trade or business and the goodwill thereof?" The present Master of the Rolls took much the same view as to what constitutes the goodwill of a business. I cannot myself doubt that they were right. It is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has acquired a goodwill. The former trader has to seek out his customers from among the community as best he can. The latter has a custom ready made. He knows what members of the community are purchasers of the articles in which he deals, and are not attached by custom to any other establishment. What obligations, then, does the sale of the goodwill of a business impose upon the vendor? I do not think they would necessarily be the same under all circumstances. In the case of *Cook* v. *Collingridge*, Eldon, L.C., had to determine what orders were to be given where a partnership had expired by effluxion of time, and where the goodwill had to be valued. He declared that there existed no obligation upon the partners to restrain them from carrying on the same trade, or any of them wanting to do so; that a claim to have an estimated value put upon any subject that could be considered as described by the term "goodwill" could not be supported upon the same grounds or principles as those in which a value was received from a partner buying the share of the partner going out of the business and retiring from the trade altogether. He thought that all that could be valued was the chance of the customers adhering to the old establishment, notwithstanding that the previous partners or any of them carried on a similar business elsewhere.

In *Johnson* v. *Helleley* a bill was filed by the surviving partner to wind up the business of the partnership. The usual decree was made. The chief clerk certified that it was most beneficial that the business should be sold as a going concern. The Master of the Rolls ordered it to be stated in the advertisement and particulars that the surviving partner would be at liberty to continue carrying on the business of a wine merchant in the same town and place. This judgment was affirmed by the lords justices. In *Hall* v. *Barrows* Westbury, L.C., said: "I think the direction to value the goodwill should be accompanied by a declaration defining what is meant by it, at least negatively; that is to say, that a declaration that the goodwill is not to be valued upon the principle that the surviving partner, if he were not the purchaser, will be restrained from setting up the same description of business." In cases of this description, where a partnership has been dissolved by effluxion of time or death, the goodwill is regarded as a part of the assets, and subject, therefore, to realization on winding up the partnership; but it would obviously be absurd that because a partnership becomes thus dissolved those who formerly constituted the firm, or the survivors thereof where the dissolution has been due to death, should thereafter be restrained from carrying on what trade they pleased. Whatever restriction the sale of the goodwill may impose, it is clear that in this class of cases it could not extend to prevent the former partners carrying on a similar trade to that in which they were previously engaged. It is noteworthy that in *Johnson* v. *Helleley* it was thought necessary to warn intending purchasers that, though the goodwill was being sold, one of the persons who had previously carried on the business might continue to trade in the same town, and Lord Westbury thought it necessary to give the same warning to the person who was to value the goodwill in *Hall* v. *Barrows*. These circumstances appear to me to afford an indication that the courts recognized that their view of what was meant by "goodwill" and the effect of a sale of it, differed from the popular conception.

Where the goodwill of a business is not sold under circumstances such as I have been discussing, but the sale is the voluntary act of the vendors, I am by no means satisfied that a different effect might not have been given to the sale and the obligations which it imposed. It might have been held that the vendor was not entitled to derogate from his grant by seeking in any manner to withdraw from the purchaser the customers of the old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers. It is now, however, too late to make any such distinction. I think it must be treated as settled that whenever the goodwill of a business is sold the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business. This is really the strong point in the position of those who maintain that *Labouchere* v. *Dawson* was wrongly decided. Cotton, L.J., says: "It is admitted that a person who has sold the goodwill of his business may set up a similar business next door, and say that he is the person who carried on the old business. Yet such proceedings manifestly tend to prevent the old customers from going to the old premises. I cannot see where to draw the line. If he may by his acts invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so?" I quite feel the force of this argument, but it does not strike me as conclusive. It is often impossible to draw the line, and yet to be perfectly certain that particular acts are on one side of it or the other. It does not seem to me to follow that because a man may by his acts invite all men to deal with him, and so, amongst the rest of mankind, invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm, in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the goodwill, and an endeavour to destroy it. If a person who has previously been partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he had previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the goodwill away from the persons to whom it has been sold, and to restore it to himself. It is said, indeed, that he may not represent himself as a successor of the old firm, or as carrying on a

continuation of their business; but this, in many cases, appears to me of little importance and of small practical advantage if canvassing the customers of the old firm were allowed without restraint. I do not think that in cases where an injunction was granted in the terms employed in *Labouchere* v. *Dawson* there would be any real difficulty in drawing the line and determining whether there had been a breach of it or not. In several cases such injunctions were granted, and there is nothing to show that any practical difficulty arose in enforcing them.

It is not material to consider whether, on the sale of a goodwill, the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him, and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a court of equity. I have, so far, dealt with the case as if the goodwill had been sold, but I think the rights and obligations must be precisely the same, for present purposes, when on the creation of a partnership it has been agreed that the goodwill shall belong exclusively to one of the partners.

For these reasons I think the judgment must be reversed, and that an injunction should be granted in the form adopted in *Labouchere* v. *Dawson*, with the modification rendered necessary by the circumstance that here the partnership has not yet expired. The respondent must repay to the appellants the costs which the Court of Appeal ordered them to pay to him.

Lord MACNAGHTEN.—The question for the House to determine is this: Is a person who has sold the goodwill of his business, or one in the position of the respondent, who has been taken into partnership upon the terms that on the expiration of the partnership the goodwill shall belong solely to his partner, at liberty to solicit the old customers of the business to give their custom in preference to him? In 1872 Lord Romilly, M.R., decided the question in the negative in *Labouchere* v. *Dawson*. In 1884 the question was determined the other way by the Court of Appeal in *Pearson* v. *Pearson*; and *Labouchere* v. *Dawson* was overruled by Baggallay and Cotton, L.JJ., differing from Lindley, L.J., who thought Lord Romilly's decision right. In *Labouchere* v. *Dawson* the question arose out of a sale of goodwill. In the present case there is a subsisting partnership between the appellants and the respondent in the business of varnish manufacturers. One of the terms of the partnership is that the goodwill "shall be and remain the sole property" of the appellant Anna Trego. The partnership will expire on the 1st of January, 1896. The business is extremely lucrative, the connection very large. The respondent is, or was when the action was commenced, employing one of the clerks in copying out the names and addresses of the customers of the firm, with the avowed intention of soliciting their custom as soon as the partnership expires. The object of the action was to obtain an injunction to restrain this proceeding on the part of the respondent. It is not necessary to consider whether the action at the outset was or was not open to objection on technical or other grounds. For this much, at least, is to be said in favour of the respondent—that he met the case fairly and frankly from the very first, without any attempt to embarrass the plaintiff or to conceal his own object. His case was, "The law allows it." There was, indeed—or there seemed to be at the last moment, if I am not doing injustice to the respondent—an attempt on his part to recede from the position which up to that time he had maintained, and to suggest difficulties in the way of any judgment in favour of the appellants. But I am quite sure that your lordships will not for a moment listen to such a suggestion after the case has been fought out in all the courts on the real issue between the parties.

After the observations of my noble and learned friend I do not think it necessary to deal with the question at any length. The arguments on the one side and on the other are summed up in *Labouchere* v. *Dawson* and *Pearson* v. *Pearson*, and little remains but to choose between the conflicting views of very eminent lawyers. Nor do I think it necessary to do more than allude to the case in which Sir George Jessel, M.R., held that a person who had sold the goodwill of his business could not even deal with his former customers. There I think the Master of the Rolls went too far. The decision trenched on the rights of the public. On the other hand, the Master of the Rolls was, I think, clearly right in refusing to extend the principle of *Labouchere* v. *Dawson* to a sale in bankruptcy. There is, I think, all the difference in the world between the case of a man who sells what belongs to himself and receives the consideration and a man whose property is sold without his consent by his trustee in bankruptcy, and who comes under no obligation, express or implied, to the purchaser from the trustee. "A person not a lawyer," said Plumer, V.C., in *Harrison* v. *Gardner*, 2 Madd. 219, in 1817, "could not imagine that when the goodwill and trade of a retail shop were sold the vendor might the next day set up a shop within a few doors and draw off all the customers. The goodwill of such a shop in good faith and honest understanding must mean all the benefit of the trade, and not merely a benefit of which the vendor might the next day deprive the vendee. The authorities, however, are strong to show that the sale of a goodwill does not import restraint, and that a person selling the goodwill of a business for however large a consideration is not prevented setting up the trade." I agree, in substance, with the Vice-Chancellor's observations.

What "goodwill" means must depend on the character and nature of the business to which it is attached. Generally speaking, it means much more than what Lord Eldon took it to mean in the particular case before him, in *Cruttwell* v. *Lye*, where he says: "The goodwill, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old place." Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work, or gained by lavish expenditure of money. I do not think that "a person not a lawyer," to use the Vice-Chancellor's phrase, would suppose that a man might sell the goodwill of his business and then set to work to withdraw from the purchaser the benefit of his purchase. However, authorities which it is now too late to question do undoubtedly show that a man who has sold the goodwill of his business may do much to regain his former position, and yet keep on the windy side of the law. The common law has always been jealous of any interference with trade. It was a lighter matter to interfere with freedom of contract and avoid covenants under seal. And so, the common law being the final arbiter on these questions, too little attention perhaps was paid to what was fair and just between man and man. A person who has sold the goodwill of his business is under no obligation to retire altogether from the

field. Trade he undoubtedly may, and in the very same line of business. If he has not bound himself by special stipulation, and if there is no evidence of the understanding of the parties beyond that which is common to all cases, he is free to set up in business wherever he chooses. But, then, how far may he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbour as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage ground of his former position. He may not sell the custom and steal away the customers. That, at all events, is opposed to the common understanding of mankind and the rudiments of commercial morality. Is it conceivable that the respondent would ever have been taken into partnership if he had hinted at such a manœuvre while negotiations for a partnership were pending? It was said that you cannot draw the line; but I think the line may be drawn at this point. It is quite true that you cannot protect the purchaser completely. With Lindley, L.J., I regret it. It is quite true that it would be better that he should protect himself by taking apt covenants from the person with whom he is dealing. But this, I think, is rather a counsel of perfection than a reason for leaving the purchaser entirely at the mercy of the vendor. The principle on which *Labouchere* v. *Dawson* rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant on the sale of goodwill that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price, and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own. I am of opinion that the appellants are entitled to judgment.

Lord DAVEY.—This appeal comes before your lordships in a somewhat unsatisfactory form. The plaintiffs and the defendant are partners together for a term which will expire on the 1st of January, 1896. On the expiration of the partnership the goodwill of the trade or business will be the sole property of the plaintiff Anna Trego. The notice of motion asked that the defendant might be restrained from making any copy or extract from the books of the partnership for any purpose other than the business of the partnership. In my opinion, the relief asked for was misconceived. As well under the general law as under the express provision of the articles of partnership the defendant was entitled during the partnership to have access to the books and to make copies thereof or extracts therefrom. It is conceivable that, if the defendant proposed to use such extracts for purposes injurious or hostile to the interests of his firm, he might be restrained from so doing. But in such case it would not be the obtaining of the information, but the use the partner proposed to make of it when obtained, which would be restrained. In my opinion, the plaintiffs have no right to prevent the defendant from making any extracts from the books he thinks fit. Indeed, in the present case, as was observed at the bar, the list of the creditors of the firm would be of service to the defendant if the law as laid down in *Labouchere* v. *Dawson* be maintained, in order to enable him to know whom he may not solicit, and to keep himself within the law. It was, however, admitted that the defendant intends after the expiration of the partnership to set up a business on his own account similar to that carried on by his firm, and he claims the right, if he thinks fit to do so, to solicit custom for his own business from the customers of his present firm. The question which has been argued before your lordships is whether he has any such right. Upon this question there has been a remarkable difference of judicial opinion. The defendant has contracted for valuable consideration that, at the expiration of the partnership, the goodwill shall belong to the plaintiff Anna Trego. To the lay mind it would undoubtedly seem a remarkable state of the law that a person who has entered into such a contract should be at liberty to go to the customers of the old firm and solicit them not to deal with the plaintiff, but to deal with him, and thus endeavour to secure for himself the business connection which he has contracted shall belong to the plaintiff. But it would probably seem to the lay mind equally remarkable that a man who has sold a business and goodwill to another should be at liberty to set up a similar business on his own account in the same street, next door, or opposite to the premises on which the business he has sold was and is carried on; nay, more, that he may advertise himself as having been a partner in or the founder or manager of the business which he has sold, provided he does not represent that the business which he is carrying on is the same or identical business with that which he has sold. Yet it is well settled that he may do all this. It has been established by a series of cases that in the sale of a goodwill or business no covenant is implied that the vendor will not start a new business in opposition to the purchaser of the old business. It is enough to refer to *Cruttwell* v. *Lye*, *Churton* v. *Douglas*, *Johnson* v. *Hellelley*, and the *dicta* in *Hookham* v. *Pottage*, 21 W. R. 47, L. R. 8 Ch. App. 91. An express covenant not to carry on business would be incapable of being enforced as a restraint of trade if it were larger than the necessity of the case, having regard to the particular character of the business, demanded, or, perhaps, unless it was restricted in some way either in time or space. It seems to follow that a general covenant not to carry on business in competition with the purchaser, which would be invalid if expressed, cannot be implied. I think it is to be gathered from *dicta* and expressions used by learned judges in the Court of Chancery that the idea of goodwill and of what is comprised in the sale of a business has silently been developed and grown since the days of Lord Eldon, who, in one passage of his judgment in *Cruttwell* v. *Lye*, seemed to regard goodwill as only the habit of customers to resort to the old premises. In *Labouchere* v. *Dawson* Lord Romilly granted an injunction against the vendor of the goodwill of a brewery from applying to any person who was a customer of the old firm prior to the date of the sale "privately by letter, personally, or by a traveller, asking such customer to continue to deal with the vendor, or not to deal with the purchasers." The judgment was based on the principle that a man cannot derogate from his own grant; that he cannot sell a thing, and destroy the value of it. It was admitted in the judgment that a man may solicit customers generally in any public manner he pleased. It is agreed on all hands that the decision in *Labouchere* v. *Dawson* went considerably beyond the cases relating to goodwill decided before that time. In *Ginesi* v. *Cooper* Sir George Jessel expressed

himself as prepared to extend the injunction so as to prohibit the vendor from dealing with the customers; and in *Leggott* v. *Barrett* he granted an injunction to that effect, but that part of the order was reversed in the Court of Appeal, and I understand that no such order is now asked for at the bar. I may remark, in passing, that the injunction in *Ginesi* v. *Cooper* went far beyond the order in *Labouchere* v. *Dawson*, and to an extent which, in my opinion, cannot in any event be supported. It restrained the defendant "from in any way endeavouring to obtain the custom of such of the customers of the petitioner as were customers of the old firm, or from attempting to take away any portion of the business bought by the petitioner." This form of order would prevent the defendant from issuing public advertisements or carrying on business in competition with the petitioner, as it is admitted he may do. In the case of *Leggott* v. *Barrett* there was no appeal against so much of the order as simply followed *Labouchere* v. *Dawson*. It was therefore unnecessary for the court to express any opinion upon it. The present Master of the Rolls, however, expressed his approval of the doctrine. James and Cotton, L.JJ., did not express any approval of it, and I think it may be inferred from the judgments that Cotton, L.J., certainly, and James, L.J., possibly, were not prepared to do so. In *Pearson* v. *Pearson* Baggallay and Cotton, L.JJ., expressed their dissent from *Labouchere* v. *Dawson*, and overruled it, while Lindley, L.J., expressed his approval of it. This is in substance an appeal from *Pearson* v. *Pearson*. On the argument of this case at your lordships' bar it certainly appeared to me that the logical result of the principle upon which I understand the case of *Labouchere* v. *Dawson* to be founded would be to restrain the vendor of the goodwill of a business from carrying on business in competition with the purchaser at all. Your lordships were not asked to take that course. And, having regard to the well-established doctrine against restraint of trade, it would be impossible, as I have already said, to imply such a general covenant. I doubted whether it was right, if you allowed the vendor to trade in competition, to impose fetters upon him which might prevent his doing so effectually or successfully. I was also struck with the vagueness and difficulty of applying the injunction as granted in *Labouchere* v. *Dawson*. Questions may arise as to the persons to be comprised under the designation of customers. The injunction also may operate most unequally. In a business of a special character it might practically prevent the defendant from carrying on business at all, whereas in a business of a different character it might have very little effect. Further consideration, however, has satisfied me that the decision in *Labouchere* v. *Dawson*, although it does not go so far as I think would be abstractedly just, is founded on a right principle; and the difficulty of doing complete justice should not prevent us from meting out such scanty measure of protection to the purchaser of a goodwill as the circumstances permit of; and although the difficulties I have pointed out exist, they are not insuperable or, probably, formidable in practice. The question whether any person is a customer within the meaning of the injunction is one of fact, to be ascertained when it arises. I have had the opportunity of reading the judgment which has been delivered by my noble and learned friend (Lord Herschell), and I desire to express my concurrence in the reasoning upon which it is founded. In particular I think that the principle, on which the injunction asked for may be supported, is that the defendant is availing himself of the knowledge of the connection formed by his old firm to take away or to depreciate the value of the goodwill and connection which he has contracted shall belong to the plaintiff. I agree as to the form of the injunction, and also as to the costs.

Lord HERSCHELL stated that Lord Ashbourne concurred.

Orders of Chancery Division and Court of Appeal reversed. Declaration that the appellants were entitled to an injunction restraining the defendant, his partners, servants, or agents, from applying privately, by letter, personally, or by a traveller, to any person who was, prior to the dissolution of the partnership of Tabor, Tregor, & Co., a customer of that firm, asking such customer to continue, after the dissolution, to deal with him (the defendant) or not to deal with the plaintiffs; and that the respondent do repay to the appellants the costs of the Court of Appeal which have been paid to him.

Solicitors for the appellants, *Miller, Wiggins, & Naylor.*

Solicitor for the respondent, *H. J. Mannings.*

Court of Appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Dec. 6.

DUNHILL *v.* NORTH-EASTERN RAILWAY CO. (*a.*)

Lands Clauses Acts—Superfluous lands—Pre-emption—Compulsory sale by railway company—Lands Clauses Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 127, 128.

It is not to be inferred from the compulsory sale by one railway company to another of lands which, if not sold, might have been required for the purposes of the selling company, that the lands are superfluous lands in the hands of that company.

Under the powers of a special Act passed in 1863 *the defendants acquired certain lands from the plaintiff's predecessors in title. Under the powers conferred by a special Act passed in* 1883 *the Lancashire and Yorkshire Railway Co. acquired compulsorily, among other lands, part of the lands acquired by the defendants from the plaintiff's predecessors in title. The Act contained a proviso that the enactment should not affect or prejudice any estate, right, title, interest, or advantage of the plaintiff, his heirs or assigns. The evidence showed that the lands, if they had not been sold to the Lancashire and Yorkshire Railway Co., might have been required for the purposes of the defendants' undertaking.*

Held (*reversing the decision of* Kekewich, J.), *that the lands sold to the Lancashire and Yorkshire Railway Co. could not be treated as superfluous lands of the defendants.*

Hobbs *v.* Midland Railway Co., 30 *W. R.* 516, 20 *Ch. D.* 418, *approved.*

Lord Carington *v.* Wycombe Railway Co., 16 *W. R.* 494, *L. R.* 3 *Ch. App.* 377, *distinguished.*

By the North-Eastern Railway Co.'s (Hull and Doncaster Branch) Act, 1863, the defendants were authorized to take, for the purposes of a railway therein described, certain lands shown on the deposited plans. The Act contained the following provision: "The railways by this Act authorized shall be completed within five years from the passing thereof, and on the expiration of that period the powers of this

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Act, or the Acts incorporated herewith, granted for executing the same, or otherwise in relation thereto, shall cease to be exercised, except as to so much of those railways as shall then have been completed, and also except those powers which are by the same Acts, or any of them, declared to be continued or which may lawfully be exercised for a longer period."

The defendants, in exercise of their powers under the above-mentioned Act, bought from the plaintiff's predecessors in title about 57 acres of land in the parish of Snaith, in the county of York. The defendants constructed a part of their Hull and Doncaster Branch Railway across the lands so acquired. They used only about 11 acres for the purposes of their railway, leaving about 46 acres which were never used for the purposes of the defendants' undertaking.

By section 40 of the Lancashire and Yorkshire Railway Act, 1883, the Lancashire and Yorkshire Railway Co. were authorized to purchase certain lands at Goole, in the parish of Snaith, which included the 57 acres which had been originally purchased by the defendants from the plaintiff's predecessors in title. The section contained a proviso "that nothing in this section contained shall alter vary, lessen, abridge, or in any manner affect or prejudice, any estate, right, title, interest, or advantage" of the plaintiff, William Henry Carter Dunhill, his heirs or assigns. The plaintiff had opposed the Act, and the proviso was inserted for his protection. The Act was not opposed by the defendant company.

In pursuance of the powers granted by their Act the Lancashire and Yorkshire Railway Co. purchased from the defendants 7 acres or thereabouts of the said lands, and paid to the defendants for the same £2,247 10s.

By various Acts of Parliament, and ultimately by the North-Eastern Railway Act, 1891, the period within which the company might sell and dispose of any superfluous lands was extended until the 28th of July, 1894, when it expired.

The evidence showed that if the 7 acres had not been sold to the Lancashire and Yorkshire Railway Co. they would have been required for the purposes of the defendants' undertaking, and this view was adopted by Kekewich, J.

The plaintiff contended that the lands purchased by the Lancashire and Yorkshire Railway Co. were at the time of the sale superfluous lands of the defendants, and ought to have been offered to him in accordance with section 128 of the Lands Clauses Act, 1845. He claimed the difference between the sum of £2,247 10s., the proceeds of sale, and the fair value of the lands at the time of the sale as between the plaintiff and the defendants, or, alternatively, damages in respect of the sale.

The Lands Clauses Act, 1845, provides as follows with regard to lands acquired by the promoters of the undertaking and not required for the purposes thereof:—

"127. Within the prescribed period, or if no period be prescribed within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of such superfluous lands, and apply the purchase-money arising from such sales to the purposes of the special Act; and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same.

"128. Before the promoters of the undertaking dispose of any such superfluous lands they shall, unless such lands be situate in a town, or be lands built upon or used for building purposes, first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed; or if such person refuse to purchase the same, or cannot after diligent inquiry be found, then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption such offer shall be made to such persons in succession, one after another, in such order as the promoters of the undertaking shall think fit."

Kekewich, J., decided that the lands sold were superfluous lands of the defendants, and that the plaintiff was entitled to the difference between £2,247 10s. and the fair value of the lands as between the plaintiff and the defendants.

The defendants appealed.

Renshaw, Q.C., *W. Baker*, and *E. R. P. Moon*, for the appellants.—It cannot be said that these are superfluous lands simply because we sold them. We were compelled to sell them, and the case is therefore even stronger than *Hobbs* v. *Midland Railway Co.*, 30 W. R. 516, 20 Ch. D. 418. If the plaintiff has any rights, they are against the Lancashire and Yorkshire Railway Co. As to *Lord Carington* v. *Wycombe Railway Co.*, 16 W. R. 494, L. R. 3 Ch. App. 377, relied upon by the learned judge, that is a different case altogether. In that case the company never wanted the land at all, and there was moreover no statutory obligation to sell. So far as the action claims damages it is barred by the Statute of Limitations.

They referred to *Ross* v. *Rugge-Price*, 24 W. R. 786, 1 Ex. D. 269.

Warrington, Q.C., and *E. Ford*, for the respondent.—Assuming that the land was within section 128 of the Lands Clauses Act, 1845, it should have been offered to us first, and is subject to that binding obligation. We were entitled to be the vendors to the Lancashire and Yorkshire Railway Co. after giving a fair price. The difference between the two prices is trust property. As to whether the land is within section 128, the Legislature has permanently dedicated these 7 acres to purposes which are not those of the North-Eastern Railway Co., and by so doing has made them superfluous lands in the hands of that company: *Lord Beauchamp* v. *Great Western Railway Co.*, 16 W. R. 241, 1155, L. R. 3 Ch. App. 745. [RIGBY, L.J.—Your argument would be the same if the land at the time of the sale were actually being used, say, for example, for a station.] It is sufficient for us to show that as a fact the lands are superfluous. *Hobbs* v. *Midland Railway Co.* was a different case, for there the company sold the land under stipulations for its own benefit. In the present case there is not a word saving the rights of the defendants. The proviso in the Act of 1883 has the effect of transferring the plaintiff's rights to the purchase money. That Act was not opposed by the North-Eastern Railway Co. Moreover, it does not follow from the Act that the Lancashire and Yorkshire Railway Co. should buy the land from the North-Eastern Railway Co. If the land had been offered to the plaintiff, they would have bought from him, and in that case he would have realized the difference between the two prices.

LINDLEY, L.J.—This case has been very ingeniously argued, and we have had the opportunity of considering the judgment of the learned judge who decided the matter. The point is a very short one, and it appears to me, I confess, free from any real difficulty.

It appears that prior to the Act of Parliament of 1883 the plaintiff, Mr. Dunhill, or his predecessor in title (it is not necessary to distinguish between the two), sold some land to the North-Eastern Railway Co., for the purpose of their railway. The land which was so sold consisted of 57 acres, and amongst the land so sold was a piece of 7 acres, which is the subject matter of the present proceedings. In the year 1883 this piece of 7 acres had been conveyed to the North-Eastern Railway Co. by a deed of May, 1871, which vested the lands in the North-Eastern Railway Co. The North-Eastern Railway Co. owned them. They were the owners in every sense of the word of those 7 acres. The evidence shows that in 1883 the lands were not superfluous lands, that is to say, they were not within the sections 127 and 128 of the Lands Clauses Act, nor could anybody then say that they were not required for the purposes of the North-Eastern Railway. The evidence is that they were required. The time, the ten years referred to in the various statutes, had not expired, and Mr. Dunhill was not in a position to say to the North-Eastern Railway Co.: "The time has come for me to assert my rights under the sections 127 and 128, and I require you to sell this land and to give me the right of pre-emption to which I am entitled." Mr. Dunhill had in 1883 the chance or possibility of acquiring the 7 acres, if at the end of ten years they should not be required for the purposes of the North-Eastern Railway Co., or if he could prove that even before the end of ten years they were not so required.

Now, that was the position of affairs when the Lancashire and Yorkshire Railway Act of 1883 was passed. At that time it is important to bear in mind that Mr. Dunhill had no right whatever and no interest whatever in these lands, unless they became superfluous lands, or lands not required for the purposes of the North-Eastern Railway, in which case he got a right of pre-emption under the Lands Clauses Act. In 1883 the Lancashire and Yorkshire Railway Co. obtained an Act which enabled them to obtain compulsorily the 7 acres for the purpose of their undertaking. Parliament gave them that power by the 40th section of the Act of 1883, which simply says this—that the "company," that is the Lancashire and Yorkshire Railway Co., may purchase or take by compulsion or agreement certain lands in Goole which include the 7 acres. Now, what was the position of affairs then? I will not allude to the proviso for the moment, but what was the position of affairs then? Kekewich, J., has held, and the plaintiff contends, that by that very circumstance these lands must be treated as no longer wanted for the purpose of the North-Eastern Railway Co. That appears to me to be an inference which it is impossible to draw from any language contained in the Act of Parliament. What does the Legislature say? It does not say: "You do not want these lands." It says: "Whether you want them or not, the Lancashire and Yorkshire Railway Co. are entitled to have them." It does not say: "You do not want them for the purpose of your undertaking" in this case, any more than it says to a private owner: "You do not want your land, the railway company does; the railway company shall have it." What the Act says to a private owner is: "You may want your land, but public reasons and convenience are such that it justifies us in making you part with it, however much you want it, for public purposes." That is what Parliament has said to the North-Eastern Railway Co. Whether the North-Eastern Railway Co. opposed the Bill or not I do not know; but here is this Act of Parliament, which clearly enables the Lancashire and Yorkshire Railway Co. to take these lands, however much the North-Eastern Railway Co. may want them. How can it be said under the circumstances, and how are we to infer either as a matter of fact, or to hold as a matter of law, that the mere circumstance that Parliament forces the North-Eastern Railway Co. to give up this piece of land to the Lancashire and Yorkshire Railway Co. is equivalent to saying: "You, the North-Eastern Railway Co., do not want it, and because you do not want it you shall part with it"? Such a construction seems to me to be impossible. But that is really the root of the decision of Kekewich, J., which is appealed against. I cannot help thinking that Kekewich, J., has got rather confused by the other cases. Certainly the case of *Lord Carington* v. *The Wycombe Railway Co.* does not touch this at all. In that case the land obviously was land not required for the purpose of the railway company, and in that case there was no such element as we have here to deal with —that is to say, an Act of Parliament passed compelling the railway company to part with its land. With regard to the case of *Hobbs* v. *The Midland Railway Co.* I think the view taken by Manisty, J., was right—that if you find the railway company selling land before the ten years has expired the *primâ facie* inference is that the company does not want the land. That is only a *primâ facie* inference; you must look at the facts to see whether the land is or is not wanted for the purpose of the railway. If you find, as Manisty, J., found in *Hobbs* v. *The Midland Railway Co.*, that the land was wanted, and was sold nevertheless by an *ultra vires* proceeding, you cannot infer from the sale itself, what is contrary to the fact, that the land is superfluous land. Therefore I think that the decision was perfectly right, and the principle upon which the decision proceeded was also perfectly right. Kekewich, J., thought the case of *Lord Carington* v. *The Wycombe Railway Co.* was opposed to the case of *Hobbs* v. *The Midland Railway Co.*; but I think it is to be entirely distinguished from that case, and also from this case.

Now, if that view is well founded, and I have not the slightest doubt about it myself, what becomes of this litigation? It ends in this, that the plaintiff is entirely in the wrong, and I think he is in the wrong from beginning to end.

Now I will say a word or two about the proviso, because in the clause which authorizes the Lancashire and Yorkshire Railway Co. to take the 7 acres there is this proviso: [His lordship read the proviso, and continued:] I have pointed out what in my opinion the plaintiff's rights exactly were when this Act of Parliament was passed; and it appears to me, although the language is not so explicit as it might be, to follow from this that if the 7 acres had become superfluous lands in the hands of the Lancashire and Yorkshire Railway Co., Mr. Dunhill might have had the benefit of this proviso, and might have been able to say to them if that happened: "Treat me as a person who sold those lands to you, and give me the right of pre-emption under the Lands Clauses Act which I should have had against the North-Eastern Railway Co. if they had not required them." That, it seems to me, is the true effect of the proviso. It seems to me it has no other operation, but of course that may be an important operation. It may not be important to Mr. Dunhill as matters are; but if these lands should become superfluous lands in the hands of the Lancashire and Yorkshire Railway Co., that proviso might be of use to Mr. Dunhill. Apart from that, it appears to me that is the only effect the proviso can have. It appears to me that to ask us to hold that this proviso gives him a right to say, contrary to the fact, that these lands are to be treated as superfluous lands in the hands of the North-Eastern Railway Co., is to ask us to say that which is not war-

ranted either by the language of the section or by the real truth.

Therefore I think this appeal must be allowed, and judgment must be given for the defendants, with costs both here and below.

A. L. SMITH, L.J.—In or about the year 1863 Mr Dunhill sold certain land to the North-Eastern Railway Co., for the purpose of their undertaking. There were 7 acres of it that in 1883 had not been utilized by the North-Eastern Railway Co. for the purpose of their undertaking. At that time the ten years mentioned in the Lands Clauses Act had not run out, because there had been various prolongations of time; and in the year 1883, beyond all question, the ten years had not run out, and those ten years by reason of subsequent prolongations did not run out till the year 1894. As a matter of fact, in the year 1883 these lands *de facto* were not superfluous lands within the meaning of the section in the hands of the North-Eastern Railway Co. It was admitted by Mr. Warrington (although he said he did not agree with what Kekewich, J., said) that they were not, that it was impossible on the evidence to hold that they were superfluous lands at that date. Now, I have looked through the evidence in consequence of what Mr. Ford has said, not adopting the remarks of his leader, and I find there are two or three passages in the evidence of Mr. Gibb, who is the general manager of the railway company, which bear upon this point. [His lordship referred to the evidence, and continued:] Therefore *de facto* this land in 1883 was not superfluous land in the hands of the North-Eastern Railway Co.

Now, what has happened? Have the North-Eastern Railway Co. sold this land, before the expiration of what I will call the ten years, within the meaning of the sections 127, 128, and 129? In my judgment they have done nothing of the sort. Those sections apply to voluntary sales by a railway company, and not to a case where the Legislature has thought fit to intervene and compulsorily take lands out of the hands of a railway company. The object of those sections is well known. In the year 1845 it was contemplated that unless railway companies were compelled to sell their superfluous lands they might become large landowners with large powers, and might become holders of land greatly in excess of what was requisite and necessary for their undertaking. If one reads sections 127, 128, and 129 carefully, in my judgment they apply to the case only of a voluntary sale by a railway company of its own land.

Now, what has happened? In 1883—the defendant company not at the moment requiring these lands, but before ever the lands did become superfluous lands within the meaning of the Act — the Lancashire and Yorkshire Railway Co. wanted these lands for the purpose of their undertaking. In those circumstances the Legislature intervened, and in 1883 the Legislature insisted that the Lancashire and Yorkshire Railway Co. should purchase, and were entitled to purchase by compulsion, these 7 acres from the North-Eastern Railway Co. Under these circumstances what is the result? It is said, because the North-Eastern Railway Co. have been compelled by the Legislature to sell lands which were not superfluous lands, the Act of the Legislature constituted them superfluous lands, although they were not so *de facto*, in the hands of the North-Eastern Railway Co., and that therefore the plaintiff had a right of pre-emption, and that the lands ought to have been offered to him before the Lancashire and Yorkshire Railway Co. were entitled to purchase these lands from the North-Eastern Railway Co. Now, I cannot see how that can be at all. In my judgment a compulsory purchase under the Act of Parliament cannot be held to be any evidence, and is no evidence at all, that lands which are not *de facto* superfluous lands at the time become superfluous by reason of the existence of the legislative power empowering the company to purchase land. Kekewich, J., with all submission to him, has gone wrong in trying to apply either of the two cases —viz., the case of *Hobbs* v. *The Midland Railway Co.* and *Lord Carington* v. *Wycombe Railway Co.* With all submission to the learned judge, they have nothing to do with this case. There was no taking by compulsion by the Act of the Legislature in either of those cases. In those cases there was a voluntary sale; and, if I may be allowed to say so, I think Manisty, J., was quite right in holding that a valid sale by a railway company of lands which had been in the company's possession prior to the expiration of the ten years was something from which you might infer that those lands were superfluous lands—for this reason, if they were not superfluous lands, what right had the company to sell those lands at all? In the case of *Lord Carington* v. *Wycombe Railway Co.* the railway company had bought land in the first instance, not for the purpose of its own undertaking, but for the purpose of selling it immediately afterwards at a profit to another purchaser, and that was set aside; and Manisty, J., set aside the conveyance in the case of *Hobbs* v. *Midland Railway Co.*, and so relegated the parties to their original rights. It seems to me that neither of those cases touches the point which we have to decide here—namely, whether the compulsory power of purchase which was given by the Legislature by the Act of 1883 to the Lancashire and Yorkshire Railway Co. converted lands which were not *de facto* superfluous lands into superfluous lands. I confess I cannot follow the learned judge in his decision upon the point, and I think he was wrong; and I think he was wrong because he missed the point.

Then with regard to the other question, about the proviso, I have nothing to add to what has fallen from my brother Lindley. I should like, however, to point out this—that when the Act of Parliament of 1883 was passed on the facts of the case there was no right with regard to the North-Eastern Railway Co. which could be preserved, as to these superfluous lands, to Mr. Dunhill; for the best of all reasons, that at that time they were not, and, as it is proved, they never would have been, superfluous lands in the hands of the North-Eastern Railway Co. to which Mr. Dunhill could have any right at all. It is true that, as these lands were transferred by compulsion to the Lancashire and Yorkshire Railway Co., it might be possible that they might become superfluous lands in the hands of the Lancashire and Yorkshire Railway Co.; and that might have been the idea of the draftsman and of the Legislature when they inserted this proviso in favour of Mr. Dunhill. But in my judgment that proviso in no way alters this case, or converts lands which were not superfluous into being *de facto* superfluous lands. Therefore I am opinion, for these reasons, the appeal must be allowed.

RIGBY, L.J.—The question arises, first of all, independently of the proviso. As pointed out by my brother Lindley, the Act of 1883 does not prove that the Legislature thought the land was not required for the purposes of the North-Eastern Railway Co.; it does prove that the Legislature thought it might be better, for public purposes, to place it in the hands of the Lancashire and Yorkshire Railway Co. That is all it proves, according to my mind.

Now, what has happened? In 1883 it is plain that the period had not arrived when the railway company were bound to say definitely whether the lands were superfluous lands or not, and the time was ultimately extended to the year 1894; at any rate, in 1883 it was not incumbent on the North-Eastern Railway Co. definitely to make up their minds upon the question. In other words, the vendor, the plaintiff, had no existing right whatsoever with regard to the land. Ultimately he might become entitled to the land in default of the company dealing with it, if it really was land not required for the purposes of their railway. That was all the right, apparently, that he had.

Now let us follow out the consequences of the sale. Before notice to treat was given them the railway company was under no obligation to offer it to the plaintiff. When notice to treat was given that formed a statutory contract, and they were bound. They were no longer in equity the owners of the land at all. A conveyance had to take place, and that was all. How can a man who has no equitable interest in land, and which he is selling in obedience to a statute, go through the form—because it must be a form only—of saying: "I will sell you the land"? He had no power to do so; he could not have done it. I think that conclusively shows that the sections which have been referred to under the Lands Clauses Consolidation Act, namely, sections 127 and 128, cannot have been intended to deal with such a case at all. It is idle for an Act of Parliament to say: "You, who, by reason of the notice to treat which has been legally served upon you, have no longer any equitable interest in the land, shall sell it." It cannot mean that.

Now look at the proviso. As I have said, all the right the plaintiff had was a contingent right, a right arising at a future time, in case it turned out that the lands were lands which were not required for the purpose of the North-Eastern Railway. Now, the evidence as to that shows conclusively what would have been the position of the land, namely, that the land at the expiration of the time in 1894 would have been required for the purpose of the North-Eastern Railway. Therefore Mr. Dunhill's rights were nothing at all. I cannot understand how under those circumstances the cases referred to have any application. I can understand when a railway company sells, and it is recited that the lands are superfluous lands, which means the same thing as saying they are not required for the purposes of the Act, that as between themselves and the adjoining owners they are bound. The case of *Lord Carington* v. *The Wycombe Railway Co.* would be sufficient authority for that. I agree with Manisty, J., that it is not conclusive evidence, and it does not operate by way of an estoppel, so as to make a railway company say what they never intended to say, that the land was not required for the purpose at all. In my judgment there is nothing in either of these authorities to lead to the conclusion that a sale of this kind under compulsory powers given to another railway company has any effect in showing that the lands were not required, and would not have been required before the end of the term, for the purpose of the railway company.

Solicitors, *Williamson, Hill, & Co.*, for *A. Kaye Butterworth*, York; *Beyfus & Beyfus.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) May 22, 1895.

In re STONE.
BAKER *v.* STONE. (*a.*)

Will—Construction—Bequest per stirpes *or* per capita.

A testator bequeathed the income of his property to his wife for life, and after her death equally between his brother and sisters, and "at the decease of either of my before-named brother or sisters, their interest herein to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be sold . . . and to be equally divided between the children of the aforesaid, share and share alike."

The testator's wife survived all the brothers and sisters. Upon her death;

Held (*reversing the decision of* Stirling, J.), *that the proceeds were divisible amongst the children* per capita, *and not* per stirpes, *notwithstanding the fact that the division was* per stirpes *so long as any brother or sister was living.*

Appeal from Stirling, J.

The testator, John Stone, by his will, dated the 10th of January, 1841, gave and bequeathed all his property to his wife for her life, and after her decease the income was to be equally divided between his brother and sisters, and "at the decease of either of my before-named brother or sisters their interest herein to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be sold, moneys called in, &c., &c., and to be equally divided between the children of the aforesaid, share and share alike."

The widow survived the brother and sisters, each of whom left children. On the widow's death the estate was divisible, and the question arose whether the children took *per stirpes* or *per capita*.

Stirling, J., on the authority of *Brett* v. *Horton*, 4 Beav. 239, held that the children of the testator's brother and sisters living at his death were entitled *per stirpes*, and not *per capita*.

The children who wished for a distribution *per capita* appealed.

Ingle Joyce, for the appellants.—There is no ambiguity in the context, and there will be nothing irrational or unjust in carrying out the testator's intentions. Stirling, J., felt himself bound by *Brett* v. *Horton*, which, however, does not govern this case, for there the division was between individuals and a class of individuals.

He referred to *Nockolds* v. *Locke*, 5 W. R. 3, 3 K. & J. 6, and *In re Campbell's Trusts*, 34 W. R. 629, 33 Ch. D. 98.

Vernon Smith, Q.C., for the respondents.—*Brett* v. *Horton* has never been doubted, and is still treated as good law. It governs this case.

LINDLEY, L.J.—The question arises whether the declaration of Stirling, J., that the proceeds are divisible amongst the children of the brother and sisters of the testator *per stirpes*, and not *per capita*, is correct. That depends upon the language of the will. [His lordship read the will, and said that the expression "proceeds arising from my aforesaid property" did not mean the proceeds arising from sale and conversion, but the income of the property afterwards directed to be sold, and continued:—] Obviously the division is to be *per capita*, and not *per*

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

stirpes; the language is not open to ambiguity. It is said that there is no sufficient expression of intention to alter the shares after the deaths of the brother and sisters. I think that the testator directed a division of the income *per stirpes* because he meant that the shares of his brother and sisters in the income should not be interfered with. I cannot see any reason for not giving effect to the plain intention of the testator. I decline to go into the cases, seeing as I do an intention clearly expressed in the will, and finding no rule of law opposed to giving effect to it.

The declaration must be that the proceeds of sale are divisible *per capita*, and not *per stirpes*.

LOPES and KAY, L.JJ., gave judgment to the same effect.

Appeal allowed.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Hippisley*, Bristol.

High Court of Justice.

Chan. Div. }
Chitty, J. } Jan. 21.

In re SOMES.
SMITH *v.* SOMES. (*a*.)

Power — Extinction — Release — Benefit to releasor — Validity—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.

The principles of the law relating to fraudulent appointments do not apply to the release of a power. Such a release will not be invalidated by a benefit resulting to the releasor.

The ratio decidendi *of* Smith *v.* Houblon, 26 *Beav.* 482, 8 *W. R. Ch. Dig.* 53, *and* In re Radcliffe, Radcliffe *v.* Bewes, 40 *W. R.* 323, [1892] 1 *Ch.* 227, *explained.*

Originating summons.

Under a marriage settlement of 1862, and a conveyance and appointment of 1887, certain estates stood vested in trustees upon trust for a father for life with remainder to the trustees upon trust for sale, the proceeds of sale to be held upon such trusts for the benefit of his daughter and her issue born in his lifetime as he should by deed appoint; and in default of and subject to any such appointment in trust for the daughter absolutely.

In September, 1893, the father released his power of appointment, to the intent that the settled property might become vested in the daughter as in default of appointment.

In December, 1893, the father and daughter mortgaged their interests for £10,000, which was paid to the father and applied by him for his own purposes.

The father subsequently became bankrupt, and the trustees, at his request and with the consent of his trustee in bankruptcy, and at the request of the daughter, and with the concurrence of the mortgagee, sold the property for £16,500, which sum was paid to the trustees.

The question arising, how this fund ought to be dealt with, the trustees took out this summons to determine whether they could or ought properly to distribute the proceeds of sale as the daughter, the father's trustee in bankruptcy, and the mortgagee might direct.

(*a*.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

Farwell, Q.C., and *Dauney*, for the trustees.—The real question is, "Can there ever be such a thing as a fraudulent release of a power?" If there can, this is a case of it, as it is absolutely clear that the release was made with a view to the father's benefit. If the father had appointed the fund to the daughter with a like view, the appointment would have been clearly bad. Does not the same rule apply to releases? The court is not bound to assist such a release: *Cunynghame* v. *Thurlow*, 1 Russ. & M. 436n.; *In re Little, Harrison* v. *Harrison*, 37 W. R. 289, 40 Ch. D. 418. The cases of *Smith* v. *Houblon*, 26 Beav. 482, 8 W. R. Ch. Dig. 53, and *In re Radcliffe, Radcliffe* v. *Bewes*, 40 W. R. 323, [1892] 1 Ch. 227, do not say that all releases are necessarily valid. Again, although the Conveyancing Act, 1881, s. 52, has enabled powers simply collateral to be released, a power coupled with a duty cannot be released—*In re Eyre, Eyre* v. *Eyre*, 49 L. T. 259, 32 W. R. Dig. 148; *Saul* v. *Pattinson*, 34 W. R. 561—any more than it could before the Act: *In re Dunne's Trusts*, 1 L. R. Ir. 516, 27 W. R. Dig. 242. In this case it was the father's duty to preserve his power of giving a direct interest to the daughter's issue, unless he chose to exercise his power by a *bonâ fide* appointment to the daughter. He cannot escape the duty of acting *bonâ fide* by releasing the power.

Byrne, Q.C., and *R. F. Norton*, for the daughter and the mortgagee.—The case is on all fours with *Smith* v. *Houblon*, and the present state of the law cannot be more clearly stated than in Farwell on Powers, pp. 11, 12, 438, 439, where all the cases cited are discussed and explained.

C. E. E. Jenkins, for the father's trustee in bankruptcy.

CHITTY, J.—The objection of the trustees is based on the fact that the father obtained a benefit by releasing the power. It is contended that a release is subject to the same rules as an appointment. It is well settled that a power of this class can be released: *Smith* v. *Houblon*. In that case the father had a power of appointment among children over a fund which, in default of appointment, was limited to them equally. Being beneficially entitled in default of appointment to one-third of the fund as representative of a deceased child, he assigned that one-third share to his mortgagees and released his power. It was held that this power was effectually released. Now, the very same objection arose in that case as is suggested here—viz., that the person releasing acquired a benefit. If the fraudulent appointment rules apply to releases, that case was wrongly decided. But the point was considered in *In re Radcliffe*, in which case the Court of Appeal followed *Smith* v. *Houblon* and rejected *Cunynghame* v. *Thurlow*. In *In re Radcliffe* the father, who executed the release, was entitled as administrator to the interest of a deceased son. I am informed by two of the counsel in that case that, though a point was mentioned in the report as to the father's life interest and the son's reversion being held by the father in different rights, in point of fact there were no substantial debts for the son's administrator to pay. It is therefore plain on the facts of *In re Radcliffe* that the father, in executing the release, was augmenting the beneficial interest which he already took under the settlement. That case appears by itself a sufficient authority to justify, or more properly speaking to bind, me in holding that the release of a power is not invalidated by the fact of a benefit resulting to the person releasing. If it is necessary for me to express a broader opinion, it appears to me that there is a fallacy in applying the principles of fraudulent appointments to releases.

The donee of a power like this is under no duty to exercise it. There is no fiduciary relation between him and the objects of the power, except that if he exercises the power he must exercise it honestly for the benefit of those objects. I cannot find any ground for applying that doctrine to the release of a power. Two cases, viz., *Saul* v. *Pattinson* and *In re Eyre, Eyre* v. *Eyre*, were cited to show that the release could not stand. But in each of those cases the power was coupled with a duty, and was part of the trust, so that the trustees could not get rid of it. I have nothing to say about those decisions except to observe that they have no application to the present case.

I therefore answer the question in the affirmative.

Solicitors, *Street, Poynder, & Whatley; Saxton & Son; Trinder & Capron.*

Chan. Div. }
Kekewich, J. } May 29, 1895.

THOMSON *v.* TRUSTEES, EXECUTORS, AND SECURITIES INSURANCE CORPORATION. (*a.*)

Company — Company formed to carry on financial operations — Capital — Assets — Investment — Surrender of part to improve remainder — Reduction of capital — Ultra vires — *Memorandum of association — Companies Acts*, 1867 (30 & 31 *Vict. c.* 131), *s.* 9, *and* 1877 (40 & 41 *Vict. c.* 26), *s.* 3.

The surrender by a limited financial company of a part of a security, constituting one of its assets, for the purpose of improving the remainder, where the company is acting within the scope of its business as set forth in the memorandum of association, is not a reduction of capital within the Companies Acts, 1867 *and* 1877, *requiring the sanction of the court.*

Motion.

The defendant corporation was incorporated in 1887 under the Companies Acts, 1862-1886, with a nominal capital of £2,000,000, divided into 200,000 shares of £10 each.

By the memorandum of association the objects were declared, *inter alia*, to include the receiving of money on deposit, making loans on security, and "generally of lending money on such terms as might seem expedient, and the carrying on of financial operations of every kind, the borrowing of money and giving security, the investing of money, the managing, disposing of, or otherwise dealing with all or any part of the property of the company, and the doing of all things conducive to the attainment of such objects."

The corporation held 6,325 fully paid-up £5 shares in a company formed for constructing a railway in Spain under a concession granted by the Spanish Government.

By an agreement dated the 14th of May, 1895, and made between the corporation and the said railway company, after reciting that, owing to lack of funds, the company were unable to complete their line, and consequently were likely to forfeit their concession, and that, it being impossible to raise further capital, a bank would advance the requisite money on the guarantee of approved guarantors, and that in consideration of giving the guarantee the guarantors should have transferred to them by the shareholders a part of the issued share capital in proportion to their holdings, it was agreed that the corporation, on being satisfied that the scheme had become binding on all parties, would at the request of the railway company transfer 2,000 shares, of the nominal value of £10,000, being part of the 6,325 shares held by them, as the railway company might direct.

The plaintiff thereupon, on the 23rd of May, 1895, issued a writ, on behalf of himself and all other shareholders in the corporation, against the corporation claiming a declaration that the agreement was *ultra vires*, and an injunction preventing it from being carried into effect. The plaintiff also served notice of motion to the same effect, on the ground that the corporation would derive no benefit from the transfer, that it therefore amounted to a surrender of assets, and was consequently *ultra vires*.

By the affidavit of its general manager the corporation stated that the object of the proposed transfer was to assist the railway company in completing its line, and thus to give a real value to the rest of the shares held by the corporation, and that unless this was done the whole agreement would fall through, and by the affidavit of the chairman of the railway company it was shown that if the agreement fell through the line would remain uncompleted, and that total loss would result.

By consent the motion was treated as the trial of the action.

E. B. Cooper, for plaintiff.—By section 9 of the Companies Act, 1867, no reduction of capital such as is here proposed by the surrender of a part of the assets of the corporation, can be made without an order of the court obtained as prescribed by the Act. Section 3 of the Companies Act extends the meaning of "capital." It is *ultra vires*, not being sanctioned by the memorandum of association.

Renshaw, Q.C., and *Kirby*, for defendant corporation.—As a financial company the corporation may do what it thinks best to protect assets. The memorandum covers what is proposed, and the court will not interfere with the corporation in the carrying on of its business: *Taunton* v. *Royal Insurance Co.*, 12 W. R. 549, 2 H. & M. 135.

KEKEWICH, J.—I think that what is proposed to be done by the corporation cannot be called a "reduction of capital," and if this is so it is clearly within their powers. It is true that the rules enacted by the Legislature to be followed in a case of reduction of capital are very strict, but they were never intended to paralyse the ordinary business of a company, and in reference to that business they must be somewhat elastically construed.

Were I to hold this to be "a reduction of capital" I should be obliged to say that whenever a company parts with any of its assets—*e.g.*, investments or securities—that is a reduction of capital. In one sense it is, but not in the sense of reducing the capital of a trading corporation.

Suppose, for instance, a company allowed to invest on mortgage of land invests £10,000 on such a mortgage, and that the land becomes depreciated and impossible to let, and the company cannot and apparently never will get anything out of their mortgage, and suppose the mortgagor were to say to them, "If you will release a few acres here, I think I should lay out some roads and so forth, and in a few years the value of the whole estate, and consequently of your security, will be much improved," and the company think it is worth trying, and honestly think that by giving up part of their security they may obtain a benefit, would it not be utterly absurd to hold in such a case that this was a reduction of capital, needing the sanction of the court on a petition and the writing of the words "and reduced"? Now, this is a case on similar lines. This is an investment or security form-

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

ing part of the assets of the company. The company's assets are employed in business, and this being a financial company has a right to advance its business in any manner within what an ordinary business man might do in the ordinary way of advancing his business. This motion is treated as the trial of the action, and I give judgment for the defendants, the judgment to be prefaced by the words "the court being of opinion that there is nothing to prevent the defendant company from entering into and carrying out the agreement of the 14th of May, 1895." The plaintiff to pay all costs of the action.

Solicitors, *Ashurst, Morris, Crisp, & Co.; Slaughter & May.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills and Wright, JJ.) Dec. 21.

Ex parte ARTON (No. 1). (*a.*)

Extradition — Requisition by foreign Government — "Offence of a political character"—Bonâ fides of foreign Government—Jurisdiction of court—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 3.

Upon an application by the accused for a writ of habeas corpus, *the court has no jurisdiction to entertain or deal with the question whether the foreign Government in demanding the surrender was acting in good faith and in the interests of justice.*

Application for a rule *nisi* for a *habeas corpus*.

The application was made on behalf of Emile Arton, now a prisoner in Her Majesty's Prison, Holloway, and it called upon the Secretary of State for the Home Department, Sir John Bridge, and the Government of the French Republic to show cause why a writ of *habeas corpus* should not issue to bring up the body of Emile Arton, against whom an order of extradition had been made by Sir John Bridge, sitting at Bow-street Police Court.

The offences in respect of which the order of committal had been made were six in number: (1) Falsification of accounts and using falsified accounts; (2) fraud as agent or trustee; (3) obtaining money and goods by false pretences; (4) crimes against the bankruptcy laws; (5) larceny; (6) embezzlement.

The application for the rule was made upon four grounds, namely—first, that the magistrate committed the accused for an offence which is not within the Extradition Treaty; secondly, that the depositions did not disclose a *primâ facie* case in support of the charges; thirdly, that the demand for Arton's surrender was not made in good faith; and, fourthly, that the demand was made for political purposes.

The Extradition Treaty with France, made in 1878, provides, in clause 3, that the crimes in respect of which extradition is to be granted are the following: (18) "Fraud by a bailee, banker, agent, factor, trustee or director, or member or public officer of any company, made criminal by any Act for the time being in force"; and section 3 of the Extradition Act, 1870 (33 & 34 Vict. c. 32), provides that "the following restrictions shall be observed with respect to the surrender of fugitive criminals: (1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character."

C. W. Mathews, in support of the application.—With regard to the first ground of the application, the crime of "*faux*," which is included in the order of committal, and which is translated as "falsification of accounts and using falsified accounts," is not a crime within the meaning of the Extradition Treaty with France, and therefore it is not a crime with respect to which extradition can be granted. [A rule was in the result granted upon this ground.] With regard to the second ground of application, that the depositions do not disclose a *primâ facie* case against the prisoner, as this applies to two only of the offences charged, and as there is a *primâ facie* case with regard to the other offences, it would be useless to insist further upon the point. [Lord RUSSELL, C.J.—The court wish you to pass over the third ground for the present, and deal with the fourth and last ground.] By dealing with the third ground and going through the facts of the case as disclosed in Arton's affidavit, the argument in support of the fourth ground would have been very much strengthened. The fourth ground is that the requisition was made for political purposes. I submit that the demand for the surrender, although ostensibly made for crimes of fraud, is in reality made for the purpose of obtaining political secrets. The surrender of the prisoner is demanded with a view to try or punish him for an offence of a political character within the meaning of section 3 of the Extradition Act, 1870. If surrendered upon these charges, he will be placed on his trial ostensibly for these charges, but certain questions will be put to him relating to political matters, and if he refuses to answer and disclose these political secrets he will be in contempt, and will be punished for contempt of court, and may be imprisoned until he answers. This is punishing him for an offence of a political character. The case of *Ex parte Castioni*, 39 W. R. 202, [1891] 1 Q. B. 149, shows that the court can go into all the facts to enable them to judge whether there has been a political offence. [The Court refused to hear any argument on the third ground.]

Lord RUSSELL OF KILLOWEN, C.J. — It is not necessary that the court should consider the general law of extradition, except to point out the distinction between its political and its strictly judicial aspect, with the latter of which alone we have to deal. Extradition is founded upon the broad principle that it is in the interests of civilized communities that crimes, acknowledged by civilized communities to be such, should not go unpunished, and it is part of the comity of nations that one State shall assist another to bring those who commit such crimes to justice. But the application of that principle, and the conditions under which extradition shall be granted, and the formalities to be observed in the obtaining of extradition, are all matters primarily for the two political Powers in question to arrange in the first instance by treaty, and then to put into law by a legislative enactment what are the conditions, the limitations, and the class of crimes for which extradition will be granted. It is to the expression of the Legislature in Acts of Parliament, and to that alone, that judicial tribunals can refer. The Act or Acts of Parliament are at once the sole source, and at the same time the strict limitation, of the judicial functions of the court. We are sitting here as judges, and as judges only, and we have nothing to do with political questions or political

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

considerations, except in so far as they are introduced into the Act or Acts we are called upon to construe.

The first ground on which this motion was made was that the person in custody has been committed for crimes not within the Extradition Treaty. That applies to one only of the six charges on which the order of committal has been made, namely—the crime of *faux*, or "falsification of accounts and using falsified accounts." It has been argued that that does not come within the enumeration of offences described in the Treaty, and there is no doubt that to justify a committal for any crime it must come within the Treaty and come within the Act of Parliament. The only category in the 3rd article of the Treaty which can be said to relate to it is the one which deals with "fraud by a bailee, banker, agent, factor, trustee, or director, or member or public officer of a company," within the meaning of the 18th category of the Treaty. The court think that there is sufficient in this point to grant a rule upon the point; and if, upon argument of the rule, those who represent the Crown are unable to satisfy the court that it is properly included, then steps will be taken to prevent the man committed being charged with that offence.

The next point is that the accused has been committed for offences of which there is no *primâ facie* proof, and no doubt the contention on this second point is quite right, namely—that the court is entitled, and is bound, to see whether or not there has been made out before the magistrate such a *primâ facie* case of guilt as would entitle him in the ordinary case of a crime committed against the municipal laws of this country to commit the person charged to take his trial for that offence. The allegation of the want of sufficient proof is restricted to two of the charges out of six, namely—fraud by an agent within category 18 of clause 3 of the Treaty, and the obtaining money and goods by false pretences; but it is admitted that both these are within the Treaty and the Act of Parliament as an offence in respect of which an extradition may properly be made. It is also conceded that as regards the remaining offences it could not be successfully contended that there was not ample evidence to justify the committal. In view of that fact, the point has not been insisted upon as to the alleged sufficiency of the evidence of the two charges, fraud by an agent and obtaining money and goods by false pretences.

The third ground urged is that the demand for an extradition is not made in good faith and in the interests of justice. I will pass by that for the present, and come to the fourth, which is that the offences for which the prisoner is committed are political in their character, and that the surrender has been demanded from political motives.

There is no doubt that if it had been shown that the surrender was demanded for an offence of a political character, or that the surrender was demanded with a view to try or punish the accused for an offence of a political character—if either of those alternative propositions could have been established—it would furnish a ground either for the intervention of this court, or for a declaration by this court that for such an offence no extradition could legally, under the Act of Parliament, be made. Is there any real ground for either of these suggestions? First, is this an offence of a political character, or is any one of the offences an offence of a political character? The bare enumeration of them seems to be an answer to that suggestion. The bare enumeration of them shows that they are completely divested of any offence of a political character. Then can it be said that the requisition is made with a view to try or punish him for an offence of a political character? It seems to me to be perfectly clear that what that means is this—that, with regard to a person whose extradition is demanded, for having committed an offence of a political character, the pretence of a charge of another and a different crime which does come within the Extradition Act and the Treaty is resorted to as a pretence and excuse for demanding the extradition, in order that he may be tried and punished for a political offence which he has already committed. The learned counsel was pressed as to what was the political offence, or the offence of a political character, which it can be alleged this man has committed. The answer was that it is impossible to give it a name or to describe it. I therefore come to the conclusion, as regards that fourth point, that there is no evidence to warrant us in coming to the conclusion either that the offence in respect of which surrender is demanded is one of a political character, or that the requisition for his surrender has been made to punish him for an offence of a political character.

The third ground was that the demand was not made in good faith and in the interests of justice. I pointed out that this was in itself a very grave and serious statement to put forward, and one which ought not to be put forward unless there are very strong grounds for supporting it. It means to convey not only a reflection of the gravest kind upon the motives and actions of the responsible Government of a neighbouring and friendly Power, but also a very grave imputation, not lightly to be made, upon the judicial authorities of that friendly Power. But is this a matter open to us at all? In my judgment it is not. This bears upon the political aspect of the question. Into its consideration matters enter of which this court is incompetent to judge, and of which, as I conceive, it has no authority to judge. They are considerations, if they exist at all, to be addressed to the Executive of this country, and they cannot enter, and ought not to enter, into the judicial consideration of this question, which to my mind turns solely upon the terms of the Act of Parliament and the Treaty on which that Act was made. Upon these grounds there will be no rule granted, except on the first point.

WILLS, J.—I am entirely of the same opinion. With regard to the point that Arton's surrender has been demanded with the view to try or punish him for an offence of a political character, I think it is impossible to doubt, applying the ordinary principles of construction, that the offence of a political character of which the Act speaks must be one which has been already committed. It is admitted that there is no conduct of the prisoner which can be so described, or which can fulfil that condition, that the prisoner has already committed a political offence against the laws of France; but it is said that if he be surrendered he will, when he gets into the hands of the French judicial authorities, be compelled either to disclose matters which he knows or to undergo indefinite imprisonment until he does answer the questions. The same considerations prevail here which induce us to say that we cannot enter into the question whether the Executive of a foreign country at peace with us is honest or dishonest in the discharge of its duty, and these considerations lead us to refuse to entertain the question whether it is probable that the French courts will depart from their own laws. We must assume that the French courts will administer justice according to their own laws; but, whether they do that or not, we have no right to interfere beforehand to prevent them from exercising in this case the kind of procedure which they exercise with regard to any criminal who may come within their jurisdiction. That seems to me to be an

absolute and complete answer to the argument addressed to us.

WRIGHT, J., concurred.

Application refused, except on the first ground.

Solicitor for the accused, *Arthur Newton.*

IN BANKRUPTCY.

Q. B. Div.
(Vaughan Williams, J.) } Dec. 3.

In re BASSETT.
Ex parte LEWIS. (*a.*)

Bankruptcy—Costs—Set off of costs of an appeal to a Divisional Court of the Queen's Bench Division against costs of an appeal to the Divisional Court in Bankruptcy—Bankruptcy Rules, 1886, *r.* 353.

The costs of an appeal to a Divisional Court of the Queen's Bench Division cannot be set off against the costs of an appeal to the Divisional Court in Bankruptcy.

Application by Mr. Lewis, liquidator of Bassett & Co. (Limited), for the payment out of court of a sum of £20 lodged by him as security for costs of an appeal to the Divisional Court in Bankruptcy, under the following circumstances.

Mr. Lewis, shortly after his appointment as liquidator of Bassett & Co. (Limited), brought a misfeasance summons, under the Companies (Winding-up) Act, 1890, against Mr. Bassett, a director of the company, in the Birmingham County Court. Mr. Lewis succeeded on the summons, and Mr. Bassett appealed to the Queen's Bench Division, where his appeal was dismissed with costs.

Mr. Lewis then presented a bankruptcy petition against Mr. Bassett in the same county court, and the petition was dismissed. Mr. Lewis appealed to the Divisional Court in Bankruptcy, but the appeal was dismissed with costs (see 43 W. R. 427).

Mr. Lewis now applied for the payment out of court of the sum of £20 lodged by him as security for the costs of his appeal, upon the ground that he was entitled to set off the costs of the appeal to the Queen's Bench Division, in which he had succeeded, against the costs of the appeal to the Divisional Court in Bankruptcy, in which he had failed.

Muir Mackenzie, for Mr. Lewis.—In the case of *Ex parte Griffin, Re Adams* (*No.* 2), 28 W. R. 714, 14 Ch. D. 37, it was held that costs in the High Court could not be set off against costs in bankruptcy, but where that case is cited in Williams on Bankruptcy, 6th ed., p. 128, it is stated that this can hardly be so now that bankruptcy matters are assigned to the Queen's Bench Division.

F. C. Willis, for Mr. Bassett.—In Robson on Bankruptcy, 7th ed., p. 373, it is stated that the costs of proceedings in the High Court not in bankruptcy cannot be set off against the costs of proceedings in bankruptcy, and *Barker* v. *Hemming*, 28 W. R. 764, is cited in support of that proposition.

The cases of *Pelton* v. *Harrison* (*No.* 2), [1892] 1 Q, B. 118, 40 W. R. Dig. 181, and *Blakey* v. *Latham*, 38 W. R. 193, 43 Ch. D. 23, were also referred to.

VAUGHAN WILLIAMS, J.—In my judgment I ought not to allow these costs to be set off. I should like to do so if I could see my way to it, because I think that in the present case such a set-off would be just and equitable between the parties. It is, however, clear that up to the date of the passing of the Judicature Act costs of an appeal on the chancery side could not be set off against an appeal on the bankruptcy side; the question, up to that date, was altogether unarguable. Now, it must be seen whether there is anything in the Judicature Act to alter this state of things, and I cannot discover that there is anything express on this point to be found in the Act itself. The rules which give power to a taxing master to set off relate only to the common law side—or rather, to the Queen's Bench Division. Therefore, as there is no express enactment or rule allowing the set-off in such a case as the present, it must be seen whether there is anything in the fact that these judgments are both of them judgments of Divisional Courts, which points to the conclusion that one set of costs may be set off against the other.

I think that there is nothing at all in this fact which can lead me to such a conclusion, and I am therefore of opinion that the costs of the appeal from the county court to the Queen's Bench Division cannot be set off against or deducted from the costs of the appeal from the county court to the Divisional Court in Bankruptcy. There are many and good reasons for keeping costs in bankruptcy distinct from other costs. Proceedings in bankruptcy are in themselves of a very special nature, and are taken against a man with a view of altering his *status*, and, in my opinion, costs in such proceedings ought not to be set off against or deducted from costs in other proceedings.

Application dismissed.

Solicitors for the applicant, *Harveys & Capron.*

Solicitor for the respondent, *F. Hatton.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div.
Probate. } July 8, 1895.

IN THE GOODS OF PONSONBY, DECEASED. (*a.*)

Probate—Administration—Bodily incapacity of executor—Grant during incompetency for use and benefit.

Where a sole executor was bodily incapable of acting, and likely to remain so for some time, the court granted letters of administration with the will annexed to a residuary legatee for life, for the executor's use and benefit during his incompetency.

Motion for a grant of letters of administration of the personal estate of Georgina Melita Maria Ponsonby, with will dated the 17th of May, 1877, and codicil dated the 17th of December, 1894, to Harriet Julia Frances Ponsonby, one of the residuary legatees for life, for the use and benefit of Sir Henry Frederick Ponsonby, the surviving executor, during his incompetency.

The deceased died on the 18th of February, 1895, having by her said will and codicil appointed Sir Henry Frederick Ponsonby and the Rev. Frederick John Ponsonby her executors and trustees, and in the events which had happened leaving her sister, the said Georgina Melita Maria Ponsonby, residuary legatee for life of two-thirds of the estate, and another sister, Selina Barbara Baring, residuary legatee for life of the remaining one-third. The Rev. Frederick John Ponsonby predeceased the testatrix. Sir Henry Frederick Ponsonby was dangerously ill,

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

totally unable, and not likely for a long time, according to the doctor's affidavit, to be able to understand or attend to business matters.

The sister Selina Barbara Baring had given her written consent to the present application.

R. A. Pritchard and *Priestley*, in support of the motion, applied for a grant either under section 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), to the residuary legatee as such, or for a grant in the terms of the motion without reference to section 73, referring to Williams on Executors, 9th ed., p. 441. Where the executor is disabled from acting or becomes incapable of legal acts as here, then there should be a grant of temporary administration, as put in 1 Oughton's Oido Judiciorum, tit. 219, 1n (*a* 2), *Durante corporis aut animi vitio.*

JEUNE, P.—I think the passage in Oughton includes bodily incapacity, and the grant should go in the terms of the motion.

Motion allowed.

Solicitors, *Leman & Co.*

House of Lords.

From C. A. England. } Dec. 2.

FORD'S HOTEL CO. *v.* BARTLETT. (*a.*)

Arbitration—Stay of proceedings—"Step in proceedings"—Arbitration Act, 1889, *s.* 4—*Practice—Appeal—Judicature Act*, 1894, *s.* 1.

A defendant by taking out a summons for obtaining an order for an extension of time for delivery of defence takes a "step in the proceedings" within the meaning of section 4 *of the Arbitration Act*, 1889.

Decision of the Court of Appeal, 43 *W. R.* 453, [1895] 1 *Q. B.* 850, *affirmed.*

Section 1 *of the Judicature Act*, 1894, *applies only to appeals from the High Court to the Court of Appeal.*

This was an appeal from the Court of Appeal (Lopes and Rigby, L.JJ.) reported 43 W. R. 453, [1895] 1 Q. B. 850.

The action was brought to recover the balance of money alleged to be due for work done under a building contract, which contained a stipulation that any disputes arising between the parties out of the contract should be referred to arbitration.

The defendants, the present appellants, entered an appearance, and on three occasions obtained from the plaintiff written consents to extensions of time for delivering their defence. The defendants took out a summons asking for further time for delivery of defence, and obtained from the master a further allowance of fourteen days.

The defendants then applied at chambers under section 4 of the Arbitration Act, 1889, for a stay of all proceedings in the action.

Collins, J., made the order. This was reversed by the Court of Appeal.

The defendants appealed.

Edward Boyle (*J. P. Murphy, Q.C.*, with him), for the respondent, urged a preliminary objection. By section 1 of the Judicature Act, 1894, no appeal lies from an interlocutory judgment or order without the leave of the court.

[The House was of opinion that the section only applied to appeals from the court of first instance to the Court of Appeal.]

Cyril Dodd, Q.C., and *Arnold Statham* (*W. H. Nagle* with them), for the appellants.—An application for an extension of time is not a "step in the proceedings within the meaning of the Arbitration Act: *Chappell* v. *North*, 40 W. R. 16, [1891] 2 Q. B. 252; *Brighton Marine Palace and Pier Co.* v. *Woodhouse*, 41 W. R. 488, [1893] 2 Ch. 486; *Ives* v. *Willans*, 42 W. R. 396, 483, [1894] 1 Ch. 68; 2 Ch. 478; *Rein* v. *Stein*, 66 L. T. N. S. 470, 40 W. R. Dig. 192; *Young* v. *Buckett*, 30 W. R. 511; *Spincer* v. *Watts*, 37 W. R. 676, 23 Q. B. D. 350; *Richards* v. *Cullerne*, 7 Q. B. D. 623, 30 W. R. Dig. 103.

Murphy, Q.C., and *Edward Boyle*, for the respondents, were not heard.

Lord HALSBURY, C.—I think this is a very plain case. The 4th section of the Arbitration Act, 1889, provides that a person who has by any contract agreed to go to arbitration may be compelled to observe that contractual obligation if some proceeding before the court is taken in order to stay the proceedings. In this provision there come the words which your lordships have to construe—viz., "before delivering any pleadings or taking any other steps in the proceedings."

Now, the defendants took out a summons in this form: "Let all parties concerned attend the master at chambers . . . on the hearing of an application on the part of the defendants that they may have one month's further time to deliver defence therein."

Upon this summons the master made an order that the defendants should have fourteen days' further time for delivering their defence. The sole question upon which we have been engaged so long is whether this is a step in the proceedings. It seems to me that it is. I am not going to give any definition of what a "step in the proceedings" may be; it is enough for this case to say that this is a "step in the proceedings."

There can be no doubt that what was in the mind of the Legislature was this—one of the great scandals which indueed the Legislature to interfere by statutory provision was the delay; and another was the costs incurred, notwithstanding that the proceedings did not go on, so that there were a great number of proceedings for which the parties had to pay, although they furnished no ultimate decision of their rights. The intention of the Legislature in giving effect to the contract of the parties, and saying that one of them should be entitled to make an application to insist that the matter should be referred according to the original agreement, was that they should at once, and before any further proceedings were taken, specify the *terminus a quo*, and that if an application to stay proceedings was made under those circumstances then that the court should enforce the contractual obligation to go to arbitration. That seems to me a very wise provision—that costs should not be thrown away in beginning to litigate.

I have designedly avoided saying anything about the other point which one of the appellant's counsel attempted to argue, namely—that, independently of the Act of 1889, the court has an inherent jurisdiction to stay proceedings in an action. Nothing appears to me more mischievous as a precedent than, when a case of this sort involving a question simply upon procedure is taken and appealed from court to court on one ground, for the parties when they come before the last court of appeal to attempt to raise a question dependent on a wholly different ground, and one which has not been considered by any one of the learned judges before whom the case had come.

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

Under these circumstances I apprehend your lordships will not think it right to consider such a point at all. Confining ourselves to the one point which has been litigated here, I entertain no doubt whatever that the appeal ought to be dismissed with costs, and I move your lordships according.

Lord WATSON.—I am of the same opinion. The only question raised by this appeal is an exceedingly small one, and in my opinion it has been rightly decided by the learned judges in the Appeal Court. I see no reason to doubt that an order obtained upon a summons for extension of time for delivery of defence is a "step in the proceedings" by the defendant within the meaning of section 4 of the Arbitration Act.

Lord MACNAGHTEN and Lord MORRIS concurred.

Lord SHAND.—I am also of opinion that the application by the appellants for an extension of time to deliver their defence, upon which an order giving fourteen days was obtained, was a step in the proceedings. The proceeding in question was unlike that in the cases which have been mentioned, where agents without coming into court at all had given an extra-judicial and voluntary consent, because this proceeding took place judicially in chambers, which was the same as if in court. It is true the application came before a master, and not before the judge; but he was sitting as representing the judge, and the proceeding was therefore unquestionably judicial and a proceeding in the cause. I think further that the proceeding of presenting such a summons and supporting it before the master implied a statement to the effect that the appellants were to defend the action. It was on that representation only that the order of court was obtained. Having regard to the provisions of the Arbitration Act, this appears to me to have been in effect an abandonment of the proposal to have the subject of the cause disposed of by arbitration. On these grounds I am of opinion with your lordships that the appellants' summons with what followed on it, was a step in the proceedings, and that the judgment of the Court of Appeal ought to be affirmed.

Lord DAVEY.—I concur.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *W. L. Cooper*, for *Morgan & Co.*, Chepstow.

Solicitors for the respondent, *Munns & Longden*.

Court of Appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) Dec. 18.

In re HARVEY.
HARVEY *v.* HOBDAY. (*a*.)

Mortgage—Settlement—Charge on inheritance—Payment by tenant for life—Presumption of intention for own benefit—Relation of parent and child.

The fact that the relationship of parent and child exists between a tenant for life and remaindermen, though not immaterial, is not of itself sufficient to rebut the presumption that a tenant for life who pays off a charge upon the inheritance intends to keep the charge alive for his own benefit, and not for the benefit of the remaindermen.

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Appeal by the plaintiff from a refusal of Kekewich, J., to vary the chief clerk's certificate.

The plaintiff, a son of Charlotte Emily Harvey, widow of Charles Bloomfield Harvey, took out a summons in November, 1894, to have it determined whether he, as executor of his mother, who was tenant for life under her husband's will, was entitled to be paid by the trustees of the will out of the *corpus* of the estate an amount which had been applied by the trustees out of the income of the widow as tenant for life in order to pay off a mortgage upon the inheritance. The testator left all his property (except a pair of houses in Western-road, Romford, which were not to be sold during the widowhood of his wife, and which were subject to a mortgage) to his executors upon trust to sell and to pay the income of the proceeds to his wife during widowhood, and after her death or second marriage to divide the *corpus* equally amongst his children who should be then living.

The two houses in Western-road, Romford, were mortgaged to a building society, the principal money and interest being repayable by monthly instalments. The trustees applied the rents of one of the houses for the monthly repayments, and by the addition of a further sum from the testator's estate finally paid off the mortgage in June, 1882.

Mrs. Harvey died in March, 1891, having never remarried. The houses were sold in May, 1893, for £1,225, and the plaintiff claimed so much of this amount as represented capital in the monthly payments to the building society. An inquiry was directed as to what amount (if any) was due to the plaintiff as executor of the widow and tenant for life in respect of money expended out of the widow's income in paying off the incumbrances. The chief clerk by his certificate found that nothing was due, and Kekewich, J., affirmed this decision.

The plaintiff appealed.

Warrington, Q.C., and *G. Curtis Price*, for the appellant.—The question is whether there is any different presumption of law where the relationship of parent and child exists between the tenant for life and the remaindermen.

They referred to *Burrell* v. *Earl of Egremont*, 7 Beav. 205; *Morley* v. *Morley*, 4 W. R. 75, 5 De G. M. & G. 610; and *Topham* v. *Booth*, 35 W. R. 715, 35 Ch. D. 607.

Renshaw, Q.C., and *Marcy*, for the respondents.—The law on the subject is clearly laid down in *Adams* v. *Angell*, 25 W. R. 139, 5 Ch. D. 634, 25 W. R. Dig. 163.

They also referred to *Jones* v. *Morgan*, 1 Br. C. C. 206.

LINDLEY, L.J.—I think it is established by the evidence beyond any reasonable doubt that, as a matter of fact (whatever the explanation of it may be), the rents of one of the two mortgaged houses were applied by the trustees of the will in paying the instalments which became due under the mortgage to the building society. Then, as regards the law, I think Mr. Warrington is right in saying that the onus is upon the defendants to prove that the ordinary legal presumption does not apply, that is, that a tenant for life who pays off an incumbrance upon the inheritance does so for his own benefit. The fact that the tenant for life and the remaindermen stood in the relation of parent and child is no doubt a material circumstance, and if there were anything else to rebut the presumption that fact would be of importance.

But I do not think any of the authorities goes the length of saying that the existence of that relationship standing alone is sufficient to rebut the presumption. We must therefore look at the circumstances to see what there is to rebut the presumption. [His lordship stated the facts, and continued:—] The tenant for life had no option about paying off the mortgage debt; indeed, it was rather to her interest that it should be paid off. And it is one important fact that no other property but these two houses was subject to the mortgage. The fact that some arrangement was made that the rent of one of the houses should be applied in paying off the mortgage debt does not throw any light upon the question whether the tenant for life intended that it should be paid off for the benefit of her children. Then, putting all the facts together, it comes to this: on the one side is the legal presumption which I have mentioned, and on the other side there is nothing to rebut it but the relationship between the parties; and that, as I have already said, is not, in my opinion, sufficient to rebut the presumption. I think that the appeal must be allowed. The costs of all parties will come out of the fund.

A. L. SMITH, L.J.—I am satisfied by the evidence that the rents of the one house were applied in paying off the building society's mortgage. What, then, is the presumption of law when such a payment is made by a tenant for life? I cannot do better than read what was said by Lord Langdale in *Burrell* v. *The Earl of Egremont*, 7 Beav., at p. 232: "A simple payment of the charge, without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention. The burden of proof is upon those who allege that in paying off the charge he intended to exonerate the estate." The burden of proof, therefore, is upon the respondents. Have they discharged it? It is said on their behalf that the tenant for life is a mother and the remaindermen are her children. It seems to me that, according to the authorities which have been cited, that of itself is not sufficient to rebut the presumption, and there is nothing else to rebut it. In my opinion, therefore, the presumption has not been rebutted, and the decision of Kekewich, J., was erroneous.

RIGBY, L.J.—I have arrived at the same conclusion. The case is in some respects one of importance. Probably it was never explained to the tenant for life that if she paid off the mortgage debt she would be entitled to a charge upon the inheritance to the extent of the principal. The voluntary relinquishment of that which the law allowed her to receive is not so strong an indication as the payment of a lump sum would have been; and if in the ordinary case of payment of a mortgage debt by a tenant for life the legal presumption arises, then in this case, where the debt was payable by instalments consisting of principal and interest, and probably all that the tenant for life knew was that if the instalments were not punctually paid the building society would come down on the property, I think it would require more than a mere suggestion of some arrangement that she should pay off the mortgage debt for the benefit of her children, to rebut the presumption that she did not intend to relinquish her right to a charge upon the property. The appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *A. H. Hunt & Co.*

Solicitors for the respondent, *Walker & Battiscombe.*

From Q. B. Div. (Lord Esher, M.R., Lord Herschell, & Kay, L.J.) Dec. 13.

DUNN *v.* REG. (*a*.)

Crown—Prerogative—Servant of the Crown—Civil servant—Contract for personal service—Appointment held during pleasure.

The prerogative of the Crown to dismiss its servants at pleasure applies to all public servants under the Crown, whether military or civil, unless there be some statutory provision for a higher tenure.

Where an authority representing the Crown appoints a person as a servant of the Crown in terms for a certain number of years, there must be taken to be imported into such appointment the right of the Crown to dismiss at pleasure, and no petition of right lies against the Crown in respect of such dismissal.

If any authority representing the Crown were to exclude such right by express stipulation, it would be a violation of public policy, and could not derogate from the power of the Crown.

This was an appeal by the petitioner from the decision of Day, J., given on the hearing of a petition of right for a new trial on the ground of misdirection, the learned judge having directed the jury to return a verdict for the Crown on the ground that all contracts of service held under the Crown, whether military or civil, are determinable at the pleasure of the Crown.

The petitioner alleged that in January, 1892, he entered the service of her Majesty's Niger Coast Protectorate under a contract made with him by Sir Claude Macdonald, Commissioner and Consul General for the Protectorate. The terms of the alleged contract were that the petitioner was to serve for a term of three years, and was engaged for a term of three years certain, at a salary of £200 for the first year, increasing £50 a year to £350.

The circumstances under which this alleged contract was entered into were as follows. Sir C. Macdonald, being then in Africa, was desirous of finding men willing to enter the service of the Protectorate, and consequently wrote to Major Verner in England, requesting him to engage men fit and suitable for the service. In this letter he communicated the terms of the service, stating that the engagement would be for three years certain. Major Verner communicated with the petitioner, who alleged that the said Major Verner read the said letter over to him and engaged him on behalf of Sir C. Macdonald. The petitioner accepted the engagement, and on the 29th of January, 1892, entered the service of the Protectorate as consular agent. On the 9th of October, 1893, the petitioner received a letter written by direction of Sir C. Macdonald informing him that his services were no longer required. The petitioner thereupon claimed to be paid his salary up to the end of the three years according to the alleged contract, or, alternatively, for damages for breach and non-performance of the said contract.

W. H. Stevenson, for the appellant.—The Crown had not the power in this case to dismiss the petitioner, because it had engaged him for a term of three years certain. Sir C. Macdonald acted with the authority of the Crown. [KAY, L.J.—He had not any authority to engage the petitioner except during pleasure of the Crown.] [Lord ESHER, M.R.—All servants of the Crown are appointed

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

during her Majesty's pleasure, except certain people who for the good of the country are by Act of Parliament appointed for a certain time. That doctrine is laid down in *Shenton* v. *Smith*, 43 W. R. 637, [1895] 2 A. C. 229. A petition of right will lie for a breach of contract resulting in unliquidated damages: *Thomas* v. *The Queen*, 23 W. R. 176, L. R. 10 Q. B. 31. The Crown is held now to be liable for breaches of contract. [Lord ESHER, M.R.—If the Crown can dismiss when it likes, there was no breach of contract.] [Lord HERSCHELL.—In Chitty on the Prerogatives of the Crown it is in substance laid down that the servants of the Crown are divided into two classes, those who hold during pleasure, and those who hold during good behaviour or under some statutory tenure.]

Counsel further cited *In re Tufnell*, 24 W. R. 915, 3 Ch. D. 164; *The Queen* v. *Mitchell*, 6 T. L. R. 332; *Cooper* v. *The Queen*, 28 W. R. 611, 14 Ch. D. 311.

Sir R. Finlay, Q.C., S.G. (*Sutton* with him), for the Crown.—The general rule is that all servants of the Crown hold at the pleasure of the Crown, unless provision has been made to the contrary by statute. The ground of public policy is just as applicable to other forms of employment as it is to military service. Sir C. Macdonald held his office himself only during the pleasure of the Crown, and could not make a contract on behalf of the Crown for a certain time without power of dismissal. Such a contract would be unconstitutional. The rule which applies to soldiers is equally applicable to civil servants. This was expressly laid down by Lord Esher, M.R., in the Court of Appeal, and by Lord Watson in the House of Lords in the case of *De Dohsé* v. *The Queen*. (This case was decided in 1886, but is not reported.) [Counsel read from shorthand notes extracts from the judgments; these appear in the following judgment.]

Lord ESHER, M.R.—In this case a relation was instituted between the petitioner, under this petition of right, and the Crown in respect of the public service; that relation was that the petitioner should become a servant of the Crown, and that he should be paid a salary. There is nothing express in his appointment with regard to the length of time during which his service should continue; but that seems to me, in my view of the matter, immaterial. It seems to me that the point in this case is one which I, in the case that has been referred to (*De Dohsé* v. *The Queen*), foresaw would some day come before the court to be determined, and I cannot help thinking that in what has been quoted I foresaw what would be the decision of this court when the question should come before it; but it was not thought expedient to determine it then, because the case was one of military service. These are the words: "Admitted, therefore, that no person, whether called a Government or anything else, could make a contract for seven years for military service. Now, whether that doctrine with regard to the Crown is confined to military service or not need not be decided to-day, in my opinion. I take leave to say that I do not accept at all that the doctrine is confined to military service under the Crown. All service under the Crown itself is public service, and to my mind it is most likely that the doctrine which is said to be confined to military service applies to all public service under the Crown, because all public service under the Crown is for the public benefit, and therefore it may be that the Crown has despotic authority to get rid of those servants who are employed for public purposes and for the benefit and advantage of the public."

That is what I seem to have said would probably be the decision of the court in a case where the service is a civil service for public purposes. Instead of saying it is probable, I have now only to say it is an absolute doctrine. That suggestion of mine was before the House of Lords in the case that has been cited to us, and it seems to me that the judgment of Lord Watson has almost in terms declared that what I said would be my opinion if the case arose, is a right opinion, and that he has said that it is an absolute decision, and must be made a decision. Let us see how he follows that: "In the first place, it appears to me that no concluded contract is disclosed in the statement contained in the petition of right; and in the second place I am of opinion that such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss." I entirely think that is right. "Further, I am of opinion that if any authority representing the Crown"—that is, if any officer of Government of the highest kind—"were to exclude such a power by express stipulation, that would be a violation of the public policy of the country, and could not derogate from the power of the Crown." That is, could not derogate from the power of the Crown to dismiss at pleasure. Anything more conclusive than that doctrine it seems to me could not be cited. I take that to be the rule laid down in the House of Lords. It is in consonance with what I expressed I thought would be the rule to be laid down in this court. But I think myself that the case of *Shenton* v. *Smith* is equally decisive. I think that one cannot read the judgment of the Privy Council in that case without seeing that it was meant to express precisely the same doctrine which has been more concisely and more clearly stated by Lord Watson in the House of Lords. I think both authority and principle alike are to the effect of what Lord Watson has stated, and that therefore this petition was wrongly conceived, and cannot be supported.

Lord HERSCHELL.—I am of the same opinion. The petitioner was appointed by Sir Claude Macdonald as consular agent or vice-consul in the Niger Protectorate.

The question is whether he can maintain a petition of right in respect of his services being put an end to when they were. His case is that he was engaged for three years certain, and that therefore there was no right in the Crown to put an end to his services before that period, and that if the Crown does so it must be liable for an action for damages for breach of contract. Now, persons employed in the service of the Crown in this way are, I take it, unless there be some statutory provision for a higher tenure, ordinarily engaged on the understanding that they hold during the pleasure of the Crown.

When, therefore, the petitioner here was appointed by Sir Claude Macdonald, although the appointment was in terms for three years, there must be taken to be imported into it the right of the Crown, which applies in the case of all civil servants, to put an end to that employment at the pleasure of the Crown. Most unquestionably there is here not a tittle of evidence to warrant a suggestion, even were it possible, that Sir Claude Macdonald had authority to employ this petitioner on any other terms than those which are applicable to the service of the Crown. The public interest is what has led to those being the terms upon which persons are employed in the public service. It has been pointed out in the cases to which reference has been made that the appointment being for the public good it is essential to the public good that there should be a power to determine that appointment at pleasure, except where it has been considered more for the public good that there should be another tenure.

For these reasons I think the appeal should be dismissed.

KAY, L.J.—I shall assume in this case that Sir Claude Macdonald did definitely engage the petitioner to be a civil servant of the Crown at a certain salary for a term of three years certain, and the question is whether, if he did so engage him, that prevented the Crown from exercising its ordinary right of dismissing him at pleasure.

Now, in the first place, one cannot help being struck by this, that Sir Claude Macdonald's own appointment, as stated by the Solicitor-General, was during the pleasure of the Crown, and it certainly would seem very strange if Sir Claude Macdonald, who was appointed during the pleasure of the Crown, should have power to bind the Crown by an appointment for three years, during which the Crown would not be able to dispense with the services of a subordinate so engaged. But I take it the general principle is satisfactorily established by the cases which have been referred to. Some of them were cases of military employment, and it was sought to say that in cases of military employment other considerations entered, and that it might be very much indeed for the advantage of the public service that the Crown should have this power of dismissal at pleasure in the case of military appointments, but that such considerations did not apply to the case of the appointment of a civil servant. But that does not convince me at all. It seems to me that in many cases the continued employment of a civil servant would be just as detrimental, or even more detrimental, to the public interest of this country than the employment of a military officer. One cannot help seeing that in distant parts, and in places where our frontiers closely approach those of other Powers, a question of peace or war might be determined by the action of a civil servant upon the spot, and therefore it seems to me that the same consideration applies with at least as much force in the case of a civil servant as it does in the case of a military servant, for maintaining the power of the Crown to dismiss its servant upon its pleasure. Then when we turn to the authorities they seem to me decisive. Besides the case of *De Dohsé* v. *The Queen*, in the House of Lords, in which the words used by the noble lords are perfectly general, and not confined to the case of military service at all, there is the case in the Privy Council of *Shenton* v. *Smith*, which was not the case of military service, but was the appointment of a man who was a doctor in a part of the British dominions. That was an appointment clearly of a man as a civil servant, and yet it was distinctly held that that appointment was subject to the power of the Crown to dismiss at the pleasure of the Crown. In my opinion Sir Claude Macdonald had not, any more than any other servant of the Crown in his position could have, power to appoint a civil subordinate servant of the Crown for a definite term so as to bind the Crown not to dismiss him before that term had expired.

That point is the principal question, and it must be decided, I think, against the plaintiff in this petition of right, and therefore the appeal must be dismissed.

Appeal dismissed.

Solicitors, *A. S. Dunn; Solicitor to the Treasury.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) Dec. 4.

GODFREY *v.* GEORGE. (*a*.)

Practice — Execution — Order for payment of costs— Solicitor—Attachment — Disciplinary jurisdiction of the court—Order in a criminal matter—Election in favour of one of two remedies—R. S. C., 1883, *ord.* 42, *r.* 24.

A person is not precluded from bringing an action to enforce an order of the court for the payment of costs, under Ord. 42, *r.* 24, *by reason only that he has a remedy by attachment under the order.*

Where there is a remedy by action and also a remedy by attachment in respect of the same matter, the plaintiff is not precluded from exercising the one remedy by having made an unsuccessful attempt to enforce the other.

But, semble, *per* Lord Esher, M.R., *and* Lopes, L.J., *that if the plaintiff had obtained a writ of attachment, and the defendant had been taken under it, the plaintiff's remedy by action would have gone.*

An order for the payment of the costs of proceedings taken to have the name of a solicitor struck off the rolls is not an order in a criminal matter.

Appeal from the Queen's Bench Division.

The action was brought to recover £317, money and interest payable under an order of the court. The defendant was a solicitor.

In 1884 he owed various sums of money, amounting to £514 1s. 8d., to Mr. Stuckey Wood, who was a client of the defendant.

In November, 1884, Mr. Wood assigned the debt to the plaintiff, who was also a solicitor.

On the 24th of January, 1885, £100 of the debt was paid off; but in February the plaintiff, being unable to obtain further payment, commenced proceedings against the defendant to have his name struck off the rolls.

On the 17th of February an order was made, by which £200 was ordered to be paid forthwith to the plaintiff, and £131 13s. 10d. to be paid into court, it being referred to the master to ascertain the exact amount of the defendant's indebtedness to the plaintiff. The £200 was duly paid to the plaintiff, and the £131 13s. 10d. was paid into court.

On the 3rd of August, 1885, a further order was made by consent, by which it was ordered that the £131 13s. 10d. should be paid out of court to the plaintiff, that the balance of £102 7s. 10d. should be secured by bills drawn by the defendant on his wife, and that the costs of the proceedings should be taxed and paid to the plaintiff. The taxed costs amounted to £142 2s. 6d. No bills were given, and, with the exception of £29, no money was paid under the order of the 3rd of August.

In 1886 the plaintiff issued an execution under the order, the return to which was *nulla bona*.

In 1895 the Divisional Court were moved for a writ of attachment against the defendant for disobedience to the order; but the court declined to issue the writ.

The plaintiff then brought the action to enforce the order, and to recover the balance of £102 7s. 10d.

Wright, J., gave judgment in favour of the plaintiff for the costs payable under the order; but with regard to the £102 7s. 10d. he said that that debt was merged in the order of the 3rd of August, which only provided for security being given, and

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

did not order the payment of the money; and, the original debt being barred by the Statute of Limitations, he gave judgment for the defendant on that part of the claim.

Both parties appealed.

Ord. 42, r. 24, provides that "every order of the court or judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect."

Crump, Q.C., and *Lewis Thomas*, for the defendant.—The plaintiff could not bring an action on such an order as this was. His only remedy was by writ of attachment. Ord. 42, r. 24, does not apply where there is a remedy by attachment: *Philpott* v. *Lehain*, 35 L. T. N. S. 855, 25 W. R. Dig. 134; *Norton* v. *Gregory*, 73 L. T. N. S. 10. In the latter case Lord Esher, M.R., said: "Some orders, indeed, are enforceable by attachment, upon which, perhaps, no action can be brought." Moreover, the order in this case, being made on an application to strike a solicitor off the rolls, was an order in a criminal matter: *In re Dudley*, 32 W. R. 264, 12 Q. B. D. 44; *In re Freston*, 31 W. R. 581, 804, 11 Q. B. D. 545; and was therefore not enforceable by action. Even assuming the plaintiff to have had both remedies, his election in moving for an attachment precluded him from pursuing his other remedy.

Marshall, Q.C. (*Pollard* with him).—The plaintiff desires to issue a bankruptcy notice. This could not be done on the order. Therefore the plaintiff was compelled to sue for judgment on the order. If the plaintiff made any election, it was in favour of civil proceedings, for in 1886 he issued a *fi. fa.* An election which is to preclude him from a further remedy must be an effectual one. An attachment is not a remedy, but a punishment for misconduct.

Lord ESHER, M.R.—In this case the plaintiff claims to recover money from the defendant upon an order made by the court that the defendant should pay the costs of certain proceedings. But it is said that the court have no power to entertain such a claim. Let us see what the order was. There was a motion against the defendant, who was a solicitor, to have his name struck off the rolls on the ground of misconduct in misappropriating money belonging to a client. The court made an order commanding him to pay costs to the plaintiff. That order therefore became an order for the payment of the amount of the costs. That was in 1885. It is said that it was not such an order as came within ord. 42, r. 24, because it was an order made in a criminal matter. *In re Hardwick*, 32 W. R. 191, 12 Q. B. D. 148, is an express authority that an order made by the court in the exercise of its jurisdiction over its officers is not an order in a criminal matter. If it had been, there could have been no appeal to this court. In that case the point was specially raised as to the right of appeal, and the whole court came to the conclusion that the appeal was good, because the order was not one in a criminal matter. There have been many appeals from orders of the Divisional Court of this kind, and the appeals have been heard in this court, and sometimes this court has disagreed with the Divisional Court. *In re Hardwick* is a decision that an appeal lies because it is not an order in a criminal matter. It is an order in a civil matter, and it is for the payment of money. It is therefore within the words of ord. 42, r. 24.

But, it is said, the solicitor might be attached. So he might. That is under the general jurisdiction of the court over its officers, it having been an order made for misconduct in his professional character. Because he may be attached, can it be said that an action cannot be brought against him? Several authorities show that an action will lie. Therefore he may be attached, or an action on the order as if it were a judgment may be brought. Then, it is said, assuming that to be true, the plaintiff must elect which of the remedies he will adopt. I can see no ground for saying that before he has done anything—that is to say, suppose he has commenced an action and has also given notice of a motion for an attachment—he can be put to his election. I know of no authority for it. If he had moved for an attachment, and an order had been made and the defendant had been taken under the order and put into prison, then, in my opinion, the plaintiff could not have maintained his action; for his legal claim would have been satisfied. But if the attachment had issued and the defendant had escaped before it was executed, then, the plaintiff's claim not having been enforced, his right of action would remain.

It has been the constant practice of the courts that if a person has two remedies for the same matter he may proceed on either until his claim is satisfied by one of them. Therefore, if the plaintiff fails in his motion for an attachment, he still has his remedy by action. The plaintiff in the present case did endeavour to enforce his remedy by attachment; but the court refused to issue the writ. How can it be said that his claim was satisfied? His remedy by attachment having failed, he is entitled under those circumstances to resort to his other remedy.

It seems to me, therefore, that judgment on this point ought to be for the plaintiff.

[His lordship then dealt with the plaintiff's appeal as to the £102 7s. 10d., which he allowed, saying that the learned judge was wrong in holding that the debt was merged in the order and that it was barred by the Statute of Limitations.]

LOPES, L.J.—It is said that an action will not lie on the order of the 3rd of August, 1885, because it was an order in a criminal matter, and was consequently not governed by ord. 42, r. 24. In *In re Hardwick* it was held that a proceeding of the kind in which this order was made was not a proceeding of a criminal nature, and that an appeal would therefore lie. The action was brought upon an order for the payment of costs by the defendant to the plaintiff. For such an action being maintainable *Philpott* v. *Lehain* and *Norton* v. *Gregory* are authorities. It is clear that an action may be brought on any order. Then it is said that, because there was also a remedy by attachment and that the plaintiff had moved for a writ of attachment, he was ousted from his remedy by action. It is important to notice that the court refused to issue the writ, and so the proceeding was abortive. If it had not been abortive, in all probability his remedy by action would have been ousted, on the analogy of a *ca. sa.*; for if in former times a writ of *ca. sa.* issued and the debtor was taken, that was a satisfaction of the creditors' claim, but if the debtor escaped the *ca. sa.* did not operate as a discharge of the ordinary remedy. But here the motion for attachment failed. It seems to me, therefore, that under those circumstances the plaintiff was at liberty to bring his action. He could not have obtained satisfaction by means of both remedies, but he was entitled to do so by one or the other, and if not by one, then by the other.

The plaintiff's cross appeal was not resisted by Mr. Crump.

KAY, L.J., after stating the facts, proceeded:—It is quite clear that an action may be brought upon an order of this kind. It is not, indeed, a judgment, but it may be enforced as if it were a judgment. It was argued that the plaintiff could not succeed in the

present case, because he had already made an unsuccessful attempt to get the defendant committed. His motion for that purpose did not succeed, and no order was made. I do not like to speak of the jurisdiction of the court to punish its officers as a remedy for the recovery of money. It is, rather, the mode in which the court deals with its officers with the object of preventing a recurrence of misconduct. No doubt, the effect of its exercise often is to obtain the payment of money; but it should not be treated as though that were the real object. The disciplinary jurisdiction of the court may be put into action by no matter whom. The right to put it into action is not confined merely to those who are aggrieved. Therefore the power to move for a writ of attachment is not a remedy to recover the money. But when that course has been resorted to, are all other remedies done away with? I do not think so. The application to get the defendant committed failed. Thereupon this action was brought to enforce the order as if it were a judgment, and to recover the balance for which security was to be given under the order, together with the taxed costs.

I think the learned judge was right as far as the costs were concerned, and that what had been done did not bar the plaintiff's claim. It is not necessary to decide whether, if an attachment had been obtained, the plaintiff would have been ousted of his civil remedy. I reserve my opinion on that point.

Defendant's appeal dismissed, and plaintiff's appeal allowed.

Solicitors for the defendant, *Foss & Ledsam.*

Solicitors for the plaintiff, *Marshall & Marshall.*

High Court of Justice.

Chan. Div. North, J. — Nov. 27.

In re BEEMAN.
FOWLER *v.* JAMES. (*a.*)

Administration—Insolvent estate—Annuity—Right of retainer—Judicature Act, 1875, *s.* 10.

An administratrix is not entitled to retain out of the estate when insolvent the estimated value of an annuity covenanted to be paid to her by the deceased. Her only right is to prove with the other creditors. Arrears due at the death can be retained.

Summons taken out in the action by the defendant, Mrs. James, to have it determined whether she, as administratrix of the estate of her son, T. G. Beeman, was entitled to retain out of the estate a sum representing the estimated value of an annuity of £6 per week, covenanted to be paid to her by T. G. Beeman by indenture of the 10th of October, 1891, and by which she released to T. G. Beeman her life interest in certain trust funds.

T. G. Beeman died on the 22nd of September, 1894, intestate. Letters of administration were granted to Mrs. James. The estate proved insolvent, and on the application of a creditor the usual order for accounts and inquiries was directed on the 6th of April, 1895. It was conceded that as regards the arrears due at the death, Mrs. James would have a right of retainer.

Gatey, for the defendant.—*Loane* v. *Casey*, 2 W. Bl. 965, covers this case. There an executor was held entitled to retain in respect of instalments of an annuity not due till after the death of the testator. A right of retainer attaches, although the amount has not been ascertained: *In re Morris' Estate*, 23 W. R. 120, L. R. 10 Ch. App. 68. In bankruptcy the right to prove for the value of future instalments is recognized, and therefore the administratrix must be able to retain to the extent of such value.

Cann, for plaintiff.—The right exists only in respect of an actual debt. The right has never been recognized in bankruptcy, and is not affected by the 10th section of the Judicature Act, 1875. *In re Hargreaves*, 44 Ch. D. 236, 38 W, R. Dig. 3, shows that a person who is to be paid in the future is not a creditor so as to be able to commence administration proceedings: *In re Compton*, 30 Ch. D. 15.

Gatey, in reply, cited *Hochster* v. *De la Tour*, 1 W. R. 469, 2 E. & B. 678.

NORTH, J.—I think the administratrix is entitled to retain the arrears of the annuity up to the death, but I do not think that she is entitled to retain out of the estate the amount of the estimated value of her future annuity. If the estate were solvent, she could not do so, and it would be giving her at once what she is not yet entitled to. The statute, no doubt, does allow a person making a claim in respect of an annuity in arrear to prove for the estimated amount, but it does not enable him to take all. The person is not thereby made a creditor for such sum.

When the annuity is not in arrear there is no right to administration, as is shown by *In re Hargreaves*; but if there is an administration decree, then the annuitant is allowed to prove. The administratrix will be allowed to prove for the value of her future annuity in competition with the other creditors.

Solicitors for the plaintiff, *Macarthur & Co.*

Solicitor for the defendant, *Dolling Smith.*

Chan. Div. Stirling, J. — Dec. 12, 19, 21.

In re POCOCK'S CONTRACT. (*a.*)

Settled land — Married woman — Person having the powers of a tenant for life— Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (1), 58 (1) (*ix.*).

Under a will land was limited to the use of trustees during the life of a married woman upon trust to pay the income to her for her separate use without power of anticipation, with remainder to such uses as she should by will appoint, and in default of such appointment to the use of herself in fee.

Held, that by virtue of section 58 (1) (*ix.*) *of the Settled Land Act*, 1882, *the married woman was entitled to exercise the power of sale conferred by that Act upon tenants for life.*

This was a summons under the Vendor and Purchaser Act, 1874, raising the question whether the vendors respectively had the powers of a tenant for life under the Settled Land Act, 1882, under the following circumstances.

Under the will dated the 1st of June, 1881, of Mary Ann Collins, land stood limited unto and to the use of trustees and their heirs upon trust as to one equal moiety to pay the rents and profits thereof to

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

(*a.*) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

Mary, the wife of Samuel John Pocock, for her life for her separate use and benefit, but with a restraint on anticipation, and from and after the decease of the said Mary Pocock to the use of such person or persons for such interest, and generally in such manner in all respects as the said Mary Pocock, whether covert or sole, should by will appoint, and in default of appointment, and subject to any partial appointment, to the use of the said Mary Pocock, her heirs and assigns. And the other moiety of the same hereditaments was thereby limited to similar uses in favour of Elizabeth Prankerd, the wife of Arthur Prankerd.

The said Mary Ann Collins died on the 6th of January, 1894, and her will was duly proved.

By a contract in writing, dated the 17th of October, 1894, and made between the said Mary Pocock and Elizabeth Prankerd, hereinafter called the vendors, of the one part, and the governors of the Wisbech Grammar School, hereinafter called the purchasers, of the other part, it was agreed (*inter alia*) that the vendors, as tenants for life respectively of equal moieties of the said hereditaments, would sell, and the purchasers would purchase, the fee simple in possession free from incumbrances of the said hereditaments.

The purchasers objected to the title on the ground that it was doubtful whether the vendors had any power to sell under the Settled Land Act, 1882; and ultimately the vendors issued the present summons under the Vendor and Purchaser Act, 1874, asking to have the validity of the above objection determined by the court.

The summons was heard on the 12th of December, 1895.

Ingle Joyce, for the vendors, argued that the case fell within the definition contained in section 2, sub-section 1, of the Settled Land Act, 1882.

E. M. Jackson, for the purchasers.

His lordship reserved judgment.

On the 19th of December his lordship mentioned the case in court, and stated that he had not been able to satisfy himself that the will constituted a settlement within the meaning of section 2, sub-section 1, of the Settled Land Act, 1882; but he wished to call the attention of the parties to section 58 of that Act, and directed the summons to be put into the paper for the 21st of December, in order that the parties might have an opportunity of considering the effect of section 58.

The case was according reargued on the 21st of December by the same counsel.

Stirling, J.—I am much obliged to Mr. Jackson for the argument he has offered on this point, but I confess I do not see any reason why this case does not fall within the provisions of section 58 of the Settled Land Act, 1882.

Now, the short facts are these. Under a will made in the exercise of a limited power of appointment the real estate now stands limited unto and to the use of trustees during the life of a married woman, to her separate use without power of anticipation, with remainder to such uses as she should by will appoint, and with remainder to the use of herself in fee. The legal estate, therefore, is in the trustees. The equitable interest is in the married woman during her life, fettered by the restraint on anticipation, and then she takes a fee liable to be defeated by the exercise of the power of appointment.

Now, it was contended that that constituted a settlement within the meaning of section 2, sub-section 1, being an instrument under or by virtue of which the land stands for the time being limited to or in trust for any persons by way of succession. I have a difficulty in adopting that view, because it seems to me hardly to fall within the words. This is an instrument, no doubt, by which the land stands limited to or in trust for one and the same person for various estates and interests by way of succession. That is not the language of the Act. What the Act deals with is an instrument under which the land stands for the time being limited to or in trust for any persons, being more than one, by way of succession.

But section 58, sub-section 1, provides this: "Each person, as follows, shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act as if each of them were a tenant for life as defined in this Act." Then clause ix. includes amongst those persons "a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event." Therefore a person entitled to the income of land under a trust or direction for payment to him during his own life is plainly within that class; and here the trust is to pay the rents and profits to the lady for her life. She is exactly such a person as is there designated. But then, no doubt, one has to consider whether this is a settlement. Sub-section 2 provides for that: "In every such case the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised."

Now, it seems to me plain that that was meant to extend the definition of a settlement to instruments not included under section 2 of the Act, and that is very well illustrated by the case which immediately precedes, namely, a tenant by the courtesy. If either by conveyance or otherwise a married woman was entitled absolutely in fee to an estate in land, upon her death leaving her husband surviving and an heir, it is the obvious intention that the husband, as being tenant by the courtesy, should be treated as a tenant for life and have the powers of a tenant for life; but unfortunately the words of sub-section 2 were not apt to that case, because the right of the husband was not derived under an instrument, but under the law. Therefore the words of section 2 were not wide enough to include that case, because they only extended the definition of a settlement to the instrument under which the estate or interest arose, and if the estate or interest of the husband did not arise under an instrument, but arose by the operation of the law, there was a difficulty in applying it to that case. But that was set right by the Settled Land Act of 1884, which said that for the purposes of the Act of 1882 the estate of a tenant by the courtesy should be deemed an estate arising under a settlement made by the wife. That seems to me to prove, if there were any doubt about it before, that the meaning of the Act of 1882 was to embrace under sub-section 2 of section 58 instruments that did not fall within the definition of settlements in the earlier part of the Act. There is nothing said as regards to whom the remainder is to go in clause ix. of sub-section 1; and, as it seems to me that the present case falls within the exact language of section 58, sub-section 1, clause ix., and as this is an Act which ought certainly not to receive a narrow construction, I think a title may be made by the married woman as tenant for life by virtue of the powers vested in her.

Solicitors, *Peake, Bird, Collins, & Peake; Wing & Du Cane.*

Chan. Div.
Stirling, J. Dec. 3, 4.

In re STAMFORD (EARL OF).
PAYNE *v.* STAMFORD. (*a.*)

Trustee—New trustee—Appointment—Trustee resident "abroad"—Solicitor for the tenant for life—Settled Land Acts, 1882, 1890.

The tenant for life under a will was empowered to appoint a new trustee of the will in the place of any trustee thereof who should (inter alia) *be "abroad." In* 1893 *P., a trustee of the will, went to live at Lisieux, in Normandy, a place within sixteen hours' rail of London. He continued to attend meetings of the trustees, with rare exceptions; and declared his intention of returning to reside in England in* 1898. *In* 1895 *the tenant for life, in exercise of her power, appointed her solicitor a new trustee of the will in the place of P., on the ground that P. was "abroad" within the meaning of that power.*

On a summons taken out by the trustees to test the validity of the new appointment,

Held, that P. was "abroad" within the meaning of the power, and that the tenant for life was consequently entitled to appoint a new trustee in his place.

Held also, that though the court would not itself appoint or confirm the appointment of the tenant for life's solicitor as a trustee of a settlement, yet it would not interfere with such an appointment when made by the tenant for life in good faith.

This was a summons taken out by the trustees of the will of the late Earl of Stamford to determine whether or not a certain indenture, dated the 28th of August, 1895, and made by the Countess of Stamford, the tenant for life under the said will, and being a deed of appointment of a new trustee in the place of a trustee who had gone abroad, was a valid appointment under the circumstances of the case, which were as follows.

The late Earl of Stamford died on the 2nd of January, 1883, having made his will on the 26th of January, 1875, whereby he appointed Arthur F. Payne, Robert Cocks, and Henry Ball executors and trustees thereof. The will was duly proved by these three persons, who were still alive. The trusts of the will were extremely long and complicated, but were shortly stated by Stirling, J., in his judgment, as follows. The testator devised four estates, in Staffordshire, Leicestershire, Cheshire, and Lancashire respectively, to the use of his trustees, their executors, administrators, or assigns, during the life of the countess upon certain trusts for her benefit, and he directed the said trustees to set apart out of the rents and profits of these estates the sum of £12,000 per annum, to be applied on account of his personal estate in or towards the discharge of his debts and the legacies and annuities given by his will, such payment and application to be in the absolute discretion of his said trustees. After the death of the countess the said estates were devised to uses in favour of different families, but in respect of the Lancashire estates the testator created a term therein of 1,000 years, and limited the same to the trustees upon trust to apply the rents and profits, firstly in payment of debts, and then in redeeming the mortgages on the four estates. The residuary estate was bequeathed to the trustees upon trust to convert the same into money, to pay thereout funeral expenses, debts, and legacies, and then to apply the surplus (if any) toward the discharge of the mortgages, with remainder to the countess absolutely. The testator, after giving various legacies general and specific, then declared that if either of his trustees or any trustee thereafter appointed should die in his lifetime, or decline to act, or having survived him should die, or be abroad, or desire to be discharged, or refuse or become incapable to act, then and in every such case it should be lawful for the countess during the continuance of the estates limited in trust for her benefit, and afterwards for the surviving or continuing trustee, or the executors of the last surviving or continuing trustee, to appoint a new trustee or new trustees.

The personal estate was insufficient to pay the debts in full, and had long since been exhausted. All the simple contract debts had been paid, but there remained mortgages to the amount of £800,000 and annuities of nearly £4,000 still undischarged. The executors had assented to the specific legacies and had paid all the pecuniary ones, but no personal estate remained in their hands available for distribution.

Up to the 29th of July, 1895, all the three trustees had acted together, but on the 8th of August the countess's solicitor, Sir Thomas Wright, forwarded to the trustees' solicitors a draft appointment of himself as trustee in the place of Arthur Payne, who it was therein alleged had gone to reside abroad. Owing to the absence from town of the member of the firm who attended to the trusts, this communication was merely acknowledged, whereupon without further correspondence with the trustees or their solicitors the countess executed the said indenture of the 28th of August, and appointed Sir Thomas Wright as trustee as aforesaid in place of Mr. Payne. It was the validity of this appointment which was now in question.

From the evidence it appeared that Mr. Payne had from the commencement of the trust acted in conjunction with his co-trustees in the administration and management of the testator's estates, but that in 1893, in consequence of his wife's ill health, he went to reside at Lisieux, in Normandy. He had, however, been constantly in communication with the trustees and their solicitors, and had attended all the meetings of the trustees with few exceptions.

The special management of the Lancashire and Cheshire estates had been left entirely to Mr. Hall and Mr. Cocks respectively, the reason for this being that they had been the agents thereof during the lifetime of the late earl. The Leicestershire estates had been managed by Sir Thomas Wright, a solicitor of Leicester, who was appointed agent a few years after the earl's death. Mr. Payne, in his affidavit, stated that it had never been alleged until the 10th of August, 1895, that his residence abroad in any way interfered with the due administration of the trusts of the will or rendered it desirable that he should cease to be a trustee. From where he resided he could reach England in sixteen hours, and letters posted in London on any given day would be received by him the following day. He had taken his house at Lisieux on a lease which would expire in three years' time, when he intended to return to England.

Bucknill, Q.C., and *Cartmell*, for the applicants.—The appointment of Sir Thomas Wright in place of Mr. Payne is improper. In the first place, Mr. Payne is not "abroad" within the meaning of the power of appointment. The word means "permanently abroad"—so as to interfere with the performance of the duties of the office: *In re Moravian Society*, 6 W. R. 851, 26 Beav. 101; *In re Arbib & Class' Contract*, 39 W. R. 305, [1891] 1 Ch. 601, see p. 606; *Skeats* v. *Evans*, 42 Ch. D. 522, 38 W. R. Dig. 202.

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

In the next place, the appointment of Sir Thomas Wright is open to objection, on the ground that he is the solicitor for the countess, the tenant for life. Now, the trustees will be trustees for the purposes of the Settled Land Acts, and the court has declined either to appoint or to sanction the appointment of the tenant for life's solicitor as a trustee when that is the case, because the interests of the tenant for life may conflict with those of the remaindermen: *In re Kemp*, 31 W. R. 930, 24 Ch. D. 485; *Wheelwright* v. *Walker*, 31 W. R. 363, 716, 23 Ch. D. 752; *In re Tempest*, 14 W. R. 850, L. R. 1 Ch. App. 485; *Sugden* v. *Crosland*, 4 W. R. 343, 3 Sm. & Giff. 192. This last case shows the deed is void.

Henry Fellows, for the Duncombes.

Borthwick, for J. F. Lambert.

W. A. Peck, for Lady Lambert.

Monnington, for Lord Stamford.

Hastings, *Q.C.*, and *Fossett Lock*, for Lady Stamford.—There has been no decree for administration, and there is nothing to interfere with the exercise of the power: *In re Norris*, 32 W. R. 955, 27 Ch. D. 333. Being "abroad" is *prima facie* a disqualification: *O'Reilly* v. *Alderson*, 8 Hare 101. The court will not appoint the tenant for life's solicitor as trustee, but it does not follow that a person having an independent power of appointment cannot do so: *Skeats* v. *Evans* does not apply here, as in that case the person who made the appointment submitted the propriety of the appointment to the court, thus giving it jurisdiction.

Grosvenor Woods, *Q.C.*, and *Blakesley*, for Sir Thomas Wright.

Cartmell replied.

STIRLING, J., stated the facts as above set out, and continued:—Without attributing any blame to the countess or her advisers, I think it is a matter of regret that the execution of the deed of appointment was not postponed until the trustees had been consulted and their views ascertained. However, what I have to decide now is whether the appointment is a valid one. The first question which arises is one of fact—*i.e.*, whether or not Mr. Payne was "abroad" at the date of the appointment within the meaning of the power in the will contained, and which I have already read. I think the question may be decided without any difficulty upon Mr. Payne's own evidence, and I am of opinion that he was "abroad" within the meaning of the power. He has been residing abroad since 1893, and does not intend to return until the expiration of his lease—*i.e.*, in three years' time. Therefore I think that on the 28th of August, 1895, he was properly described as "being abroad." Now, I do not desire to depart from anything laid down by Lord Romilly in *In re Moravian Society*. In each case it is a question of fact; and here I come to the conclusion on the facts that Mr. Payne was abroad at the time the deed was executed by the countess. It is said that residence abroad is not a disqualification for the office of a trustee; and I am asked to read the clause as if a new trustee could only be appointed in the place of a trustee who is abroad, when the fact of residence abroad interfered with the proper discharge of the duties of the trust. Those words, however, are not in the will. The trustee, by residing abroad, as laid down by Wigram, V.C., in *O'Reilly* v. *Alderson*, puts himself in a position which entitles any *cestui que trust* to require that the office should be filled by another trustee. Certainly, in this case none of the remaindermen have called upon the countess to exercise the power of appointing a new trustee, but nevertheless it was within her discretion to do so. If the exercise of that power were capricious, the court might interfere; but no such case has been suggested. Mr. Payne's residence abroad created a certain amount of inconvenience and expense. The countess, as tenant for life, is quite competent to exercise the power, and I cannot see that she has exercised it with caprice or without good cause.

It is said, however, that Mr. Payne is in the position of an executor and legal personal representative of the testator, and that the power of appointment ought not to be exercised so long as there are debts remaining unpaid. If there were any personal estate remaining unadministered, there might be something in the contention; but in the present case the objection cannot prevail. All the general personal estate is exhausted. The pecuniary legacies have been paid, and the specific legacies assented to, and this can only have been done on the footing that the duties of the executors had been fully executed, and that they were willing to convert themselves into simple trustees. Hence nothing is now vested in Mr. Payne as executor *virtute officii*.

I now come to a matter which is deserving of my most serious consideration—*i.e.*, the fact that the countess has thought fit to appoint as a trustee of this will her own solicitor. The trustees of the will are vested with a power of sale of the real estates, and they will also be trustees for the purposes of the Settled Land Acts, and as such trustees they may have to consider matters where the respective interests of the tenant for life and the remaindermen might conflict with one another, and where they will consequently be bound to hold an even hand between the parties. Now, it is suggested that the solicitor of the tenant for life is not in a position to discharge that duty properly, and, I must say, I feel that is a very forcible objection. In fact, it is an objection which would prevent the court itself from appointing a person in the position of Sir Thomas Wright, and from sanctioning any such appointment. The rule is clearly laid down in Cotton, L.J., in *In re Kemp*, 24 Ch. D., at p. 487, a case of the appointment of trustees for the purposes of the Settled Land Acts. In that case the Lord Justice says: "The appointment of trustees is required to impose a check upon the extensive powers conferred by the Act upon the tenant for life, and the 44th section contemplates there being differences between the trustees and the tenant for life. I have no doubt that Mr. Wood, as solicitor of the tenant for life, would advise him to the best of his ability, and recommend him to exercise his powers with a proper regard for the interests of the remaindermen. But solicitors, like judges, are fallible, and how could Mr. Wood as one of the trustees exercise a proper judgment on their behalf upon questions on which he had already advised the tenant for life? It would be Mr. Wood as trustee putting a check upon Mr. Wood as solicitor for the tenant for life, and he would be placed in a false position." This lays down a rule of practice for the guidance of the court from which it would not be right for me to depart, and of which, moreover, I entirely approve. But the question is, Is this rule binding under all circumstances? Can the court depart from it if it sees fit? Now, I myself have departed from it in one case—*i.e.*, *In re The Marquis of Ailesbury*, 41 W. R. 644, [1893] 2 Ch. 345. The court ought certainly to be very slow to do so, and ought, before doing so, to be satisfied not only that there will be no disadvantage to the trust estate, but also that great advantages will accrue from such a course. If this were an application for the appointment of a new trustee, or for the sanction

of the court to such an appointment, I should certainly decline to depart from the rule. This, however, is not such a case, and, as pointed out by Cotton, L.J., there is a difference between the question of the validity of a certain appointment by the donee of a power and the question whether the court would itself make or sanction such an appointment. This distinction was recognized by Pearson, J., in *In re Norris*.

The question, then, is, Does the existence of the rule prevent the donee of the power from exercising it by appointing her own solicitor? In my judgment, though I would not myself make or sanction such an appointment, yet when it has been actually done by the tenant for life it is not necessarily invalid. There is nothing apart from his position as solicitor to the countess which renders the person appointed unfit to fulfil the duties of the office, and no beneficiary has said anything against the appointment, but the matter has been left to the discretion of the court. Under these circumstances I cannot say that the appointment is other than a valid one.

Lastly, it is suggested that Mr. Payne still remains in the position of a legal personal representative, and may be under some liability. Now, if any such liability exist in the fact, nothing that has been done can prejudice his right to an indemnity. It is of the greatest importance that a trustee's right of indemnity be preserved, and I desire to say that no right of Mr. Payne as legal personal representative ought to be prejudiced, and for this purpose I reserve to him liberty to apply.

Solicitors, *Bower, Cotton, & Bower; Smith, Fawdon, & Low*, for *Sir Thomas Wright*, of Leicester; *Iliffe, Henley, & Sweet*, for *Laycock, Dyson, & Laycock*, of Huddersfield; *A. E. Griffiths; Gamlen & Burdett.*

Chan. Div. | Nov. 29.
Romer, J. |

BARTLETT *v.* MARSHALL. (*a.*)

Nuisance—Noise—Lawful trade—Character of neighbourhood.

The defendants had, since July, 1894, *carried on the business of newspaper forwarding agents at premises in the City of London. The plaintiffs were respectively the leaseholders and the part occupiers of certain residential premises erected in* 1886, *and which were opposite to the defendants' premises. The occupying plaintiffs and others of the tenants of the plaintiffs' premises had been so disturbed by the noise of the defendants' carts and the shouts of their drivers and other of the defendants' employees between* 2 *a.m. and* 6 *a.m. that they were in many cases unable to sleep; and some of the plaintiffs' tenants had in consequence left and others had threatened to leave.*

Held, that the defendants' business had caused a nuisance by noise so continuous and of such a character as to entitle the plaintiffs to an injunction.

Trial of action.

This was an action in which the plaintiffs the leasehold owners, and certain tenants, of premises known as Temple-chambers, in the City of London, claimed an injunction to restrain the defendants, who carried on the business of newspaper forwarding agents, from carrying on the said or any noisy business, and from continuing the nuisances occasioned thereby.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

The facts of the case were as follows. The premises in question consisted of a large block of buildings. They fronted on the east side Temple-avenue, and were bounded on the north by Tudor-street, and on the south by certain vacant land the property of the London Corporation. The premises had been erected by certain of the plaintiffs or their predecessors in title in the year 1886, and had been let by them since 1887 partly for offices and partly for residential chambers. At that time the land east of Temple-avenue was vacant. About two or three years ago the defendants built large premises on the east side of Temple-avenue, with an entrance into Temple-avenue on the west, and also into a street known as Tallis-street on the south—a street newly laid out and leading eastward, almost opposite the central entrance to the Temple-chambers.

On the 30th of July, 1894, the defendants commenced to carry on there, and have since carried on, the business of newspaper forwarding agents, the carrying on of which business caused a great deal of noise, and inconvenienced the sleep of the occupiers of the plaintiffs' residential chambers. In consequence of this the plaintiffs affirmed that their premises had been rendered unfit for habitation and far less comfortable than had formerly been the case, and that tenants thereof had been lost and would continue to be lost.

The defendants submitted that if the noise of which the plaintiffs complained existed, it was due not to the defendants' business, but to the ordinary traffic of the neighbourhood. They also submitted that, as the neighbourhood in which the premises of both parties were situated was devoted to the printing and publishing trades, the noise in the vicinity of the plaintiffs' premises was incident to the locality, and that the noise (if any) produced by the defendants' business was of so slight a character as to be no substantial addition to that otherwise produced in the neighbourhood.

The plaintiffs, in their reply, submitted that the noise was of such a character as entirely to change the quiet character of the neighbourhood, which entirely consisted of residential chambers and offices.

A large amount of evidence was offered on both sides, and several residents in the chambers, inspectors of police, police constables on duty in the neighbourhood, and others were examined.

The evidence was somewhat conflicting, but it appeared that the residents in the chambers were awakened by noise of the carts and vans of the defendants unloading and driving past, and by the shoutings or loud talkings of their drivers and other employees of the defendants, between the hours of 2 a.m. and 6 a.m. In consequence of this many of the residents were unable to sleep, and the result had been that some of them had left the premises, and others threatened to do so. It was also shown that since complaints were first made of the nuisance, except on the side of the plaintiffs' chambers facing or nearly facing Tallis-street, the noise had been considerably abated by the laying down of a wooden pavement in Temple-avenue.

Oswald, Q.C., and *Boyle*, for the plaintiffs.—The noise made by the defendants has considerably injured the interests of those of the plaintiffs who are reversioners, as some of the tenants of the residential chambers who were unable to sleep have left the premises, and there is therefore a loss in the matter of rents. If the noise is continued, the chambers must become more and more unsuitable for habitation. There is no question but that in such a case as this the court has a right to interfere: *Bellamy* v. *Wells*, 39 W. R. 158; *Barber* v. *Penley*, [1893] 2

Ch. 447, 41 W. R. Dig. 152; *Benjamin* v. *Storr*, 22 W. R. 631, L. R. 9 C. P. 400.

Eve, Q.C., and *J. W. Greig*, for the defendants.—The defendants are entitled in carrying on their business to make some noise. There has been nothing unreasonable in their conduct: *Christie* v. *Davey*, [1893] 1 Ch. 316, 41 W. R. Dig. 153. The locality in which the alleged nuisance has taken place must also be considered. It is impossible to apply to premises situate where the plaintiffs' premises are situate, the rules that may fairly be considered applicable to a house in Belgravia.

Oswald, Q.C., commenced to reply, but was stopped.

ROMER, J.—It almost invariably happens that cases involving nuisances give rise to a considerable conflict of evidence, and in that respect the present case forms no exception. I do not propose to go into the evidence in detail, but the conclusion to which I come on the facts is that the defendants' business has been so carried on as to be a nuisance by noise to those persons who sleep in rooms overlooking or near the defendants' premises. No doubt, after complaints were made matters improved, having regard to the state of things existing when the premises of the defendants were first opened; but the nuisance, although in a modified form, continued until this action was brought, and has continued since, although I must say that as far as those inhabitants of the plaintiffs' chambers who sleep in rooms not facing or nearly facing Tallis-street are concerned the nuisance has been greatly diminished by the laying down of wooden pavement in the Temple-avenue. I do not say that the defendants could not carry on their business without causing a nuisance, or that there have not been several mornings when substantially no nuisance was caused; but I am satisfied that the nuisance has been so continuous and of such a character as to entitle the plaintiffs to an injunction substantially as asked for by them. There must, therefore, be a perpetual injunction restraining the defendants, their servants and agents from carrying on the business so as to be a nuisance by noise to the occupants of the plaintiffs' chambers, and the defendants must pay the costs of the action.

[It was subsequently arranged that the injunction should be suspended for three months, that the defendants might see if anything could be done to diminish the noise, they undertaking to do their best to carry on their business so as not to cause a nuisance. An inquiry as to damages was also directed, but the costs were reserved.

Solicitors, *Munns & Longden; Miller, Smith, & Bell.*

Chan. Div.
Vaughan Williams, J. } Nov. 8.

GREAT NORTHERN RAILWAY CO. *v.* THE COAL CO-OPERATIVE SOCIETY (LIMITED). (*a.*)

Bill of Sale—Industrial and provident society—Debenture—Non-registration — Winding up—Incorporated company—Bills of Sale Acts, 1878 (41 & 42 *Vict. c.* 31) *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 17.

Debentures issued by an industrial and provident society established under the Industrial and Provident Societies Act are not exempted from the provisions of the Bills of Sale Acts by section 17 *of the Bills of Sale Act*, 1882.

This was the further consideration of a debenture-holders' action, which raised the question whether certain debentures issued by the Coal Co-operative Society, which was an industrial and provident society established under the Industrial and Provident Societies Act, 1862 (25 & 26 Vict. c. 87), were or were not within section 17 of the Bills of Sale Act, 1882, in so far as they purported to charge the capital, stock, goods, chattels, and effects of the society. Section 17 of the last-named Act provides that "nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital, stock, or goods, chattels, and effects of such company."

The debentures in the present case were expressed to be a charge upon the freehold, copyhold, and leasehold hereditaments of the society and the goodwill of its business, and all its capital, stock, goods, chattels, and effects, and all other its property both present and future.

Judgment was given in the debenture-holders' action on the 10th of May, 1894, and an order to wind up the society was made on the 7th of June, 1894.

The debentures not having been registered as bills of sale, the question as above stated arose between the liquidator of the society and the holders of the debentures.

Buckley, Q.C., and *A. & B. Terrell*, for the plaintiffs in the debenture-holders' action.—In section 17 of the Bills of Sale Act, 1882, the words "incorporated company" apply to societies under the Industrial and Provident Societies Acts; see sections 4, 5, 6, 11, subsection (1), and 12 of the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), and sections 4, 5, and 21 of the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39).

Levett, Q.C., and *Macnaghten*, for the official receiver and liquidator.—The words in section 17 of the Bills of Sale Act, 1882, apply to companies for the registration of whose mortgages and charges there are other statutory provisions than those contained in the Bills of Sale Acts—for instance, companies incorporated under the Companies Act, 1862. The Industrial and Provident Societies Acts contain no such provisions for the registration of mortgages and charges. The mortgages and charges over chattels given by such societies are clearly within the mischief aimed at by the Bills of Sale Acts, and come within the definition in section 4 of the Bills of Sale Act, 1878. A society of this kind is not a "company." Section 60 of the Industrial and Provident Societies Act, 1893, expressly draws a distinction between a "registered society" and a "company." These societies are clearly not limited companies within the meaning of the Companies Act, 1862, as is shown by sections 54 and 55 of the Industrial and Provident Societies Act, 1893. The Forged Transfers Act, 1891 (54 & 55 Vict. c. 43), s. 2, says "company" shall mean "any company incorporated by or in pursuance of any Act of Parliament, or by Royal Charter." Sections 6 and 7 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), show that the powers of that Act drew a distinction between companies and such a society as the society in the present case. These debentures are bills of sale taken independently of any statutory enactment. The question whether a bill of sale given by a company must be registered was left open in *In re Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627. In *Attenborough's case*, 33 W. R. 387, 28 Ch. D. 685, Pearson, J., thought that it must be

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

registered. But this society is not a company in any of the legal meanings of the word "company."

They referred to *Jenkinson* v. *Brandley Mining Co.*, 35 W. R. 834, 19 Q. B. D. 568.

Buckley, Q.C., in reply.—This society is a corporation, and is therefore not within the Bills of Sale Act. A debenture of a corporation is not within the mischief against which the Bills of Sale Acts are directed: *Read* v. *Joannon*, 38 W. R. 734, 25 Q. B. D. 300.

He also referred to section 10 of the Bills of Sale Act, 1878.

VAUGHAN WILLIAMS, J.—As far as I can see, the question that I have to decide is one which at present is not decided. There is no direct authority. It is really, as far as I can see on the authorities, an open question, and I must decide it as best I can. Now, the first Bills of Sale Act, passed in 1854, was an Act passed with a specific object, which is stated in the preamble of the Act which is entitled "an Act for preventing frauds upon creditors by secret bills of sale of personal chattels," and begins with a recital: "Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are able to keep up the appearance of being in good circumstances." Now, the Act of 1854 is made to apply in favour of specified persons, and of those persons only—those persons being really execution creditors, and assignees in bankruptcy, and trustees under deeds for the benefit of creditors generally. That Act was amended in 1878, but the Act of 1878 was passed, as far as I understand, for the same object and for the protection of the same classes as the Act of 1854. Both Acts were passed to prevent the same mischief (*i.e.*, frauds on creditors), and for the protection of the same persons, *i.e.*, either individual creditors who had obtained judgment and issued execution, or creditors generally who got execution in the shape of bankruptcy. There is nothing in the Act of 1878 which indicates that there was any intention to afford any special protection to liquidators of companies in liquidation. Then one comes to the Act of 1882. The Act of 1882 has a very much wider scope than either of the previous Acts. It is not only intended for the prevention of frauds upon creditors, but it is also intended for the protection of debtors and those who are in need, against those who are apt to take advantage of their necessities to prey upon them and defraud them. So it is a natural consequence that one should find that the Act of 1882 does not only apply, as the Acts of 1854 and 1878 did, to a case where the grantee remained in possession of the property, notwithstanding the bill of sale, but also applies in the case of bills of sale, grants, and charges which are given as security for debts or advances, and to cases where the grantee may be in actual possession.

Now, that being the short history of the Acts, one finds in the Act of 1882 (s. 17) the provision upon which so much has been said to-day. That section runs: [His lordship read the section, and went on:—] Those who have argued on behalf of the debenture-holders say, in the first place, the Bills of Sale Acts, whether you take the two earlier Acts or the later Act, have no application whatever to bills of sale and similar instruments issued by corporations. They say the two earlier Acts did not apply to corporations at all, and they further say that with regard to the Act of 1882 (which has to be construed with the Act of 1878—an Act still in force, the Act of 1854 having been repealed) not only does the Act of 1882 itself not apply to bills of sale or debentures issued by companies, but also that the Act of 1878, which has to be read with the Act of 1882 as one Act, can no longer apply, if it did apply, to debentures issued by corporations or incorporated companies; and it is claimed by those persons who hold these debentures that they are persons holding debentures issued by an incorporated company within the meaning of section 17. On the other hand, it is argued on behalf of the liquidator that the Act of 1854 and the Act of 1878 did apply, and the Act of 1878 does apply, to debentures or bills of sale or charges issued by corporations or companies; and that with regard to section 17 of the Act of 1882, whatever it may do in the case of an incorporated company, the present society is not an "incorporated company" within the section; with the result that under the older Acts and under the later Act these debentures remain liable to the provisions of the Bills of Sale Acts generally.

A good deal of light is thrown on these contentions by the decision of Bowen, L.J., in *In re the Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627. In that case Bowen, L.J., undoubtedly puts it that the judgment of the court is based upon the ground that mortgages or charges of any incorporated company for the registration of which other provisions have been made by the Companies' Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act, 1878. If that is the whole of the decision of the Court of Appeal, I hold that the present society is not entitled to the benefit of that decision. It does not come within the scope of it at all. This society is not a company in which the registration of mortgages or charges is provided for by either of these two Acts, or indeed by any other Act. The result is that these debenture-holders are not entitled to say that they are exonerated from the provisions of the Bills of Sale Acts by reason of this decision of Bowen, L.J., because that decision is in terms applicable only to companies for the mortgages and charges of which provision is made for registration by the other two Acts. That being so, I cannot myself hold that that decision is one that the debenture-holders can successfully rely on. I have therefore to look at section 17, and see whether these debentures come within that section irrespective of Bowen, L.J.'s decision. I hold that this society does not come within it. The ground I should like best to put it on is the simple one that section 17 excludes from the operation of the Act of 1882 "companies," and that this is not a company, it is a corporation which bears the name of "society." The word "company" has come to have a very well-recognized meaning. There are various legal "companies," but this "society" does not come within the connotation of the word in any of its legal meanings. I think that alone would be sufficient ground for saying that the section is defined by the Legislature in favour of companies, and that if the Legislature had intended to include all sorts of corporations nothing would have been easier for the Legislature than to say so in plain terms. Though I think that a sufficient ground, I should like to add as a further ground that the absence of provisions for registration is a reason why the Legislature may very well have drawn the line between companies in respect of which there is such a provision made and corporations in respect of which there is no such provision. But it is my duty still to look at this decision of Bowen, L.J., and to see whether there is anything else in it which is either binding on me, or which I ought, in deference to Bowen, L.J., to follow. There is nothing that is binding on me. The question was distinctly raised in *In re Standard Manufacturing Co.*, Aye or no, were corporations generally bound by the

Bills of Sale Acts, irrespective of the effect of section 17? Bowen, L.J., looks at the Bills of Sale Acts. He points out that bills of sale charges or debentures issued by "companies" do not, in his opinion, come within the mischief pointed at by these Acts. He goes on, and points out that much of the language of the Acts is not apt language to use if the statutes were intended to apply to corporations; but at the same time he takes the definition clause under the Act of 1878 (section 4), which does not, for this purpose, materially differ from the definition clause under the Act of 1854, and says in terms that the words of that definition clause are wide enough to cover a bill of sale or debentures issued by a company. He winds up by saying that no corporation can, in any circumstance, be within the Bills of Sale Act, 1878. It seems to me that Bowen, L.J., deliberately and studiously leaves the question open. He goes on to say that "the view that debentures like the present are not within the Bills of Sale Act, 1878, was that adopted by Pollock, B., in *John Welsted & Co.* v. *Swansea Bank*, 5 Times L. R. 332; and by Lord Coleridge and Wills, J., in *Read* v. *Joannon*, 38 W. R. 734, 25 Q. B. D. 300; see also *Edmonds* v. *Blaina Furnaces Co.*, 35 W. R. 798, 36 Ch. D. 215; *Levy* v. *Abercorris Slate and Slab Co.*, 36 W. R. 411, 37 Ch. D. 260." He then says: "We agree with this view"—*i.e.*, the view adopted in those cases — "and we think that this appeal should, therefore, be allowed, with costs both here and below." If he had stopped there, I should have felt that that was such an affirmation of the view contained in those cases, that it bound me. But he goes on to say, without a fresh sentence, "on the ground that the mortgages or charges of any incorporated company for the registration of which other provisions have been made by the Companies' Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act, 1878." That is to say, he does not exclude companies generally from these Acts, but only companies in which provisions are made for the registration of mortgages. It seems to me, therefore, that Bowen, L.J., deliberately leaves open the question whether the Bills of Sale Acts apply to other companies—*i.e.*, apply to companies in the case of which no provision is made for registration.

Being, then, at large to deal with the question, I cannot help starting with the Act of 1854, and remembering with regard to that Act that at the time when the Act of 1854 was passed the Companies Act, 1862, was not passed (*i.e.*, the provisions for the registration of mortgages under the Act of 1862 were not in existence), and that, whatever may have been the intention of the Legislature at the time of the passing of the Act of 1854 with regard to companies coming within the provisions of the Companies' Clauses Act, 1845, the Legislature cannot have had any intention with reference to companies under the Companies Act, 1862. But with regard to those companies it seems that the decision of Bowen, L.J., is impossible to reconcile with *Deffell* v. *White*, 15 W. R. 68, L. R. 2 C. P. 144, and *Shears* v. *Jacob*, 14 W. R. 609, L. R. 1 C. P. 513, in which it was held in 1866 that the Bills of Sale Acts did apply to companies under the Companies Act, 1862. I assume that the company in *Deffell* v. *White* was a company under the Companies Act, 1862, from the date of the case (1866). In *Shears* v. *Jacob* the company is stated in terms to be a company "limited." With regard to the residue of the authority, there is some each way. There is a decision by Pearson, J., in *Attenborough's case*, 33 W. R. 387, 28 Ch. D. 685, which is a positive decision that debentures issued by companies come within the Bills of Sale Acts, or at all events it is the expression of a very decided opinion. There should be added the case of *Ross* v. *Army and Navy Hotel Co.*, 35 W. R. 40, 34 Ch. D. 43, where Kay, L.J. (then Kay, J.), said the Companies Act seemed to assume that companies under the Companies Act are within the Bills of Sale Acts. It is true the court did not there avoid the security, but it was not at all on the ground that the Bills of Sale Acts had no application to such companies. On the other hand there is, as I have said, the case of *Read* v. *Joannon*, where Lord Coleridge expressly decides that corporations are outside the Bills of Sale Acts, and there are the cases mentioned by Bowen, L.J., which, without at all expressly deciding, seem to me to assume that the Bills of Sale Acts have no application to corporations at all. I think it right to mention that it is impossible to suppose that Bowen, L.J., meant to decide the case upon the ground that the Bills of Sale Acts have no application to companies at all, because, if he had intended to decide that, the elaborate grounds which he goes into for the decision would not have been necessary; he had only to say: "This point is concluded by *Read* v. *Joannon*." I have, therefore, first the decision of Bowen, L.J., which is a decision that companies in which provision is made for the registration of mortgages are not within the Act of 1878. I have to say whether I will go one step further, and say that no corporations are within the Bills of Sale Acts. I do not feel disposed to go that step further. What would most dispose me to go that step further is the fact that, though Bills of Sale Acts have been in force ever since 1854, there has not been (since the two cases I have mentioned) any decision avoiding debentures as coming within the Bills of Sale Acts. Down to 1882 the reason for that is that the question could not very often arise, because the Acts of 1854 and 1878 had no operation in favour of liquidators, and so far as execution creditors were concerned the question very rarely arose, because the moment an execution was put in you got a petition and a winding-up order, and in that way the raising of the question was avoided.

I hold that this industrial society is not excluded from the operation of the Bills of Sale Acts.

Solicitors, *W. Barrs; Bowen, Cotton, & Bowen; Mossop & Rolfe.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Cave, J.)

Oct. 30; Dec. 3.

ELLESMERE BREWERY CO. *v.* COOPER AND OTHERS. (*a*.)

Principal and surety — Co-sureties — Contribution— Alteration in bond—Materiality—Discharge of sureties.

A bond was given by the defendant C. as principal, and by the defendants N., E., P., and B. as sureties, by which they were jointly and severally bound to the plaintiffs in the sum of £150. *The condition of the bond was that if C. duly accounted to the plaintiffs for all moneys received by him for them, the bond should be void. The bond provided that the liability of N. and E. should be limited to* £50 *each, and of P. and B. to* £25 *each. N. was the last surety to sign the bond, and after his signature added, in good faith, the words "for* £25 *only." The principal made default in the sum of* £48.

Held, in an action against the principal and sureties,

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

that the alteration by N. was a material alteration, casting an additional burthen upon the other sureties, and that as against them the bond was thereby rendered void; that the bond was also rendered void as against N., for his liability under the bond was undertaken on the faith of the joint liability of the other sureties.

Appeal from the judgment of the county court judge of Shropshire.

The action was brought on a bond against the principal and sureties. Judgment was given for the plaintiff company against the principal, and for the sureties.

The plaintiff company appealed against the latter part of the judgment.

The facts and arguments are fully stated in the judgment of the court.

A. T. Lawrence, for the plaintiff company.

Hansell, for the defendants.

The following authorities were referred to: *Dering* v. *Earl Winchilsea*, 1 Cox 318; *Craigthorne* v. *Swinburne*, 14 Ves. 160; *In re MacDonaghs*, Ir. R. 10 Eq. 269, 24 W. R. Dig. 227; *Thomson* v. *Butcher*, 3 Buls. 300; *Gardner* v. *Walsh*, 3 W. R. 460, 5 E. & B. 83; *Suffield* v. *Bank of England*, 30 W. R. 932, 9 Q. B. D. 555; *Pendlebury* v. *Walker*, 4 Y. & Coll. Eq. Ex. 424.

Cur. adv. vult.

Dec. 3.—The judgment of the COURT (Lord RUSSELL OF KILLOWEN, C.J., and CAVE, J.), was against Cooper and four other defendants who had read by Lord RUSSELL OF KILLOWEN:—This was an action signed a bond as sureties for Cooper. At the trial before the learned county court judge of Shropshire judgment was given for the plaintiff as against Cooper, and judgment given for the four remaining defendants, the sureties.

The facts were that Cooper having become agent and traveller for the plaintiffs was called upon to give them some security. He accordingly gave the bond in question, in which he was joined by the four other defendants.

The bond is dated the 30th of April, 1894. By its terms the five defendants are jointly and severally bound to the plaintiffs in the sum of £150. It then recites that Cooper had been appointed agent for the company, and states the condition of the bond to be that if Cooper duly accounted for all moneys received by him for the plaintiffs and otherwise performed the duties of his agency, the bond should be void. It then provided that the liability of Nunnerley and Emberton (two of the defendants) should be limited to £50 each, and that of Pay and Bromfield (two other of the defendants) to £25 each. The effect, therefore, of the bond, as drawn, was that the principal and the sureties were jointly and severally bound in the sum of £150, but that liability could not be enforced against any of the sureties beyond the limit of the sum specified as to each of them. Nunnerly was the last to sign, and his signature thus appears on the bond: "Walter Nunnerley, Twenty-five pounds only."

The witness to the execution of each of the signatories was Mr. Bruce, the plaintiffs' manager, who, so far as appears, took the bond without making any objection to the manner of Nunnerley's execution, nor was it suggested that Nunnerly had surreptitiously added the qualification of "twenty-five pounds only" to his signature. As no evidence was given on the point, it cannot be assumed that Nunnerley in bad faith sought by the form of his execution of the bond to limit any liability he had previously agreed to undertake. The probability is that in giving particulars of his sureties Cooper had erroneously stated that Nunnerley had agreed to undertake liability to the extent of £50, whereas he had done so only to the extent of £25. Subsequently Cooper, the principal, received moneys for the plaintiffs to the amount of £48, for which he had failed to account, and judgment was given against him at the trial for that amount. The contested question was the liability of the other defendants, the sureties. The learned county court judge held that no one of them was liable, and gave judgment for them accordingly. The present appeal is against that judgment.

It was argued for the plaintiff:—

(1) That the form of Nunnerley's execution did not constitute an alteration of the bond so as to discharge from liability the three prior executing sureties;

(2) That if an alteration, it was not a material alteration, and therefore did not discharge such sureties; and, lastly,

(3) That in any case Nunnerley was liable to the extent of £50, or if not of £50, at least to the extent of £25.

In my judgment, no one of these contentions is well founded. I think the effect of Nunnerley's mode of execution on the facts of this case is substantially the same as if the proviso in the body of the bond had been altered by him before execution by striking out £50 and inserting instead £25. It was therefore an alteration; its effect I shall presently discuss. The argument of the learned counsel for the appellant was that the loss in question was to be divided into fourths, and that so long as each fourth did not exceed the sum for which each surety had become liable each of them was bound to pay, and without any right of contribution from his co-sureties, whether the fixed limit of his liability was for the greater or the smaller amount. Here it was said the fourth of the loss was £12, and as Nunnerley had clearly intended to make himself liable, as also had Pay and Bromfield for £25 each, it was immaterial whether Nunnerley signed for £25 or for £50. Each, it was contended, was bound to pay £12; and Emberton was bound to bear no more of the loss than the others.

In my judgment this contention is founded on a misapprehension of the law. It renders it necessary to consider the principle upon which liability of sureties *inter se* rests.

That principle is that sureties for the same principal and for the same engagement, even although bound by different instruments and for different amounts, have a common interest and a common burthen; so that if one surety who is directly liable to the creditor pays such creditor he can claim contribution from his co-sureties, whose obligations to the creditor he has discharged. But how is the amount of the claim to be determined? According to the argument of the learned counsel for the plaintiff it is to be determined by the number of the sureties. Thus, if there are four sureties and one of them pays all, he can recover one-fourth and one-fourth only, of his payment from each of the other three co-sureties. But this is not in all cases true, even where each of the sureties has made himself liable for the same amount. Thus, where four sureties are jointly and severally bound in a surety bond, and one of them pays the amount of the bond, but one of the remaining three sureties is insolvent, the right to contribution against the two other sureties is for thirds, not for fourths, of the sum so paid. But how, where, although the sureties are jointly and severally bound, there are different limits of liability, as in this case? It is clear that where the full amount of the bond is due and payable to the creditor, liability can only be

enforced by him against each surety to the limit of the liability fixed in the instrument. In such case there would be no right of contribution, for each had paid to the limit of his liability. But suppose only half the amount of the bond is due and payable to the creditor, and such amount is paid by one only of the sureties who has fixed the limit of his liability at one-half the amount of the bond, could it be said that he had no right to contribution from his co-sureties? Surely not. The burthen is a common burthen of all, but unequally distributed. By his payment of the loss of one-half the surety has discharged a liability which might have been enforced against the other sureties up to the fixed limit. It would be against all equitable principles that in such a case the other sureties should go free, because it happened that the creditor had enforced payment against one only. Again, it is clear that one surety cannot keep for his own sole benefit a security for his suretyship where he is bound with other sureties for the same principal and the same engagement. Suppose, then, that one surety, whose limit of liability was £1,000, has realized £1,000 from such a security, being bound with three other sureties with a limit of liability of £2,000 each, making in all £7,000. It is clear that that £1,000 must be taken into account for the benefit of all the sureties *inter se*. But upon what principle? Surely, upon the only principle which will secure its equitable division—namely, proportional distribution. Thus the surety for £1,000 would benefit to the extent of one-seventh, and each of the others to the extent of two-sevenths each. The same principle must apply where the burthen has to be distributed. Where the claim of the creditor is to the full amount each must pay up to the fixed limit of his liability; but where the claim is less than such full amount, and it is discharged by one, the claim must be proportionately borne by the others, even where the claim does not exceed the fixed limit of the liability of the surety who has paid.

What I have so far said is, I think, to be gathered from the principles laid down in *Dering* v. *Winchilsea*; but in *Pendlebury* v. *Walker*, Alderson, B., expressly states the rule thus: "Where the same default of the principal renders all the co-sureties responsible, all are to contribute, and then the law superadds that which is not only the principle but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount, and if not equally, then proportionately to the amount for which each is a surety." In *Steel* v. *Dixon*, 29 W. R. 735, 17 Ch. D. 825, Fry, J., cites with approval the language I have quoted; and later Pearson, J., in *In re Arcedeckne*, 24 Ch. D. 709, 31 W. R. Dig. 162, adopts the language of Fry, J. See also *Ellis* v. *Emmanuel*, 24 W. R. 832, 1 Ex. D. 157, and *Evans* v. *Bremridge*, 4 W. R. 161, 2 K. & J. 174.

Apply this principle to the present case. I assume the bond to have been executed according to its original tenor, without qualification or alteration.

The total loss being £48, Emberton having subscribed for £50 out of the total of £150 would be liable for one-third, and if he paid no more would have no claim for contribution; if he paid to the plaintiff more than one-third, he could claim contribution from his co-sureties in the proportion of their subscriptions. Stated as a sum in proportion, Emberton's liability would be arrived at thus: As 150 is to 50 so is 48 to the result. So worked out Emberton would be liable for £16 only, and if he paid more would have a claim for contribution. In like manner Pay and Bromfield would be liable for £8 each, and Nunnerley for £16.

Now, to appreciate the materiality of the alteration, let us consider its effect upon the liability of Nunnerley. He explicitly says: "I execute the bond only on the terms of my liability being limited to £25." He could not, therefore, in any case be made liable for more. Whether he can be made liable even for the £25 I shall presently consider.

What, then, is the effect of the altered limitation to £25 by Nunnerley upon the position of the other three sureties? Take Emberton's position. For simplicity assume that the total liability to the plaintiff company for £48 had been paid by Emberton. According to the tenor of the bond without the alteration, Emberton would have to bear two-sixths, equal to one-third, and Pay and Bromfield one-sixth each. But by the alteration it is manifest that Emberton, who has paid, would not have the same right of contribution against Nunnerley; and if Nunnerley is not bound at all, would have no right of contribution against him. The alteration, then, was clearly material. It is unnecessary to give similar illustrations as to Pay and Bromfield.

The result, therefore, is that neither Emberton, Pay, nor Bromfield can be made liable on this bond. Each of them is entitled to say: "The contract into which I entered was on the basis of Nunnerley being a party to it with a liability of £50. That is not the contract as it now appears from the bond, and I am, therefore not bound by it."

Their position would be still stronger if Nunnerley is not bound by the bond at all.

The remaining question then is, Is Nunnerley bound at all?

I have already intimated that, as he expressly said, "I shall be liable only for £25," he cannot be made liable for £50. But is he liable even for the £25? I think he is not. He, in good faith, as must be assumed, expressly limits his liability to £25; but he undertakes that liability, not as a separate or independent liability, but as part of a contract in which three other sureties are joining him, against whom in certain eventualities he will have rights of recourse, between whom and himself a common burthen is to be borne, although unequally distributed. But if in fact such other sureties are not bound by the contract (and I have adjudged that they are not), Nunnerley is entitled to say: "This is not the contract into which I have entered, and I am not bound by it."

The judgment of the learned county court judge must stand, and the appeal will therefore be dismissed, with costs.

Solicitors for the plaintiff company, *Moore & Davies*, for *Salter & Giles*, Ellesmere.

Solicitors for the defendants, *Kennedy, Hughes, & Kennedy*, for *Lloyd*, Ellesmere.

Prob. Div. & Adm. Div. } July 29, 1895.
Probate. }

IN THE GOODS OF HONYWOOD. (*a*.)

Probate — Amendment of grant — Error in name of executor.

A grant of probate was made to an executor in the name F. M., he being so described in the will, but his real name was F. J. M. The Bank of England refused to register the will or transfer stock belonging to the estate owing to this discrepancy.

The court allowed the grant to be amended by making it to "F. J. M., known in the will as F. M."

Motion by executors of the will of F. R. Hony-

(*a*.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

wood that the grant of probate might be amended by altering the name of one of the executors from Frederick Marsden to Frederick John Marsden, which was his real name, although he was called Frederick Marsden in the will.

Barnard, for the executors, in support of the application.—The estate includes certain stock of the Bank of England, and this executor having signed the transfer F. J. Marsden the Bank has refused to register the grant or transfer the stock.

JEUNE, P.—I can see no objection to the probate going to "Frederick John Marsden, known in the will as Frederick Marsden."

Order accordingly.

Solicitors, *Forster, Frere, & Co.*

ERRATUM.—*Ellesmere Brewery Co.* v. *Cooper*, *ante*, at p. 255.—The first sentence in the judgment of this case should read as follows: "The judgment of the COURT (Lord RUSSELL OF KILLOWEN, C.J., and CAVE, J.) was read by Lord RUSSELL OF KILLOWEN, C.J.: This was an action against Cooper and four other defendants who had signed a bond as sureties for Cooper."

Court of Appeal.

From Chan. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) — Jan. 22.

LOCK v. THE QUEENSLAND INVESTMENT AND LAND MORTGAGE CO. (LIMITED). (*a*.)

Company—Shares—Shares paid up in advance of calls—Payment of interest out of capital on shares so prepaid—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 14, 38, 101; *Table A*, *clause* 7.

By the articles of association of a company the directors were at liberty, as they thought fit, to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him upon such terms in all respects as the directors might determine; and might also, if they thought fit, pay out of the capital of the company interest on sums paid up on shares in advance of calls. Some of the shareholders paid up in full the amounts remaining unpaid on their shares, such payments being payments in advance of calls, under an agreement with the company that they should receive interest at the rate of £6 per cent. per annum on the amount so paid up in advance.

Held, that such articles were perfectly legal and valid, and that the company was entitled to pay the interest on prepaid shares out of capital in the absence of profits.

Dale *v.* Martin, 9 *L. R. Ir.* 498, 11 ibid. 371, 31 *W. R. Dig.* 208, 32 ibid. *Dig.* 36, *approved.*

Appeal by the plaintiff from Stirling, J.

The company was formed in 1878, and the objects thereof were the investment and loaning of money in Queensland.

The original capital of the company was £2,000,000, but this was subsequently reduced, and now consisted of 164,992 preferred shares of £1 10s. each fully paid, and 164,992 ordinary shares of £7 each upon which only £1 had been originally paid. 20,000 of these latter shares, however, had been paid for in full by their respective holders, the payment of £6 per share being a payment in advance of calls.

In the year 1895 no profits were made by the company, the year's working resulting in a loss; but nevertheless the directors paid interest at the rate of £6 per cent. per annum to the holders of the 20,000 ordinary shares upon the amounts paid by them in advance of calls, in pursuance of an agreement to that effect.

Article 40 of the articles of association was as follows: "The board shall be at liberty, from time to time, as they think fit, to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him upon such terms in all respects as the board may determine."

Article 150.—"All dividends on shares shall be declared by general meeting. No dividend shall be paid except out of the net profits of the company, either for the year, or remaining over from previous years in some reserve fund or otherwise; but the directors may, if they see fit to do so, pay out of the capital of the company interest on sums paid up on shares in advance of calls."

Article 154.—"If a larger amount be paid up on some shares than on others of the same class, the dividend on the shares of that class shall be paid in proportion to the amount paid up on each share, except in so far as all or some part of the excess shall have been received by the board on the terms of paying interest thereon, in which case the part bearing interest shall not be reckoned for the purposes of dividend."

Article 156.—"The directors shall deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise."

Article 158.—"Unpaid dividends and interest on shares shall never bear interest as against the company."

The plaintiff moved before Stirling, J., for an injunction to restrain the company from making any such further payments of interest to shareholders except out of net profits.

Stirling, J., following the practice as settled in Ireland by the case of *Dale* v. *Martin*, 9 L. R. Ir. 498, 31 W. R. Dig. 208, and on appeal 11 *ibid.* 371, 32 W. R. Dig. 36, refused the motion.

The plaintiff appealed.

Brodie Cooper (*Millar, Q.C.*, with him), for the appellant.—I admit that if this payment of interest—not dividend—out of capital is legal, it is expressly authorized by the articles of association; but the negociation, being between the company and a shareolder, was not in the nature of a loan, and therefore the transaction did not constitute a debt of the company. The principal was not repayable except in the case of a winding up. The express condition on which people are allowed to trade with limited liability is that the fund which the Legislature has ear-marked for the benefit of the outside creditors shall not be repaid to the shareholders in any shape or form. The disability to pay interest out of capital is not on the part of the company; it is the status of the shareholder which renders it illegal. The cases show not only that the shares shall be fully paid up, but also that the capital shall not be diminished by any transactions whatever between the shareholders and the company.

He referred to *In re Sharpe*, 40 W. R. 241, [1892] 1 Ch. 154; *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409; *Ooregum Gold Mining Co.* v. *Roper*, 41 W. R. 90, [1892] A. C. 125.

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Graham Hastings, Q.C., and *C. E. E. Jenkins*, for the respondents, were not called upon.

LINDLEY, L.J. — I do not feel, I confess, any difficulty about this case. I think that the answer to Mr. Brodie Cooper's argument, in which he has done full justice to his case, is this—it goes a great deal too far. If he is right, it would follow that no part of the capital of a limited company could be applied in paying a debt to a shareholder of any sort or kind.

Now, it is impossible to read *Trevor* v. *Whitworth* and *Ooregum Gold Mining Co.'s case*, and to suppose for a moment that the learned lords who decided those cases intended to lay down any such proposition as that. It is entirely contrary to certain sections of the Companies Act of 1862 itself. If you look to section 38, clause 7, and section 101 of the Companies Act of 1862, you will find that shareholders can be creditors of their own companies, and that they can stand and prove in competition with creditors of their own companies, provided only that their claims are not in respect of either shares or dividends or calls. In other words, if I am a shareholder in a limited company, and I lend that company £20,000 on the terms of being repaid with interest, I am entitled to be repaid that £20,000 and interest, out of the capital of the company in competition with the other creditors of the company, even on a winding up. I am not entitled to stand as a creditor of the company in competition with other creditors, or with any creditor, in respect of my capital, whether prepaid or not prepaid, or in respect of dividends or profits or anything of that sort, but in respect of debts contracted with me as an outsider, to use that expression, I am entitled.

Therefore Mr. Brodie Cooper's argument goes a great deal too far; and we have this simple question, Is there anything *ultra vires* of this company in the stipulation that it shall be lawful for the directors to pay to a shareholder, whilst the company is a going concern, so much money—6 per cent.—upon capital advanced before it has become due in respect of calls? I have already pointed out in the course of the argument how extremely disastrous it would be to companies to deprive them of that power. It is a benefit to the company to be able to raise money upon terms so much more advantageous to itself than by contracting an ordinary debt, in which case they would be compelled to repay the principal as well as the interest on it. By this machinery they can raise money by obtaining advances from the shareholders in respect of their calls not yet due, upon the terms of paying what I may call for convenience interest upon that capital so prepaid, which interest will cease when that capital is really called up. Nobody supposes that this interest will go on after all the capital is called up. It is interest on prepaid capital, and when the prepayment ceases to be a prepayment, there is no interest payable.

Now, if you look at the clauses in the articles, you will find that they are expressly framed with a view to carry out that kind of business arrangement. Article 154 does throw light on the true construction of articles 40 and 150, and it shows that when the capital is called up this arrangement about interest will cease, and the shareholders will be on a par. They will have to take dividends instead of interest. Now it is said that clause 7 in table A, which authorizes directors to pay interest in respect of prepaid calls, does not authorize the directors to pay that interest out of capital, and Mr. Brodie Cooper's contention is that we must read it as authorizing only the payment of interest out of profits. Well, I admit that the language is not so explicit as perhaps might be desired, but a construction has been put upon that clause in Ireland in 1883, first by the court of first instance, and secondly by the Court of Appeal, in which that court held that interest could be paid, even out of capital. We are asked to say that that is wrong, although it has stood from 1883 downwards, and has been acted on, I believe, ever since throughout the whole of England. I cannot help thinking that the judgment of the Irish court was right, and right in principle; and that the principle upon which the Irish Judges have decided the case does not infringe at all the principles laid down and acted on by the House of Lords in *Trevor* v. *Whitworth* and *In re The Ooregum Gold Mining Co.* The purchasing of shares is a totally different transaction, and so is issuing shares at a discount. The Act of Parliament says the shares are to be paid for, that £20 a share means £20 a share, and that the £20 is to be paid. And *The Ooregum case* means this—that you cannot avoid the liability by the company buying back the shares. That is all, but that has nothing to do with the payment of debts. You must look for the obligation to pay debts to sections 38 and 101; and, having regard to those, it seems to me that the decision of the Irish court is quite right, the decision of Stirling, J., is quite right, and that this appeal must be dismissed.

KAY, L.J.—In this case the articles of association distinctly authorize what has been done. Article 40 provides that—[His lordship read the article, and also articles 150 and 154, and continued:] First of all, is that legal or illegal? If these clauses are *ultra vires*, then, of course, the argument succeeds. Are they *ultra vires*? How can they be *ultra vires*, when we find in section 14 of the Act of 1862 that "any company may avail itself of the provisions of the Act, table A"; and section 7 of table A is this: "That the directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon." That is the law. That provision of table A is made legal by the Act of Parliament itself. I have referred already to section 14 of the Act. Now, the provisions in these articles in effect are the same as that provision in table A; and therefore it is impossible to say that the articles, so far as they authorize the directors to agree to pay interest upon the capital paid by the shareholders on their shares in advance, are *ultra vires* or beyond the powers of the company whose articles contain that provision.

Then the next thing is, What is the meaning of the provision that the company may take from its shareholders, in advance—that is, before calls are made—money paid on their shares, and may agree to pay interest on such money at such rate as they think fit? That agreement to pay interest is a valid agreement, and the effect is this—that the company borrows money from its shareholders which it need not pay back, which is a great advantage to the company, because if it borrowed from outsiders then the money might be recalled, and they might have to pay back the capital; but borrowing it from shareholders they have not to pay back the capital, and therefore when they borrow it in that way the company get a great advantage. But they are at liberty to contract to pay interest, and what is that interest when it is contracted to be paid by the company? Is

it anything but a debt? It is a valid contract. It is not a dividend on shares. Is it anything but a debt? I cannot conceive how in law it can be considered as anything but a debt? A contract to pay interest upon money which the shareholder voluntarily pays in advance on the faith of that contract must be a debt created by contract; and then, if it is a debt created by contract, and if that contract is a legal and valid contract, why should it not be paid out of capital? All debts are payable out of capital, whether they are for interest or principal, or whatever they are for. Debts are payable by the company out of the capital; and if this be a debt, it is payable out of the capital. The company, it seems, had not profits out of which to make these payments, and the debenture-holders are now objecting to these payments being made out of capital; but they are debts. If they are debts, how can they object? It seems to me that they are plainly debts which the company are bound to pay by contract with its shareholders, which contract, as I have said, is perfectly legal.

Now, I quite agree, if I may say so respectfully, with the reasoning of Fitzgibbon, L.J., in the case of *Dale* v. *Martin* which has been referred to. It is cited by Stirling, J., and I read from his judgment this part of the citation: "But then it is said the payment of the interest out of capital reduces the capital below the nominal amount fixed by the memorandum. This, it must be conceded, the board could not do; but the answer to the objection is that this is not a reduction of capital in any sense, except that of a spending of the capital in payment of a lawful debt, which occurs in every case in which money has to be paid out of capital in discharge of the liabilities of a company." That is a complete answer to that part of the argument. The company cannot reduce its capital. It cannot do it either by issuing shares at a discount or by repurchasing its own shares. That the House of Lords has decided in the two cases which have been cited to us. But this is not a diminution of the nominal capital. This is not a return of capital to the shareholders. As Fitzgibbon, L.J., says, it is a proper spending of its capital in payment of that which was a *bonâ fide* debt of the company. I think the decision, if I may respectfully say so, of the court in Ireland was quite right, and that the decision of Stirling, J., following that, was also quite right.

I observe in the case of *Trevor* v. *Whitworth* (12 App. Cas., at p. 415), Lord Herschell in his speech says this: "What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but in the latter case to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished, by any expenditure outside these limits, or by the return of any part of it to the shareholders." This being expenditure within what seems to me to be the proper and lawful limits of the expenditure of a company, it comes exactly within those words of Lord Herschell in the case of *Trevor* v. *Whitworth*.

SMITH, L.J.—I entirely agree with what has fallen from my learned brothers. If I said anything, I should only be repeating; and I will simply say that I entirely agree.

Appeal dismissed.

Solicitors for the appellant, *Ashurst, Morris, Crisp, & Co.*

Solicitors for the respondents, *Trinders & Capron.*

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) Dec. 16, 17.

In re STRAFFORD (EARL OF) AND MAPLES' CONTRACT. (*a.*)

Vendor and purchaser—Settled land—Tenant for life—Improvement rent-charge — Release of part of land charged—Consent of incumbrancers—Improvement of Land Act, 1864 (27 & 28 *Vict. c.* 114), *ss.* 68, 69—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 5, 30.

The tenant for life of an estate which was subject to an improvement rent-charge created under the Improvement of Land Act, 1864, *agreed to sell a portion of the settled estate free from the rent-charge. The tenant for life proposed, with the consent of the owners of the rent-charge, to exonerate the land sold from the rent-charge by virtue of section* 5 *of the Settled Land Act*, 1882; *but the purchasers took the objection that under section* 68 *of the Improvement of Land Act*, 1864, *the consent of the Board of Agriculture (who now represented the commissioners referred to in the Act) must be obtained.*

Held, that the consent of the Board of Agriculture was not necessary, and that a good title had been shown.

Appeal from Kekewich, J.

By an order dated the 11th of February, 1886, under the hands and seals of the Land Commissioners in pursuance of the Limited Owners' Residences Act, 1870 and 1871, and Improvement of Land Act, 1864, the Wrotham Park Estate was charged with a yearly sum of £1,265 11s. 4d.

The Earl of Strafford, the tenant for life of the Wrotham Park Estate, by a contract dated the 4th of June, 1895, agreed to sell to Frederick Maples and others for £2,500 a piece of land containing thirty-four acres or thereabouts, forming part of that estate.

The purchasers, in pursuance of the contract, delivered certain objections and requisitions, of which the first was as follows: "An effectual release of the property from the charge created by the abstracted order of the 11th of February, 1886, must be produced, and it must be handed to the purchaser on completion."

The vendor submitted to the purchasers a draft deed of exoneration, to which the owners of the rent-charge were parties, and by which they exonerated the premises sold from the charge. The purchasers approved this draft, but contended that it should be approved by the Land Commissioners, now the Board of Agriculture, in accordance with section 68 of the Improvement of Land Act, 1864. The vendor denied that there was any need to apply to the Board of Agriculture, and stated that he would exercise his powers under section 5 of the Settled Land Act, 1882, and exonerate the land from the rent-charge with the consent of the incumbrancers.

The purchasers still objecting to the title, the

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister at-Law.

vendor took out a summons under the Vendor and Purchaser Act, 1874, asking for a declaration that upon the execution of the deed of exoneration, and without the consent of the Board of Agriculture, a good title had been shown to the premises according to the contract.

Upon this summons Kekewich, J., held that the consent of the Board of Agriculture must be obtained, and that the purchaser's objection was valid.

The vendor appealed.

Section 68 of the Improvement of Land Act, 1864, provides that the Inclosure Commissioners may either release from the charge any part of the land charged or may apportion the charge, provided that no lands shall in consequence of any such apportionment or release become charged with any greater amount than that to which in the opinion of the commissioners they have been durably benefited by the improvements in respect of which such charge was created.

Section 5 of the Settled Land Act, 1882, provides that "where on a sale, exchange, or partition, there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest, the subject of the settlement, or by creation of a term of years in the settled land or otherwise, make provision accordingly."

Bramwell Davis, Q.C., and *Pattison* (*F. E. Farrer* with them), for the appellant.—There is no substance in this objection, for the purchasers cannot be damaged. Section 68 of the Act of 1864 is merely an enabling section, and does not prevent the owners of a rent-charge themselves releasing the charge. The vendor and the owners of the rent-charge can release the land by virtue of section 5 of the Settled Land Act, 1882.

They referred to *Booth* v. *Smith*, 33 W. R. 142, 14 Q. B. D. 318; *In re Howard's Settled Estates*, 40 W. R. 360, [1892] 2 Ch. 233, and Key and Elphinstone's Precedents in Conveyancing, 4th ed., vol 2, p. 688, note (*a*).

Warrington, Q.C., and *Medd*, for the respondents.—The question is whether section 5 of the Settled Land Act, 1882, applies to the case of a charge under the Improvement of Land Act, 1864, an Act which is left subsisting by the later Act, as may be seen by reference to section 30 of the Act of 1882, which extends the list of improvements contained in the Act of 1864. The important words are "with the consent of the incumbrancer," and they must be read with some limitation, such as "if at law they are in a position to consent." That would be necessarily implied, *e.g.*, in the case of an infant or a limited company. Under section 16 of the Tithe Commutation Act, 1842, which is incorporated by the Improvement of Land Act, 1864, the purchasers may be called upon by the owners of the unsold lands to contribute to the payment of the rent-charge.

Bramwell Davis, Q.C., replied upon the last point.

LINDLEY, L.J., after reading the order of Kekewich, J., and stating the facts, proceeded as follows:—First of all, I will refer to the Settled Land Act, 1882. Section 5, on which this case really turns, begins in this way. [His lordship read the section, and continued:—] That is to say, according to the language of the section, a tenant for life on a sale, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land in exoneration of the part sold. Now, that is an additional power given to a tenant for life who has power under section 3 to sell the settled lands. We all know that one of the great objects of the Settled Land Act of 1882 was to facilitate sales of land, and that it gave tenants for life enormous powers—amongst others, the power to sell land of which they were only tenants for life, notwithstanding the subsequent limitations. It was felt there might be a difficulty about incumbrances, and it was enacted that the tenant for life might do that which I have just mentioned. Nothing can be larger than the language which occurs in section 5 of the Settled Land Act, and I think it lies on anyone who says that that section does not mean what the words apparently do mean, to show to what extent, if any, those words ought to be restricted. The purchasers say here that a rent-charge created under the provisions of the Improvement of Land Act, 1864, is not an incumbrance within section 5 of the Settled Land Act. Why is it not? The reason alleged is that if you look at the Improvement of Land Act, 1864, you will find that these charges are made charges by the statutory commissioners, whose duty it is to consider the interest of everybody whose property is charged, and who have power to consider all the circumstances. Reference has been made to section 68 of that Act, and it is said that whenever a rent-charge has to be apportioned it can only be done by the commissioners subject to the conditions therein referred to. The question really turns more upon section 68 than upon any other, and I will refer to that without going through or referring to the various sections that have been read, and which I do not think it necessary to deal with. I will notice Mr. Medd's argument on the Tithe Act by-and-by.

Section 68 assumes the existence of a statutory rent-charge created under the earlier section. [His lordship read sections 68 and 69, and continued:] Just let us consider what that section (68) does. It says nothing at all about what the owners of the incumbrances can do themselves. The owner of the statutory charge is the owner of the incumbrance, and if he sees fit one cannot see why he should not release it. There is nothing here to prevent him doing it, or to prevent him releasing part of the land charged if he chooses to do so, and take the consequences. One of those consequences might be that by releasing part of the land he might release the whole; and he might, I suppose, if he chose, release the whole. Under Lord St. Leonards' Act the charge might be apportioned; but if the incumbrancer chooses to release the whole, there is nothing against it. The object of section 68 is not to fetter the owners of the charge, but to confer on the commissioners power which but for that section they would not have, and which, be it observed, can be exercised adversely to the persons interested in the estate. The duty is entrusted to the commissioners of looking after the interests of those who have charges. The proviso is all-important. If the commissioners are exercising their powers, then they are to take care that no land shall, in consequence of any apportionment or release made by them, become charged with any greater amount than that for which, in the opinion of the commissioners, they have received benefit. The owner of the rent-charge could not throw on the land which he chose to release the whole of the rent-charge which was charged on the land released and on the land not released. Of course, he could not not do that by himself. That could only be done with the consent of those who are interested in the whole of the land charged. But the

commissioners can do that, and that is a very important thing.

Now let me pass from that, and let us see what there is inconsistent with section 5 of the Settled Land Act. I cannot see anything. I do not see what there is in the power given to the commissioners inconsistent with the subsequent legislation giving tenants for life power to sell land free from incumbrances. Why should they not, with the consent of the incumbrancers? They cannot do what the commissioners can do. That is another matter; but when you come to apply section 5 of the Settled Land Act, 1882, to other lands you find that upon the sale the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold. I do not mean to say that he can give a statutory charge to take priority over all other charges. That would be quite another matter. If the incumbrancer chooses to take the charge, he will take it as an ordinary charge subject to priorities and everything else. It does not concern anyone but the incumbrancer. If he chooses to consent, it can be done; but if he does not consent, it cannot be done by the tenant for life. Now, it is said that there is something in the Settled Land Act, 1882 itself, which is inconsistent with this, and reference is made to section 30. That section, as I read it, merely enlarges the improvements which can be made under the Act of 1864, without referring to section 5 of the Settled Land Act. That is to say, there are two methods of improving lands, one under the Act of 1864, through the medium of the commissioners, now the Board of Agriculture. Their powers are increased by section 30, and that section does not refer to section 5 at all.

Nor is there any valid argument deducible from the repealing section (s. 64) of the Act of 1882. There are certain sections of the Act of 1864 modified by that repealing section and the schedule, but there is nothing there to curtail the power given to the tenant for life; and it appears to me that if we were to deny to the tenant for life the power to release the land under section 5, we should be doing that which is the last thing the Legislature contemplated. We should be hampering the tenant for life in the exercise of that power of sale which is given to him by section 3, and which is the cardinal power given by the Act of 1882.

Now, Mr. Medd has made a point which I thought was entitled to some attention. He says that the purchasers will not be safe in completing the purchase with such a deed of release as is tendered to them, because he says they may be called on to contribute to the payment of this rent-charge by the owners of the unsold lands. He refers to section 16 of the Tithe Act of 1842, which, he says, and says truly, is incorporated by the Act of 1864. When you look at the Tithe Act of 1842 it does not assist him at all. The case will not arise. Mr. Medd's client has a perfectly good title discharged from the whole of this statutory rent-charge. The release is made with the consent of the owner of that rent-charge; and Mr. Warrington's point, that notwithstanding this conveyance the owners of the rent-charge could come down upon the land, seems to me utterly untenable. It is very true that the draft does not contain any express words of release by the owner of the rent-charge. If that were all, I do not think that we should have had any summons or any appeal. That is not the point. The point is this. If the parties chose to execute a deed in that form, which they are content to do, would the purchasers have to run this inconceivable risk? It seems to me that they would have a perfectly clear and good title to the lands agreed to be sold, perfectly discharged, and not affected.

I think the appeal must be allowed.

A. L. SMITH, L.J.—I agree.

RIGBY, L.J.—In deference to the opinion of the learned judge of the court below, although I should be content to rely entirely on the judgment which has been declared, I should like to add a few observations. The Act of 1864 was a very beneficial one, enabling limited owners to charge the lands of which they were limited owners with rent-charges for specified improvements. Of course, that is effectually safeguarded, and the course adopted was to create a jurisdiction in the commissioners, now represented by the Board of Agriculture, who were to see that the improvements were improvements such as would enhance the value of the land charged; and therefore all persons interested, including incumbrancers, would understand exactly the value of the improvements before they sanctioned the rent-charge.

Passing over the other sections of the Act, which appear to me immaterial or not sufficiently material to require separate consideration, it appears that the Legislature thought that a rent-charge of that kind, extending over, it may be, a large property, might seriously hamper owners of land in dealing with their properties; and section 68, as I understand it, makes the Board of Agriculture the tribunal for redressing any undue interference with the owners of land in dealing with their estates. It enables them, on the application of an owner in specified cases—one being where the owner is desirous of selling a portion of the land—to reconsider the position of things and inquire whether it is necessary that the whole of the rent-charge should remain charged by the absolute order made in the first instance. If they found that consistently with the interests of the holders of the rent-charge and the other persons concerned they might release a portion of the land, they had jurisdiction to do so; a jurisdiction carefully hedged about, no doubt, but still a jurisdiction which they could exercise *in invitum*, notwithstanding the resistance of the owners of the rent-charge, and notwithstanding, as I read the section, the resistance of the other persons interested, on the ground that no harm would be done them. They may apportion the rent-charge, or they may release a portion of the land from it and charge the whole on the other part of the property, although the property may have gone into different hands since the creation of the rent-charge. One portion, as the section itself contemplates, may be in the ownership of one person, or one set of persons, and others may have got into different ownerships. Obviously the very reasonable, and obviously the very necessary, thing is that in what they do as a tribunal of reference acting between the parties, whether they consent or not, is limited in this way, that they are not to throw on any one part of the property a greater burden than corresponds to the benefit which is derived by that property. Section 69 merely directs how the matter is to be carried into effect. I do not think for a moment that section 68 interferes with that liberty which the owners of a rent-charge under the Act had, in common with all other owners of property, of dealing with their own property as they think fit. And in the argument it was found impossible to press the matter so far as to say that if you have an owner of the land, a fee simple owner of the land or persons making up the fee simple, on the one side, and the owner of the rent-charge on the other, they might not agree as they pleased. That involves this, that the owner of the rent-charge may, if he thinks fit, release his charge without going to the tribunal appointed by the Board of Agriculture

to entitle him to do that which his own power of ownership alone is sufficient to enable him to effect; and if he can release the whole charge, he may release part. I do not mean to say that he can affect the interest of parties who do not consent, and whose interests may be affected. I do not mean to say that he can increase the burden imposed on any part of the land; but I take it that it is clear that he can release, notwithstanding any of the provisions of the Act of 1864, any part of the lands from his rent-charge. Then, if he can do that of his own free will, he may do it when he is asked to do it, by a person who has power to sell land, on the occasion of a sale.

Now, when we come to the Settled Land Act, what do we find to be the scheme of that Act, speaking generally? It was an Act of great boldness and of great scope, but I think the provisions of it, when carefully considered, do point to this—that a tenant for life or the persons having the powers of a tenant for life under the Act, is for certain most important purposes to have a power as extensive as that which an owner in fee simple has. He may sell the land. If he can do that, an owner in fee simple can do no more. It by no means follows that he can be converted into an owner in fee simple by the Act. He is not; but he can sell the land, and by the Act provision is made for securing the purchase money for the benefit of those who are beneficially entitled under the settlement. When you have got so far as that, when you have made him for the purpose of the sale as capable of disposing of the whole of the property as if he were the fee simple owner of it—and when you find, as we do in section 5, a provision that he may with the consent of the incumbrancers in any case make an arrangement for releasing the part sold from incumbrance, and may always, with the consent of the incumbrancer, do that in exoneration of the property that remains unsold—I ask myself why should he be treated as having a less power for that purpose than if he were the owner in fee simple?; and I can see no answer to that, except that he should have all those powers just as he had the entire power of sale.

The question now is, whether there is anything in the Act of 1864 that prevents that *primâ facie* application of section 5 of the Settled Land Act, 1882, which the words certainly seem to force upon us. It appears to me that that question is already answered by the consideration that under the Act of 1864 itself, the incumbrancers may, if they choose, release any part of the property charged. By saying this I do not mean for a moment to assert that by releasing one portion of the property they can alone or in conjunction with the landowner make an additional charge in the nature of a rent-charge under the Act of 1864, with all its advantages and priorities over the other lands; but it appears to me that they do not lose that portion which is already charged; and it is for them to consider in any case whether they have not a sufficient security already on the parts which remain unsold, and whether, with the assistance of the tenant for life selling under the power of the Settled Land Act, they may not have that supplemented so as to make it a perfectly satisfactory security. Of course, if there is any doubt about that, the incumbrancers will take very good care not to consent. They cannot be obliged to consent. The Act never intended that they should be obliged; and if they do not consent, the only result will be that possibly there will be a sale of the land subject to the rent-charge or such portions as may be available, or the vendor will be driven to go and get the Board of Agriculture in a proper case to exercise the powers given to them by the section 68. If the owners of the rent-charge see their way to a sufficient security for themselves and consent to release the lands if sold, I can see no reason why they should not be allowed to do it. Section 30 of the Settled Land Act somewhat extends the powers of the Act of 1864, and, so far as my attention has been called to the matter, it in no way repeals any part of that Act. The very fact that the Legislature had in mind while passing the Act of 1882, the fact that there was a method of creating rent-charges upon land by limited owners by the intervention of the Board of Agriculture, rather leads me to the conclusion that when by section 5 they did not make any exception with regard to the Acts brought to their attention they did not mean, so far as any argument can be drawn from its absence, to make such exception.

Now, here we have the simple question, Have the owners of this rent-charge released the land proposed to be sold from the rent-charge? We have no question to consider as to the effect of that release. I think it is plain from the Act that, as regards persons beneficially entitled under the settlement, the tenant for life can give a charge on the properties which remain unsold. Whether it goes further or not is not a matter that has now to be determined. It would be difficult, perhaps, to establish whether it does go further, but that is a question for the consideration of the incumbrancers, and for their consideration alone. When we have the fact that they are prepared to execute a deed for the purpose of exonerating the property which is being sold, I say that that will effectually release the lands just as much as if it were done outside the court altogether on any occasion agreed upon between the owners of the land charged and the owners of the rent-charge. They can release, and by such agreement they do release.

With regard to Mr. Medd's point about contribution, to my mind that would be a very good point if the first one were established that there was no effectual release. But then it would not be wanted; if there is no effectual release, the land is charged, and that is enough. If there is an effectual release, there can be no right to contribution, because that right only exists between the owners of land subject to a common charge when each in equity is entitled to contribution. The Tithe Act, 1842, gave a summary remedy for contribution in the case of those persons who had paid the whole amount of a tithe rent-charge, or a greater proportion than their lands ought properly to bear—gave, in fact, the same remedy against the others as the tithe-owner himself would have had. But that would not enable any of them to get contribution from a person whose lands were not subject to the tithe rent-charge; nor need any action of that sort be apprehended here, if we are correct in holding that there is a release of the lands sold under this statutory provision.

I think that the objections on the part of the purchaser are fully met, and that a good title, so far as this matter is concerned, is made; and that being the only point that has or could be made, I think this appeal ought to be allowed, with costs.

Solicitors, *Farrer & Co.; Valpy, Chaplin, & Peckham.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) — Nov. 21, 22, 26, 27; Dec. 17.

GAS FLOAT WHITTON. (a.)

Admiralty — Salvage — County court — Jurisdiction — Subjects or objects of salvage — Ship — Gas float — Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 458, 476—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 3.

The subjects or objects in respect of the saving of which, the High Court of Admiralty has jurisdiction by the common law are confined to a ship, her apparel, her cargo, including flotsam, jetsam, and lagan, or the wreck of them, and to freight in danger and saved by reason of the saving of the ship or cargo; and the subjects or objects of salvage are not enlarged by the Merchant Shipping Act, 1854, *or by any of the preceding statutes, or by the County Courts Admiralty Jurisdiction Act*, 1868, *with the sole exception that the saving of lives of persons in danger from being on board ship have been added to the list of such subjects or objects.*

The plaintiffs claimed a salvage award in a county court having Admiralty jurisdiction for services rendered to a gas float adrift in the tidal waters of the Upper Humber. The structure was of iron, boat shaped, and contained gas, which supplied the light raised above it.

Held, that the gas float was not a "ship" or a "wreck" within the meaning of sections 2 *and* 458 *of the Merchant Shipping Act*, 1854, *and could not be the subject of salvage.*

Appeal from the decision of the Divisional Court in Admiralty affirming the judgment of the judge of the Kingston-upon-Hull County Court.

The county court judge awarded damages for salvage services rendered in the River Humber by the respondents to a gas float, the property of the appellants, the Corporation of Trinity House, at Hull. The gas float was stationed near Brough, in the River Humber, for the purpose of a beacon. The nature of the float and the circumstances of the alleged salvage were ascertained by the county court judge, and were as follows: The float was of iron. The lower part bore the resemblance of a ship or boat. It had two ends, shaped like the bow of a vessel. It was about fifty feet long and twenty feet broad. It had no mast, stern post, fore post, or rudder. It could not be navigated. It always remained fixed by an anchor, or anchors, or otherwise, at a particular spot. It cost £600. Its interior was occupied by a gas cylinder, which supplied gas for the light night and day for about six weeks. The light was fixed on a structure of wood in the form of a pyramid fifty feet high. No one was ever stationed on the float, and it could not carry any man or goods from place to place, except that a man could ascend by means of a manhole to the light, in order to clean or arrange it. During a gale on the 22nd of December, 1894, the gas float got adrift and was driven ashore. The respondents, who were waterside men, fastened ropes to it, and kept it till the Trinity yacht arrived, when, with the respondents' assistance, it was got off.

The county court judge held that the gas float was a "ship," and, under the circumstances, a "wreck," within the meaning of sections 2 and 458 of the Merchant Shipping Act, 1854, and that it was therefore the subject of salvage; and he gave judgment for the respondents, awarding them £15 in respect of their services.

The Divisional Court held that the gas float was not a "ship" or "wreck" within the meaning of sections 2 and 458; but that as such a structure, used in connection with navigation and exposed in the ordinary course of its use to the perils of the sea, would have been within the jurisdiction of the Admiralty if adrift upon the high seas, it was, by virtue of section 476 of the Merchant Shipping Act, also within the jurisdiction of the Admiralty when in the body of a county; which jurisdiction was extended to the county courts by section 3 of the County Courts Admiralty Jurisdiction Act, 1868. The judgment of the county court was therefore affirmed.

The arguments of counsel on both sides, together with the cases cited, appear sufficiently in the judgment of the court.

Sir W. Phillimore and *F. Laing*, for the appellants.

L. E. Pyke, Q.C., and *Butler Aspinall* (*Arthur Pritchard* with them), for the respondents.

Cur. adv. vult.

Lord ESHER, M.R., after stating the facts, proceeded:—The question in dispute was whether the county court had jurisdiction to hear and determine upon the claim of salvage reward. It was argued on behalf of the appellants before us that the gas float was not the subject matter of a salvage claim in the High Court of Admiralty within either its common law or any statutable jurisdiction; and that if it was not so, neither was it within the statutable jurisdiction of the county court. It was urged that the original—*i.e.*, the common law—jurisdiction of the Court of Admiralty in respect of salvage was limited to claims in respect of alleged services to a ship and her apparel, or to the cargo of a ship, including cargo which had become flotsam, jetsam, or lagan, and to freight alleged to be saved by the saving of a ship or cargo, and to the wreck of ship or cargo; and that the alleged services were rendered on the high sea. It was true that the jurisdiction was extended by statute to the saving of life; but, it was urged, only to the saving of the life of a person whose life was in danger from his being or having been on board a ship and in danger on the high sea. Where in some cases the jurisdiction of the Admiralty Court was extended further than the limits of the high sea, yet it was so only in respect of the same objects or subjects as were within the jurisdiction of the Admiralty on the high sea. It was then argued that, upon the true construction of the statutes giving Admiralty jurisdiction to the county courts, they only conferred on those courts, in respect of salvage services occurring within counties, the same jurisdiction as to the same subjects and objects as were within the jurisdiction of the High Court of Admiralty where the services were rendered within its jurisdiction. It was then argued that the float in question was not in any sense a ship, was not a subject or object in respect of the saving of which the High Court of Admiralty could have exercised or could exercise salvage jurisdiction, and therefore was not a subject or object for the similar jurisdiction in the county court.

It was argued for the respondents that the High Court of Admiralty had jurisdiction in respect of salvage services claimed to have been rendered at sea far beyond services to ship, cargo, and apparel and freight; that such jurisdiction extended to the saving of any article in danger on the sea, or if not to all articles yet to all which could be brought

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

under the denomination of maritime property; and that maritime property included every floating object which is constructed for the purposes of navigation, meaning thereby some reference to the business of navigation, although it itself was not intended ever to be and could never be navigated. It was urged that, even if such things were not the subjects or objects of salvage within the original jurisdiction of the Admiralty, they were rendered so by statute. And it was further argued that, though not now within the jurisdiction of the High Court of Admiralty either by common law or statute, they were by statutes within the jurisdiction of the county court.

The first point raised is, Whence is the original or common law jurisdiction of the High Court of Admiralty of England to be ascertained? The answer is from the continuous practice and the judgments of the High Courts at Westminster. This proposition was so stated in the case of the *Gaetano and Maria*, 30 W. R. 766, 7 P. D. 137: "Neither the laws of the Rhodians, nor of Oleron, nor of Wisby, nor of the Hanse Towns are of themselves any part of the Admiralty law of England." It was attempted by one of the counsel to say that the laws of Oleron were to be considered as part of the law of England. To anyone who reads some of their strange enactments it must be ridiculous to suggest that they are part of the English law. For instance, in the laws of Oleron, article 23, "if the pilot through ignorance causes the ship to miscarry, he shall make full satisfaction or lose his head"; article 24, "if the master or one of the marines or any one of the merchants cut off his head they shall not be bound to answer for it"; and article 26, "if the lord of any place be so barbarous as to maintain (wreckers, &c.), he shall be fastened to a post or stake in the midst of his own mansion-house, which being fired at the four corners thereof, all shall be burned together." But they contain many valuable principles and statements of marine practice which, together with principles found in the digest and in French and other ordinances, were used by the judges of the English Court of Admiralty when they were moulding and reducing to form the principles and practice of their court. All these sources of legal principles were used by Lord Tenterden in his great work. But he says in the last of his prefaces, in the preface to the fifth edition: "It should be observed, however, not only of all these treatises, but also of the civil law and the ordinances, without excepting even the ordinance of Oleron (which, being considered as the edict of an English prince, has been received with peculiar attention in the Court of Admiralty), that they have not the binding force or authority of law in this country, and that they are here quoted sometimes to illustrate principles generally admitted and received," &c.

It should be remarked that, as the law of the Admiralty is to be ascertained from the practice and judgments of its judges, it must be found or deduced from affirmative practice or judgments; neither principle nor proposition can be deduced from mere negative—*i.e.*, by saying the point has never been treated in the Court of Admiralty. If you find that the Court of Admiralty has affirmatively stated that it has jurisdiction in certain cases, you cannot affirm that it has jurisdiction in other cases merely on the ground that the Court of Admiralty has not expressly excluded them by negative words; you must bring the proposed case within some affirmed principle or some affirmative judgment or practice.

The second point, therefore, is, What is the jurisdiction of the High Court of Admiralty as to salvage, ascertained from its practice and judgments and from statutes? As to its practice and judgments, irrespective of statutes, it seems to be one uniform, continuous statement by judges and writers of authority that the jurisdiction as to salvage is exercised in respect of a ship, her apparel, and her cargo, of freight in danger and saved by reason of the saving of the ship or cargo, and of flotsam, jetsam, or lagan, being each of them part of the cargo of a ship. Lord Tenterden thus expresses it: "It is the compensation that is to be made to persons by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss. This compensation is known by the name of salvage." In Park on Insurance, ch. 8, on salvage: "Salvage is an allowance made for saving ship or goods, or both, from the dangers of the seas, fires, pirates, or enemies." In Kent's Commentaries, vol. 3, pp. 244-5, of salvage: "Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss in cases of shipwreck, derelict, or recapture. The equitable doctrine comes from the Roman law, and it was adopted by the admiralty jurisdictions in the different countries of Europe." In Parsons, ch. 7, on salvage: "In admiralty, and generally in the law merchant, it means the compensation which is earned by persons who voluntarily assist in saving a ship or her cargo from peril." In Williams and Bruce's Admiralty, ch. 6, on salvage: "Salvage is the reward payable for services rendered in saving property lost at sea, or in saving any wreck, or in rescuing a ship or boat, or her cargo or apparel, or the lives of the persons belonging to her, from loss or danger." In Mr. Carver's book, which will be the Abbott on Shipping of the future, ch. 11, on salvage and wreck, s. 322: "By the common law one who saves, or helps in saving, a vessel, to which he is a stranger, from danger at sea, is entitled to a reward for his services." "So, also, with regard to cargo or other property belonging to a vessel at sea which is rescued from danger, whether while in a vessel or after having been thrown or washed out of her; those who rescue such property are entitled to reward and to a lien upon the property for the reward." "The reward thus payable to these salvors is called salvage."

There is no word used by any of these writers which mentions any subject or object of salvage under the common law jurisdiction as to salvage of the High Court of Admiralty other than the ship, her apparel, or cargo, or the wreck of them. If in Williams and Bruce more was meant by the phrase "property lost at sea," the statement is in the notes made to depend on the authority of American cases, which will be discussed hereafter.

In the last treatise on the subject of salvage—Kennedy on Salvage—the case is thus stated: "A salvage service, in the view of the Court of Admiralty, may be described sufficiently for practical purposes as a service which saves or helps to save maritime property—a vessel, its apparent cargo, or wreck—or lives of persons belonging to any vessel when in danger," &c. The learned author then quotes the American cases as to rafts of timber, but observes: "There does not appear, however, to be any reported case in which the English Admiralty Court has awarded salvage for the preservation of any but such maritime property as is included in the suggested description."

So far, therefore, as the text writers are to be considered, if the extended meaning of the subject matter of salvage in the High Court of Admiralty in its original or common law jurisdiction is that which is asserted on behalf of the plaintiffs in this case, all

the writers but two have overlooked it; and of the two, one founds it solely on the American cases, and the other cites those cases but questions them.

If we go further and examine the sources of the English law, as for instance the laws of Oleron, of Wisby, and others, every article in them treats of ships, and what concerns them, and of nothing else. As for instance, article 63 of the laws of Oleron: "In all other things found by the seaside, which have formerly been in the possession of some or other, as wines, oil, and other merchandise, although they have been cast overboard, and left by the merchants," &c. And so in the most valuable and remarkable code known as the Ordinance of Louis XIV. of August, 1681, the whole of more than a hundred sections deals with ships and the affairs of ships only, and with the wreck of ships or effects called ship-wrecked effects: see section 45, "of wrecks and ships run aground." For these, see the Treatise on Sea Laws.

In the Black Book of the Admiralty there is not a passage which indicates anything but ships and the conduct of them. Laws of Wisby, Black Book of Admiralty, p. 405, ch. 13, of things found on the sea: "Should a man find goods driving on the sea, where he can see no land, should he bring these things to land he shall have half for his labour; if he could see the land, he shall have a third part. (1) Should a man find goods on the ground, where he has to use oars and hooks, he shall have the third part. (2) Should a man find a ship driving on the sea, and no people are in it, and he brings it to land, of that which results from it, whether from the ship or from the goods, he shall have half, and it shall remain outside the city's bounds. (3) Should a man find goods driving to land to which he can wade, he shall have of them the eighth penny; so likewise should a man find goods driven on to the shore, he shall have the eighth penny therefrom. If anyone denies that he has found such goods, and is afterwards convicted of it, that is theft." Reading the word "goods" here subject to the context of all the other clauses, it must, I think, mean goods which have been in a ship. The truth is that no merchant or legislator ever imagined goods at sea which had got there without having been in a ship.

Then turning to what is, after all, the chief source from which the jurisdiction of the Admiralty Court is to be ascertained—namely, the decisions of the English courts—we begin with *Sir Henry Constable's case*, 5 Co. Rep. 215, which defines what is "wreck of the sea," and that "flotsam" is when a ship is sunk or otherwise perished and the goods float on the sea; "jetsam" is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea and afterwards, notwithstanding, the ship perish; "lagan" is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods so cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork or such other thing that will not sink, so that they may find them again; and none of these goods which are called "flotsam," "jetsam," and "lagan" are called "wreck" so long as they remain in or upon the sea; and the Court of Admiralty shall have cognizance of them whilst they are in or on the sea.

In *Hartford* v. *Jones*, 1 Ld. Raym. 393, Lord Holt held in favour of a lien as against an action of trover, the lien being claimed for salvage servic s—*i.e.*, being an Admiralty lien. But those services were alleged to be for saving the goods from a ship which took fire, and they hazarded their lives to save them. In *Nicholson* v. *Chapman*, 2 H. Bl. 254, an action of trover was brought in respect of a quantity of timber placed in a dock on the banks of the Thames, but the ropes accidentally getting loose, it floated and was carried by the tide. It was saved, and the defendant refused to deliver it until salvage was paid. Eyre, C.J., and the court held the saving of it was not such a salvage as the law recognized—*i.e.*, in the Admiralty or common law courts. "The question is," said the Lord Chief Justice, "whether this transaction can be assimilated to salvage. The taking care of goods left by the tide upon the banks of a navigable river may, in a vulgar sense, be said to be salvage, but it has none of the qualities of salvage in respect of which the laws of all civilized nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and that our law has also provided that this recompense should be a lien upon the goods which have been saved." He then goes on to say that goods carried by sea are exposed to danger, and that the recompense is dictated by principles of public policy recognized in civilized and commercial countries. "Such are the grounds upon which salvage stands. They are recognized by Holt, C.J., in *Hartford* v. *Jones*. But see how very unlike this salvage—*i.e.*, in *Hartford* v. *Jones*—is the case now under consideration." The difference thus alluded to evidently is that in the earlier case the goods were saved from a ship on the sea, in the later case the goods were never on the sea at all. In the case of *Raft of Timber*, 2 W. Rob. 251, Dr. Lushington refused to issue a monition, *i.e.*, a summons, calling upon the owner of the raft to show cause why salvage should not be awarded. It is said that the question was only as to the locality in which the services were rendered. But Dr. Lushington also relied upon the nature of the object. "This," he said, "is neither a ship nor a sea-going vessel; it is simply a raft of timber."

There is no case in any English court in which the question of salvage reward has ever been entertained unless the subject of the salvage service was a ship, her apparel, or cargo or freight which is peculiar to ships, or wreck of a ship, or her cargo, or, by statute, the life of a person in danger because the person has been on board ship. It follows that no jurisdiction of the Admiralty in England can be carried, by reason of the practice or judgments of the Admiralty or any other court, beyond a claim for salvage in respect of the subjects and objects named. As to the alleged extension of the jurisdiction of the High Court of Admiralty by statute, the question is whether it has been extended by statute in cases of salvage claims to any subjects or objects which were not subjects or objects of salvage claims before the statutes.

The first statute really relied on was 3 & 4 Vict. c. 65, s. 6. It is an Act to extend the jurisdiction of the Court of Admiralty. It does extend the jurisdiction to subjects and objects in respect of which the court had no jurisdiction before. As to salvage there is only section 6 which is relied on. Section 6 is: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to any ship or sea-going vessel, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered." This is to be construed according to the ordinary rules of construction. Having regard to the existing state of the law, it is impossible to say that the statute goes further than to extend the area of locality. It abolishes the distinction between the same services in respect of the same subjects or objects according as they were rendered within the body of a county or on the high seas, but does not alter the nature of salvage, which is a reward for services to ships, &c.

The statute 17 & 18 Vict. c. 78, s. 13, was relied on. The words are: "In all cases in which a party has a cause or right of action in the High Court of Admiralty of England against any ship or freight, goods, or other effects whatsoever, it shall be not necessary to the institution of a suit for such person to sue out a warrant for the arrest thereof, but it shall be competent to him to proceed by way of monition." The whole statute is as to the regulation in the Admiralty Court of the procedure of cases in the court. The statute is not applicable until the case is in the court. It does not affect the question of what case is or is not within the jurisdiction of the court—that is, what case is or is not capable of being brought into the court.

The statute 9 & 10 Vict. c. 99 was called to our attention, and was minutely dissected at immense length. It is repealed; but nevertheless it was said it could be used to show what were the subjects or objects of salvage. I think that after its repeal it cannot be used at all. But if it could, it does not seem upon a true construction to support the assertions for which it was cited. The section mainly relied on was section 40: "The High Court of Admiralty shall have jurisdiction to decide upon all claims and demands whatsoever in the nature of salvage performed, except in cases of goods hereinbefore directed to be sold as droits of Admiralty, whether in the case of ships or vessels, or of any goods or articles found either at sea or cast upon the shore, and whether such services shall have been performed upon the high seas or within the body of any county, anything in any Act contained to the contrary notwithstanding." But that section ascertains only the forum of trial. Section 19 enacts what can be saved so as to give a right to salvage, and the persons entitled to salvage reward for such saving: "Any person (except receivers under this Act) who shall act or be employed in any way whatsoever in the saving or preserving of any ship or vessel in distress or of any part of the cargo thereof, or the life of any person on board the same, or of any wreck of the sea, or of any goods, jetsam, flotsam, lagan, or derelict, or of any anchors, cables, tackle, stores, or materials which may have belonged to any ship or vessel, whether the said ship or vessel shall have been in distress or otherwise, &c., shall be paid a reasonable reward or compensation by way of salvage," &c. It seems that construing these two sections as parts of one statute, section 40 determines the forum in which the claims of persons, who claim to have performed the services to the subjects or objects named in section 19, are to be referred.

We are then brought to the main statute applicable to the case before us—the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). It was passed to amend and consolidate the Acts relating to merchant shipping, not specifically to alter anything with regard to salvage. It does not in its title or preamble state an intention to alter the common law applicable to merchant shipping, but only the Acts relating to merchant shipping. The first section relied on is section 2, the interpretation section. Such a section in modern drafting of statutes does not itself affect the nature of anything spoken of or dealt with in the statute. It only avers that instead of repeating every one of several things dealt with in other sections, they are to be taken as repeated whenever the one word or phrase is used. Thus, whenever the word "ship" is used in any section of the Act, it is as if in that section the words were "a ship or any description of vessel used in navigation not propelled by oars." The statute deals with a variety of matters relating to merchant shipping, and with a great number of modes of dealing with such matters within and without different courts. One part of the statute deals with salvage. The sections relating to it are under the heading "Salvage in the United Kingdom." It deals, therefore, only with salvage on the high seas within the three miles limit, and with salvage within counties. Section 458 is: "When any 'ship'—*i.e.*, 'when any ship or any description of vessel used in navigation not propelled by oars'—or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom—*i.e.*, of Great Britain and Ireland—and services are rendered (1) in assisting such ship—*i.e.*, ship or any description of vessel used in navigation, &c.—or boat, (2) in saving the lives of the persons belonging to such ship—*i.e.*, &c.—or boat, (3) in saving the cargo or apparel of such ship—*i.e.*, &c.—or boat, and wherever wreck—*i.e.*, wreck or jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water—is saved by any person other than a receiver within the United Kingdom, there shall be payable, &c.—a reasonable amount of salvage." Section 459: "Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship—*i.e.*, &c.—or boat as aforesaid," &c. The statute does not deal with salvage beyond the three miles limit.

It is obvious that within the limit it deals specifically with subjects or objects which, as has been stated at the commencement of this judgment, were the subjects and objects alone dealt with in the High Court of Admiralty before any statutes as regards salvage. This section does not add, either within or without the realm, to the subjects or objects of salvage. Section 476 is also under the heading "Salvage in the United Kingdom." It is: "Subject to the provisions of this Act, the High Court of Admiralty shall have jurisdiction to decide upon all claims whatever relating to salvage, whether the services in respect of which salvage is claimed were performed upon the high seas or within the body of any county," &c. In this section the subjects or objects of salvage are not mentioned. It deals with salvage. With what salvage? Obviously with that which is in law salvage—*i.e.*, with the saving of objects and subjects which in law, *i.e.*, the common law, the statute law, and the maritime law, are recognized as the subjects and objects of salvage reward. Section 497 is no larger. The statutes do not enlarge the subjects or objects, but by dealing only with the subjects and objects mentioned strongly corroborate the view hereinbefore expressed as to the original jurisdiction of the High Court of Admiralty. In Part 6, headed "Lighthouses" and "Management of Lighthouses," by the interpretation clause lighthouses, "in addition to the ordinary meaning of the word, shall include floating and other lights exhibited for the guidance of ships, and buoys and beacons shall include all other marks and signs of the sea." They are in this Act, all of them, distinguished from ships. The statutes have added one subject—*i.e.*, life—as liable to salvage to be awarded by the High Court of Admiralty, but have added no others. The question argued, that a larger jurisdiction as to the subjects or objects of salvage is given to the county courts than to the High Court of Admiralty, is too preposterous to be worthy of further notice.

It was argued that the gas float was a ship within the ordinary meaning of the word ship, or within the meaning of what was said to be the definition of the word ship in some judgments of the court. It is said that the judgment of Lord Blackburn in *Ex parte Ferguson*, 19 W. R. 746, L. R. 6 Q. B. 290, is inconsistent with the view that "ship" is to be used only in its ordinary meaning amongst people conversant

with shipping business. But the description given of that which in the case was called a "coble" made it clear that that coble was a vessel in its ordinary sense, though all cobles are not ships or vessels, but some are only boats.

The case of *The Mac*, 7 P. D. 126, 30 W. R. Dig. 106, was much relied on. It is the case of the hopper barge. I agree that expressions used by me were not happy. I think the first phraseology is enough. "The word includes anything floating on or upon the water built in a particular form and used for a particular purpose." But I think the subsequent phrase, "used for the purpose of navigation" was unhappy. It should have been "was being navigated." In the case of *The Cleopatra*, 47 L. J. Adm. 72, 27 W. R. Dig. 204, the thing saved was held to be sufficiently like a ship to be not unfairly treated as a ship. The case of *The Caisson* before Sir R. Phillimore, reported in the Maritime Register of the 12th of May, 1876, is relied on. It looks as if the judge of the Admiralty Court was asked by both sides to name the amount and the distribution of a fair reward. If so, he acted as an arbitrator. If he acted as a judge, the case is contrary to all others, and is wrong. It seems impossible to say that, within the ordinary English meaning among merchants or sailors or persons dealing with maritime affairs, this thing could be called a ship, a vessel, or a boat.

But now we have to deal with the argument that the general law maritime acknowledged in the High Court of Admiralty included and includes subjects or objects as the subjects or objects of salvage which are beyond ship material and cargo, including flotsam, jetsam, and lagan, and wreck of ship or cargo. It was argued that everything found floating on the water, although it itself could not possibly be a navigable thing, might be the subject or object of salvage. And it was said that there are American judgments which justify such a statement. If there are, I for one should hesitate before I differed from them. I have the greatest respect for American decisions. It is because of the reference to the American judgments that I have used immense labour in writing this judgment. I hope it will be some day considered in American courts. But, before examining the American judgments, I will refer to the statement of the law by Bowen, L.J., in *Falke* v. *Scottish Imperial Insurance Co.*, 35 W. R. 143, 34 Ch. D. 248:—"The general principle is beyond all question, that work or labour done or money expended by one man to preserve or benefit the property of another do not, according to English law, create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs, any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in maritime law. With regard to salvage, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."

The judgment of Martin, B., in *Palmer* v. *Rouse*, 6 W. R. 674, 3 H. & N. 509, seems to be to the same effect. "The case depends upon the construction of the Merchant Shipping Act, 1854. That Act was passed with reference to shipping, and must therefore be taken to apply to matters connected with shipping. The Act gives a jurisdiction unknown at common law, and subjects the owners of goods to the payment of charges to which at common law they were not liable. It must therefore be construed strictly. Now, according to the well-known definition of flotsam, it refers to goods which, having been at sea in a ship, are separated from it by some peril."

The case principally relied on in the American Reports is that called *A Raft of Spars*, Abbott's Admiralty Reports, p. 291, in May, 1848. It was tried before Betts, J., in a district court having Admiralty jurisdiction. The raft, which consisted of sixteen spars, was observed to be adrift below the Narrows and floating out to sea. The libellant stopped the raft and towed it to the Staten Island shore. The owner instituted a replevin action in the Supreme Court of the State of New York. The alleged salvor instituted the salvage suit in the district court. The owner of the raft intervened in the Admiralty suit, and moved that the action there should be set aside, or that all proceedings in it should be stayed until the replevin suit in the State Court should be determined. It was on this motion that Betts gave judgment. "The single point that arises for decision upon the motion," says Betts, J., "is whether this court will, either as matter of right to the claimant or by comity towards the municipal courts, cause the prosecution of this suit to surcease until the action at law in the State Court is determined." It may be that the learned judge might have based his decision on the view that the Admiralty Court had no jurisdiction to entertain the question of salvage. But that point does not seem to have been argued at that stage; at all events, it is not noticed. The judgment seems to be that, assuming for the purposes of the motion before it that both courts had jurisdiction, there was no legal reason for postponing the hearing of the one suit to the hearing of the other. What might be decided in either court on the hearing was left to the future. The next case in order of date is *Tome* v. *Four Cribs of Lumber*, reported in several reports and in Taner's Dec. 533, in November, 1853. It was heard in the Circuit Court, on appeal from the District Court in Admiralty. Rafts or a raft of timber were being floated down the Susquehanna river. The rafts were anchored in the stream. By reason of a sudden rise in the river, accompanied by a high wind and heavy sea, the rafts went adrift and were carried down the river with the current. They were stopped by one Davis, who claimed salvage. The district court entertained and allowed salvage reward. In the Circuit Court the judgment was reversed by Taney, C.J., on the ground that the district court had no jurisdiction. The Chief Justice relied much on the case of *Nicholson* v. *Chapman*. He says: "These rafts anchored in the stream, although it be a public navigable river, are not the subject matter of Admiralty jurisdiction in cases where the right of property or possession is alone concerned. They are not vehicles intended for the navigation of the sea or the arms of the sea. They are not recognized as instruments of commerce or navigation by any Act of Congress. They are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive them and transport them to their destined port. And any assistance rendered to these rafts, even when in danger of being broken up or swept down the river, is not a salvage service in the sense in which the word is used in the courts of Admiralty. The district court, therefore, had not jurisdiction to issue the process,"

&c. This judgment seems to me to adopt the reason of the judgment in *Nicholson* v. *Chapman* contained in the words "the service had none of the qualities or character of the services for which the maritime law of all commercial nations allows salvage where the property is in danger of perishing from the perils of the sea." There are parts of the judgment of the Chief Justice which seem to show that he thought the raft in question was not in danger. But that is a point which would be an answer to the claim in the trial, and which would have to be tried by the court if it assumed or could assume jurisdiction. It is a not point of jurisdiction.

The case of *Fifty Thousand Feet of Timber*, 2 Lowell's Reports, p. 64, in 1871, in the district court, is with respect to two rafts of timber found floating in the harbour of Boston. Lowell, J., decreed a salvage reward. "A salvage service is performed when goods are saved from peril at sea or on other navigable waters, or cast upon the shores thereof." "There are two judgments that a raft of timber is an exception to the general rule: *Nicholson* v. *Chapman*, 2 H. Bl., and *Tome* v. *Four Cribs of Lumber*, Taney's Dec. 533." This seems to be hardly an accurate description. The cases did not state that there was an exception. They stated a rule, and decided that rafts of timber were not within it. The judgment, with deference, is more sarcastic than well considered. The learned judge asserts that Taney, C.J., was mistaken and Dr. Lushington wrong. He construes the English statute 9 & 10 Vict. c. 99, s. 40, with deference again I say, wrongly. He says that the only difficulty in the case before Dr. Lushington was as to locality, and he says "that it was so held by Betts, J., in a well-considered judgment." I cannot find in the judgment of Betts, J., any allusion to such a point. Lowell, J., says: "A suit for salvage is neither contract nor tort. It resembles the latter in being a proceeding for unliquidated damages and in depending on locality." Is that a correct description either of a salvage suit or even of the action to which the learned judge assimilates such suit? "If the services are rendered, it is of no consequence whether the goods are a ship or part of a ship, or were ever on board a ship. A great many of the cases are of mere derelict goods picked up at sea; and no one ever heard that it would be a defence to a proceeding for salvage that the goods had been washed out to sea from the shore by a gale or flood, or had been dropped from a balloon. I have had a case of the former kind, though, to be sure, the subject matter was an unmanned vessel. If it had been a barrel of oil, the principle would have been the same." I cannot accept this judgment as a careful discussion and decision on American law.

Bywater v. *A Raft of Piles*, 42 Federal Reporter, p. 917, in June, 1890, is decided on the authorities of Betts, J., and Lowell, J., and on an endeavour to distinguish the case before Taney, C.J.

Whilst writing this judgment, and, indeed, at a very late period of it, the counsel on both sides, with the loyalty always shown by counsel to the court, sent to me the case of *Cope* v. *Vallette Dry Dock Co.*, 12 Davis's Reports, p. 625, decided in January, 1887, in the Supreme Court of the United States. It was an appeal from the Circuit Court of Louisiana, which had dismissed a libel for salvage brought in the district court on the ground that the district court sitting in Admiralty had no jurisdiction to entertain in the particular case a claim for salvage. The salvage claimed was in respect of saving from total loss a "dry-dock." It was a structure contrived for the purpose of taking ships out of the water in order to repair them, and for no other purpose. It consisted of a large oblong box with a flat bottom and perpendicular sides. In the year 1866 it had been put into position by being permanently moored by means of large chains to the banks of the Mississippi river, and was sparred off from the bank by means of spars to keep it afloat. When it was desired to dock a vessel the dry-dock was sunk by letting in water till the vessel to be docked could be floated into it. It was then raised by pumping water out, leaving the docked vessel in a position to be inspected and repaired. It was furnished with engines, but they could only be used for pumping, and the dry dock had no means of propulsion, either by wind, steam, or otherwise. It was not designed for navigation, and could not be practically used therefor. As a conclusion of law the Circuit Court found that the services of the libellants were not salvage services, and that neither that court nor the district court had jurisdiction of the case. The judgment of the Supreme Court contains the following passages:—"We have no hesitation in saying that the decree of the Circuit Court was right. A fixed structure such as this dry-dock, is not used for the purposes of navigation, is not a subject of salvage service any more than is a wharf or warehouse when projecting in or upon the water." "A ship or vessel used for navigation and commerce, though lying at a wharf and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service." The judgment then cites the passage from Abbott, and cites other English authorities, and then says: "If we search through all the books from the Rules of Oleron to the present time we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to or lost in the sea or its branches, or other public navigable waters, and have been found or rescued." The judgment then discusses the case of the hopper barge, and then, referring to the American cases, says: "There has been some conflict of decision with respect to claims for salvage services in rescuing goods lost at sea and found floating on the surface or cast upon the shore. When they have belonged to a ship or vessel as part of its furniture or cargo, they clearly come under the head of wreck, flotsam, jetsam, lagan, or derelict, and salvage may be claimed upon them. But when they have no connection with a ship or vessel some authorities are against the claim, and others are in favour of it." The only authority in America for the use of the large term insisted upon by the arguments before us is the case before Lowell, J. I think that case cannot be supported in America or acted on here. As to American law, I think the case in the Supreme Court is decisive.

I come, therefore, to the conclusion that, by the common law or original law of the High Court of Admiralty the only subjects in respect of saving of which salvage reward could be entertained in the Admiralty Court were ship, her apparel and cargo, including flotsam, jetsam, and lagan, and freight, and the wreck of these; that the only subject added by statute is life salvage, and that the county court has no right to exercise jurisdiction with regard to any other subject-matter than that which might be entertained by the High Court of Admiralty. Whether salvage could be granted for the saving of what is called a light-ship may be doubtful. I incline to think not. If it could, it is only because the light-ship would be held to be a ship. As to some instances which were proposed—viz., the *Victory*, in Portsmouth Harbour, I have no doubt that she is a ship. So was the *Dreadnought*, used for years as a hospital. So is a ship used as a coal hulk. But the thing in question in this case is not a ship in any sense. The appeal must be allowed.

LOPES and KAY, L.JJ., concurred.

Solicitors for the appellant, *Rowcliffes, Rawle, & Co*, for *Wilson & Son*, Hull.

Solicitors for the respondent, *Pritchard & Sons*, for *J. & T. W. Hearfield & Lambert*, Hull.

High Court of Justice.

Chan. Div.
North, J. } Nov. 29, 30.

HOLT & Co. *v.* SAUNDERS, GREEN, & Co. (*a*.)

Trade-mark—Action for infringement—Motion to expunge mark—"Trilby" in ordinary type—Patents, &c., Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *sub-section* 1 (a), (b), (d), (e).

Names of persons, whether real or fictitious, used as a trade-mark fall within sub-sections (a) *and* (b) *of section* 64 (1) *of the Patents, &c., Act, and not within sub-section* (e); *hence a name not being a signature is not a good trade-mark unless printed, impressed, or woven in a particular and distinctive manner.*

Motion by the defendants to rectify the Register of Trade-marks by striking off the word "Trilby," registered as a trade-mark in class 38 for aprons, gloves, &c., by the plaintiffs, who had commenced this action against the defendants for infringing the same. The trade-mark consisted of "Trilby" in ordinary type. The evidence went to show that the word had been taken from a well-known novel, and that it had also been used in connection with other goods by other manufacturers.

Vernon Smith, Q.C., and *Kirby*, for the defendants, in support of the motion.—"Trilby" is a word common to the trade: *Burland* v. *Broxbourne Oil Co.*, 38 W. R. 89, 42 Ch. D. 274. Moreover it has reference to the character and quality of the goods, for in the novel "Trilby" wears an apron, and therefore it suggests an apron such as is described in the book: *Harris' Trade-mark*, 9 P. R. C. 492. According to that case, this mark could not have been registered under the Act of 1883; and *Farbenfabriken, &c., Somatose case*, 42 W. R. 488, [1894] 1 Ch. 645, shows that the Act of 1888 has not extended the scope of what may be registered. Names of persons, whether real or fictitious, can only be registered under sub-sections (*a*) and (*b*) of section 64, and not under sub-sections (*d*) or (*e*), and this mark does not fall within (*b*) because it is not a written signature, nor within (*a*) because it is not "printed, impressed, or woven in some particular and distinctive manner."

Swinfen Eady, Q.C., and *Micklem*, for the plaintiffs, against the motion.—There is no evidence that the mark has any reference to the character or quality of the goods; it is an invented word within the meaning of the Act; and as to the question of registration, proper names fall within sub-section (*e*), and *Banks and James' Trade-mark* (*Shakespeare case*), *ante*, p. 32, does not decide that they do not. The word "Lawford" was allowed a good mark for rackets in *Slazenger* v. *Malings*, W. N. (1885), p. 124.

NORTH, J., after stating that "Trilby" could not be considered an invented word at the date of registration, as there was nothing new about it in view of the publication of the name in the novel prior to the mark getting on the register, continued:—Sub-section (*e*) is more difficult, but I cannot see that "Trilby" has reference to the character or quality of aprons or a pair of gloves, and there is no evidence before me as to what one may learn as to their character or quality from the word by itself. But the reason why I think that it cannot be registered is that I do not think that sub-section (*e*) includes a name at all, and I look upon "Trilby" as a name. Sub-sections (*a*) and (*b*) deal with names. Now, sub-section (*b*) refers to the individual or firm applying for registration; but sub-section (*a*) says nothing about the individual or firm applying for registration. I take it, therefore, that the individual or firm there referred to is not confined to the individual or firm applying for registration.

Now, let us take the present case in its simplest form. I will assume that William James Holt, who made the affidavits, is the sole member of the firm. Now, if he came to ask to register for aprons the name "William James Holt," as I take it that the words "William James Holt" are not geographical nor descriptive of the goods, then, according to the argument before me, those words could be registered under sub-section (*e*). But then I find this difficulty—namely, that sub-section (*a*) requires that it must be the "name of an individual or firm printed, impressed, or woven in some particular and distinctive manner," and I take that to mean, that if "William James Holt" is used as a trade-mark it must be printed in some distinctive and particular manner; it would not do to have it in ordinary print. I think it impossible that William James Holt can have a trade-mark if his name is printed in a particular and distinctive manner, and also that he can have it under sub-section (*e*) if printed in the most ordinary style. I think, therefore, that the section must be read so as to make cases of names come under sub-section (*a*), and William James Holt could have registered his name under that sub-section alone. Then does it make any difference that the name sought to be registered is not the name of the person actually applying? Now, contrasting sub-sections (*b*) and (*a*), the words of the latter show that it is not confined to the case of the name of the firm or person applying, but that it may be the name of a person or firm not applying. Then is there anything to make it necessary that the name should be that of a living or dead individual, as opposed to the name of a fictitious individual? It seems to me that under sub-section (*a*), not only could William James Holt not register his own name, if in ordinary type only, but that he could not register the name of any other person if printed in ordinary type (*In re Banks & James' Trade-mark*). I take it that under sub-section (*e*) the applicant could not register the name "Shakespeare," "Sir Walter Scott," or "Du Maurier." Does it make any difference that the name sought to be used is not the name of a person, but the name of a fictitious character. I take it that if "Shakespeare" could not be registered as a name it would be equally impossible to register "Hamlet." Chitty, J.'s, decision in the *Shakespeare case* would be exactly in point had that case been decided under the Act of 1888; but the *Somatose case* shows that that Act has not extended the power of registration beyond that given by the earlier Act.

Motion allowed.

Solicitor for the defendant in the action, *Le Voi*.

Solicitors for the plaintiff in the action, *Sharpe, Parker, & Co.*

(*a*.) Reported by R. SILLEM, Esq., Barrister-at-Law.

Chan. Div.
Kekewich, J.

Nov. 28.

In re WHEELER AND DE ROCHOW'S TRUSTS. (*a.*)

Trustee—New trustee—Power to appoint new trustee—Person nominated for that purpose—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 10.

Where under a trust instrument a named person has power to appoint new trustees in certain events, on the happening of an event not specified in the instrument, but specified in the Trustee Act, 1893, *the power of appointment is not exercisable by the named person.*

Under the provisions of the settlement executed on the marriage of Mr. and Mrs. De Rochow it was provided that in case any trustee should "die, desire to be discharged from, or refuse, decline, or become incapable to act," the husband and wife, or the survivor of them, might appoint a new trustee in his place.

In March, 1895, one of the three trustees of the settlement was adjudicated a bankrupt, having previously absconded. By a deed, dated the 13th of July, 1895, Mr. De Rochow (the wife being dead) purported to exercise the power of appointment in the settlement, and by virtue of the provisions of the Trustee Act, 1893, to appoint one Sewell to be a trustee in place of the absconding trustee.

Cross summonses were then issued—one by Mr. De Rochow and Sewell, asking that under section 35 of the Trustee Act, 1893, the right to call for a transfer of and to transfer the trust funds, and to receive the dividends, might vest in the continuing trustees and the new trustee; and the other by beneficiaries asking for the appointment of a new trustee in place of the absconding trustee, and that the right to transfer or call for a transfer of the trust securities might be vested in the continuing trustees, and the new trustee to be so appointed.

Bramwell Davis, Q.C., and *F. H. Maugham*, for the applicants on the first summons.—The husband is enabled to appoint under section 10 of the Trustee Act, 1893, as the person nominated for the purpose by the settlement: *In re Walker, Hughes' Contract*, 24 Ch. D. 698; *In re Coates to Parsons*, 35 W. R. 375, 34 Ch. D. 370.

Warmington, Q.C., and *G. Borthwick*, for the beneficiaries.—The terms of the settlement do not provide for the case of bankruptcy. The court should appoint: *Cecil* v. *Langdon*, 33 W. R. 1, 28 Ch. D. 1.

Bramwell Davis, Q.C., replied.

KEKEWICH, J.—The power for the appointment of new trustees which is found in the 10th section of the Trustee Act, 1893, is of a remedial nature, devised to avoid difficulties and enable them to be overcome without having recourse to the court, and enabling trustees to be appointed by deed in cases where it was not formerly possible to do so. It was the intention of the Legislature to enlarge the powers conferred by a settlor or testator; not to oust the provisions of the instrument, but to extend them. We find in section 10 the words "the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust." What does that mean? In the first place, simply the persons named, in whom the power of appointing new trustees generally is vested, without the events in which the power was to arise being mentioned. Does the Legislature not intend that where the power is vested in persons in certain events which are expressed in the instrument they are to be empowered under the Act to appoint new trustees in events not contemplated by the instrument? Before adopting that construction it is to be observed that everything is made subject to the provisions of the instrument itself. On that construction there are many cases to which it would be difficult to apply the provisions of section 10. In my opinion, only the persons nominated in the particular events and for the particular property are the persons who are to have the power of appointing new trustees under section 10 of the Trustee Act, 1893. A testator or settlor might well consider that a person who was competent to appoint new trustees in some events was not competent to do so in others.

I think therefore that, as in this case the settlement does not confer the power of appointing new trustees in the event of the bankruptcy of a trustee, the powers conferred by the instrument are inapplicable. The powers given by the Legislature must be exercised by the persons appointed by the Legislature, and not by the persons nominated by the instrument. The result is that there will be no order on the first summons, and on the second there must be an order appointing a new trustee with a vesting order.

Solicitors, *Dixon, Weld, & Dixon; Blunt & Co.*

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

Chan. Div.
Kekewich, J.

Nov. 9.

In re SMITH.
SMITH *v.* THOMPSON. (*a.*)

Trustee—Investment—Discretion—Commission or bonus paid to trustee—Liability to make good loss.

A testator gave the residue of his estate to trustees to invest in or upon such stocks, funds, and securities as they "shall think fit." The trustees invested £3,000, *part of the trust estate, upon debentures at par of the New Travellers' Club, one of the trustees receiving, without the knowledge of his co-trustee, a bonus or commission of* £300 *on the transaction. The co-trustee assented to the investment, thinking it would benefit the trust estate. As a matter of fact the debentures were not, and never had been, of par value, and at the time the action was brought were of little or no market value.*

Held, (1) *that "as they shall think fit" meant "as they shall honestly think fit"*; (2) *that the commission or bonus of* £300 *received by one of the trustees was a bribe, and therefore that that trustee did not "honestly think fit," and that consequently he was liable to make good the loss occasioned to the trust estate by the investment of the* £3,000; (3) *that the co-trustee (on the facts) acted* bonâ fide, *and therefore did "honestly" think fit, and that consequently his estate was not liable to make good the loss*; (4) *that the* £300 *commission was received by the trustee as agent of the trust estate, and consequently must be paid by him thereto.*

Thomas Smith, by his will, dated the 10th of October, 1890 (as subsequently altered by a codicil), appointed Arthur Carpenter and the testator's son Clement Smith executors and trustees thereof, and thereby bequeathed the residue of his estate to the said trustees upon trust in their absolute discretion to invest the same "in or upon such stocks, funds, and securities as they . . . shall think fit."

The testator died on the 21st of January, 1892, and his will and codicil thereto were proved on the 19th of February, 1892.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

The trustees the defendant Arthur Carpenter and the said Clement Smith, invested the residue, which amounted to upwards of £17,000, in various mortgage securities, in colonial securities, and in debentures (hereinafter referred to) for £3,000 in a company called "The New Travellers' Club, Limited."

Carpenter was persuaded to apply, on behalf of the trustees, for £3,000 of such debentures at par by the promise that the company should pay him £300 as a bonus or commission for procuring such application by the trustees, which sum the company duly paid to Carpenter. The interest on the debentures was 5 per cent. per annum, and Carpenter suggested to Clement Smith that certain of the trust funds invested at 3½ per cent. should be sold, and that the proceeds, amounting to £3,000, should be invested in the said debentures. Clement Smith thereupon, on the 1st of May, 1893, wrote stating that one of the testator's businesses required help, and asked Carpenter to take up club stock for £3,000 at 5 per cent. interest for the benefit of the business, stating that he as one of the executors of the estate advised this. The transaction was completed in May, 1893, but Clement Smith did not discover that Carpenter had received £300 bonus until the month of July, 1894.

Clement Smith died on the 18th of October, 1894, and by his will appointed the defendant Carpenter and the defendant Catherine Jackson executors.

On the 1st of April, 1895, the defendant Bernard Thompson was appointed a new trustee of the will of Thomas Smith, in the place of Clement Smith deceased.

The said debentures were not and never had been of par value, and could have been bought for much less, and were now of little or no market value.

This was an action by the beneficiaries of the residuary estate of Thomas Smith, seeking to make Carpenter the surviving trustee, and the estate of Clement Smith the deceased trustee, jointly and severally liable for loss incurred by the trust estate owing to the above investment; and the plaintiffs asked (1) to have the real and personal estate of the testator Thomas Smith administered, and the testator's will carried into execution; (2) that the said colonial securities and the debentures might be realized; (3) that the defendant Carpenter and the estate of Clement Smith might be jointly and severally held liable for any loss which might accrue to the testator's estate by reason of the said investments in the said colonial securities and debentures, with interest at 4 per cent.; (4) that the defendant Carpenter might be ordered to pay the said sum of £300, with interest at 4 per cent.; (5) that if and so far as might be necessary the estate of Clement Smith might be administered.

Renshaw, Q.C., and *W. Freeman*, for plaintiffs.—The trustees were, under these very wide words, not justified in investing in these floating debentures: *Lewis* v. *Nobbs*, 26 W. R. 631, 8 Ch. D. 591; *In re Brown*, 33 W. R. 692, 29 Ch. D. 889. A trustee ought not to invest in bonds to bearer, nor to invest in mortgages without having a valuation previously made.

George Henderson, for the defendant Carpenter.

Marten, Q.C., and *Dundas Gardiner*, for the defendant Catherine Jackson. — Clement Smith knew nothing of the bonus received by his co-trustee, and acted *bonâ fide*, and, as he thought, for the benefit of the trust estate, throughout. That being so, he acted in accordance with the discretion given him by the will. The discretionary power is very wide.

KEKEWICH, J.—I think there is sufficient material before me to enable me to dispose of this case at once. It all turns on the meaning of the clause in the will: "And as to the rest, residue . . . to invest . . . in such stocks, funds, and securities as they shall think fit."

Two cases have been cited, *Lewis* v. *Nobbs*, before Hall, V.C., and *In re Brown*, before Pearson, J., where the judges gave a very wide interpretation to the words giving discretionary power to the trustees, and in my view rightly, because if a narrow interpretation were placed on such words they might as well be struck out altogether. Mr. Renshaw says that the trustees in this case could not invest on a mortgage without having a valuation. I should say that they were clearly authorized to do so if they thought fit. The question is, What is the meaning of "shall think fit"? I think it means "shall honestly think fit." A trustee could not honestly think a bad security fit, and in investing in such a security it could not be said that he had invested "as he thought fit." There are many authorities in which, where a trustee says, "I exercised my discretion in a particular way," the answer is, "No, you did not"—that is, "not with a due regard to your fiduciary position." As to the investments in colonial stocks and upon mortgages, I cannot say that the trustees did not "honestly think fit" so to invest; and, as to these debentures, I do not suppose that a very prudent man would invest in such debentures as a floating security of any limited company, whatever an ordinary man might do; but many people invest in securities of this kind, and have only a hazy idea of what "a floating security" means. Many think it is a good security; and why should not the trustee in this case "honestly think fit"? Mr. Renshaw says he cannot, because the debentures were securities to bearer, but that objection is not conclusive. The securities are locked in a box which requires two keys to open it. It would not be difficult to find in many modern settlements power to invest in bearer debentures.

The question is, Is Carpenter liable on other grounds; and, if so, is Smith liable because he concurred? The history of the matter is this. Smith was anxious to invest in order to increase the income, but the debentures were introduced by Carpenter. Smith trusted to Carpenter, and I do not see how I can say that he did not honestly think the investment fit; but Carpenter is liable, because he did not "honestly think fit." Carpenter is therefore liable for any loss, and must make it good; and Smith's estate must be exonerated. Carpenter must also account to the trust estate for the £300. He received it on behalf of that estate; I do not see that that is affected by his making good the money (*i.e.*, loss arising from investment) the year after. He took it as agent of the trust estate.

Solicitors, *Webster & Webster; Hunters & Haynes; O. E. Dawson.*

Q. B. Div.
(Hawkins and Lawrance, JJ.) Jan. 13.

REG. *v.* EVANS AND OTHERS, JUSTICES, AND PARRY. (*a*.)

Bastardy—Affiliation summons—Putative father leaves England before birth of child—Ceases "to reside in England within twelve months next after the birth"—Bastardy Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 3.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Where the alleged father of a bastard child born on the 30th of January, 1894, left England in December, 1893, and did not return until March, 1895,

Held, that he "ceased to reside in England within twelve months next after the birth of such child" within the meaning of section 3 of the Bastardy Act, 1872, so that the mother could take out an affiliation summons at any time within the twelve months next after his return to England.

In this case a rule *nisi* had been obtained for a *mandamus* to the justices of the petty sessional division of the county of Anglesey to hear and determine an affiliation summons.

The facts of the case are as follows.

On the 30th of January, 1894, the complainant, Margaret H., gave birth to an illegitimate child, of which she alleged W. Parry, a second mate on foreign-going vessels, was the father.

The said W. Parry left England in December, 1893, prior to the birth of the child, and did not return until March, 1895.

On the 1st of March, 1894, the mother laid an information in bastardy before the justices against Parry as the putative father of her child, and a summons was thereupon issued against him. Owing to the absence of Parry this summons was not served upon him until March, 1895, when he returned to Falmouth.

The summons was then made returnable on the 1st of April, 1895, upon which date an adjournment was made to the 5th of May, when the summons was heard.

The defendant appeared and gave evidence, and the summons was dismissed, on the ground that the corroborative evidence was insufficient. The claimant then on the following day, having obtained further evidence in support of her application, obtained a second summons against the said W. Parry, which was made returnable in the same petty sessional division on the 20th of May, 1895.

On this summons coming on for hearing it was objected on behalf of the defendant that the justices had no jurisdiction to hear the application, on the ground that the same was not made within twelve months from the birth of the said child, and that the defendant had not ceased to reside in England within the twelve months next after the birth of such child; and the defendant himself deposed that he had left England on a voyage on the 29th of December, 1893, and that he remained away until the 22nd of March, 1895.

After hearing the evidence of the defendant, the justices allowed the objection, and decided that they had no jurisdiction to hear and determine the said application, and declined to do so.

From this decision the complainant now appealed.

Section 3 of the Bastardy Act, 1872, provides that any single woman who may be delivered of a bastard child "may either, before the birth or at any time within twelve months from the birth of such child . . . or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child," apply for a bastardy summons.

E. Honoratus Lloyd, for the defendant, showed cause against the rule. The justices had no jurisdiction to hear the second summons. The complainant failed upon the first summons, which was taken out in proper time; and she cannot now succeed on a second summons, for the time has gone by. She must, according to section 3, take out the summons within twelve months from the birth of the child, except where the alleged father has ceased to reside in England within twelve months next after the birth of the child. In this case the defendant ceased to reside in England in December, 1893, and the child was not born until the 30th of January, 1894; therefore he did not cease to reside within the twelve months next after the birth within the meaning of section 3. [HAWKINS, J.—Did not the defendant cease to reside during the whole of the twelve months next after the birth of the child?] He could not continue to "cease to reside." A man ceases to live when he dies, but it cannot be said that he continues ceasing to live. [HAWKINS, J.—Ceasing to reside in England is, like desertion, a continuing act, and a man who leaves England ceases to reside there all the time he is absent.] The section refers to the time when he began to cease to reside, that is to the actual moment when he left England. If it had been intended to include the whole period of his absence, the section would have been made to read "ceased or had ceased to reside." The rule should be dismissed.

W. Mackenzie, in support of the rule, was not called upon.

HAWKINS, J.—I am of opinion that the point taken by counsel is absolutely untenable, and that the rule must be made absolute.

LAWRANCE, J.—I am of the same opinion.

Rule absolute for a mandamus.

Solicitors, *W. Thornton Jones*, Bangor; *Peacock & Goddard*, for *S. R. Dew*, Bangor.

IN BANKRUPTCY.

Q. B. Div.
(Vaughan Williams and Kennedy, JJ.) Dec. 19.

In re DURNFORD.
Ex parte DURNFORD. (*a*.)

Bankruptcy—Discharge subject to conditions—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28 (2)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8 (2).

Where an order of discharge has been granted subject to onerous conditions, and it appears that the creditors will benefit but slightly by the continuance of such conditions, while the bankrupt will be thereby unduly oppressed, the court will venture to disregard the interest of the creditors and grant the bankrupt an unconditional discharge.

Appeal by the bankrupt from two orders of his honour Judge Cadman, in the county court of Halifax.

The appellant was adjudicated bankrupt in 1885, being then a solicitor in practice in Halifax, with liabilities amounting to over £1,800. He obtained his discharge in the same year, subject to the following conditions: that he should produce his accounts every year to the official receiver, and that he should pay over to the official receiver any earnings and income over £200 a year until all his creditors should have been paid in full.

The bankrupt, finding that he was unable to get a practice together in Halifax, took a clerkship in Tenby, where he remained until 1888, at a salary rising from £130 to £160 a year.

From 1888 to 1893 he held a clerkship at Tunstall at £200 a year.

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

In 1893 he obtained a clerkship in London, and his salary in 1895 was raised to £330 a year.

When he presented his accounts for 1895 the official receiver, after allowing for the increased expense of living in London, fixed £17 as the amount to be paid over by the bankrupt for the benefit of his creditors, and took out a summons in the county court to enforce payment of this sum.

The bankrupt made a cross application that the conditions of his discharge might be varied.

The judge ordered the bankrupt to pay £17 to the official receiver, and refused to vary the order of discharge because it had not been made by himself, but by his predecessor Judge Snagge.

The bankrupt appealed.

Muir Mackenzie, for the appellant.—Since the date when this order of discharge was made the court has frequently laid down that these orders ought not to be made when the bankrupt is dependent upon a salary, but only where he has prospects of money coming to him from other sources. [He was stopped by the court.]

Sutton, for the official receiver.—My view is that the original order was oppressive, and I am merely here to see that the facts are properly put before the court, and do not wish to urge anything unfair to the bankrupt.

Cancellor, for a creditor.—The object of the order of discharge in this case was to benefit the creditors, not to punish the debtor; and it is hard upon the creditors who have had to wait for so long that as soon as the bankrupt begins to earn more than £200 a year he should seek to vary the order of discharge and escape from having to pay his creditors anything: *In re Bullen, Ex parte Arnaud*, 36 W. R. 836, 5 Morr. 243; *In re Tobias & Co., Ex parte Tobias*, 39 W. R. 399, [1891] 1 Q. B. 463. [VAUGHAN WILLIAMS, J.—You may get the man dismissed from his situation if you cut him down to starvation wages.] I would suggest that the order be that he pay £50 a year for five years for the benefit of his creditors.

VAUGHAN WILLIAMS, J.—Ten years have now passed since this order was made, and, as it appears to me that if it is continued in force the amount that the creditors will receive will be small in proportion to their debts, I think that we may consider the interests of the State in preference to the interest of the creditors. With regard to the sum of £17 ordered to be paid by the county court judge in respect of the surplus of past years, I dismiss the appeal, and leave that order unaltered, save that the bankrupt is to have three months within which to pay that sum.

With regard to the application to vary the order of discharge, I would say this. Here is a case in which the bankrupt was given his discharge ten years ago subject to these conditions. Since then his efforts to earn a livelihood and regain his position have been most creditable. No one can read the dates in his story as set forth in the affidavits without sympathy for his gallant and successful efforts. Unfortunately he has never been able to earn any substantial surplus over the limit allowed by the order of discharge.

We think that it is not to the interest of the State that the burden of this order should weigh upon the appellant longer than is essential for justice. There is no reason why a penal order should continue against the bankrupt; but the court must consider the interest of creditors, and has no right to act against their interest and take away their dividends. We do not, however, think in this case that if we were to continue this order against the bankrupt the money the creditors would receive would be anything substantial in proportion to the amount of their debts; and for that reason we do not think that the pecuniary interest of the creditors in this case ought to prevent our making an order in the interest of the State and the public, such as the debtor has fairly earned by his own conduct.

We therefore grant him his discharge free from any conditions whatever; but he must pay the £17 within three months. The costs of this application must come out of the £20 deposited in court. The official receiver may take his costs in full out of that sum, and the creditor who has appeared may have what is left.

KENNEDY, J., concurred.

Appeal allowed.

Solicitors, *Lewis & Lewis; Easton & Cargill; The Solicitor to the Board of Trade.*

Court of Appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) — Dec. 18.

EYRE v. WYNN-MACKENZIE. (*a.*)

Practice—Appeal—Leave to appeal after time expired—Alteration of law since judgment—Solicitor-mortgagee—Mortgagees' Legal Costs Act, 1895 (58 & 59 *Vict. c.* 25), *s.* 3.

A solicitor-mortgagee who, before the passing of the Mortgagees' Legal Costs Act, 1895, *was held not entitled to charge profit costs against his mortgagor cannot get an extension of time for appealing from such order on the ground that such Act is retrospective, for the Act was not intended to affect orders which were made before the passing of the Act.*

Motion by the plaintiff, a solicitor, for leave to appeal from an order of Kekewich, J., notwithstanding that the time limited for appealing by the Rules of the Supreme Court had expired.

Kekewich, J., had held (42 W. R. 220, [1894] 1 Ch. 218) that a covenant in a mortgage of a life estate to the solicitor of the mortgagor for payment not only of the specific sum advanced, with interest, but also of "every other sum of money which may hereafter be advanced or paid by the mortgagee to, or on account of, or become owing to, the mortgagee by the mortgagor," did not include profit costs, and charges of the mortgagee, either as solicitor to the mortgagor or his agent for receiving and distributing the income; such a covenant being, as regarded profit costs, and charges, void as clogging the equity of redemption.

Judgment in the action was delivered on the 28th of November, 1893, and the order was passed and entered in April, 1894, though it had never been acted upon by any of the parties.

The plaintiff did not appeal from such order within the time limited by the Rules of the Supreme Court.

On the 6th of July, 1895, the Mortgagees' Legal Costs Act, 1895, was passed.

Section 3 of that Act provides as follows:—

"(1) Any solicitor to or in whom, either alone or jointly with any other person, any mortgage is made, or is vested by transfer or transmission, or the firm of

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

which such solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done, or to charge against the security, for all business transacted and acts done by such solicitor or firm subsequent and in relation to such mortgage, or to the security thereby created or the property therein comprised, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts, and accordingly no such mortgage shall be redeemed, except upon payment of such charges and remuneration.

"(2) This section applies to mortgages made, and business transacted, and acts done, either before or after the commencement of this Act."

De Castro, for the plaintiff.—The new Act is retrospective; and, as no proceedings have been taken under the order as drawn up, it is only fair, and no hardship on the defendants, that the plaintiff should have the benefit of the altered state of the law.

C. Gurdon, for the defendants, was not called upon.

LINDLEY, L.J.—It is obvious that this Act was not intended to interfere with judgments which had already been given by the court. If we gave leave to appeal in this case, we should be reopening all judgments of a similar kind which had been given prior to the passing of the Act. We cannot do that.

A. L. SMITH and RIGBY, L.JJ., concurred.

Application refused.

Solicitors for the plaintiff, *G. L. P. Eyre & Co.*

Solicitor for the defendants, *A. H. Burns.*

From Chan. Div. (Lord Herschell; and A. L. Smith and Rigby, L.JJ.) Nov. 18, 19.

HARPER & Co. (LIMITED) *v.* WRIGHT AND BUTLER LAMP MANUFACTURING Co. (LIMITED). (*a.*)

Patent—Design—Infringement—Similarity in essential features—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 51, 52, 58, 60—*Designs Rules*, 1890, *r.* 9.

The plaintiffs were the registered proprietors of two designs for upright hexagonal oil-stoves. The first design consisted of a church window, with tracery above and below it. The second design was a modification of the first, and showed an extended base. The defendants sold upright hexagonal oil-stoves similar to those of the plaintiffs, though the church window was of a different style of architecture and the tracery above and below was different.

Held, that, though there were differences in detail, the plaintiffs' and defendants' stoves were alike in their essential features, and that the defendants' stove was an "obvious imitation" of the plaintiffs' within the meaning of section 58 of the Patents, &c., Act, 1883.

The insertion in an application for registration of the words "pattern, shape, configuration, and ornamentation" does not prevent the registration from being a registration of the design as a whole.

There is nothing in the Act which deprives a person who has registered a design, of his right to protection if he mistakenly puts on articles that he sells registered numbers which ought not to be there.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Appeal from Kekewich, J.

This was an action for the infringement of two designs of which the plaintiffs were the registered proprietors.

The first design was for upright hexagonal stoves, and consisted of a church window with tracery above and below it; the second design being a modification of the first, and shewing an extended base.

The defendants sold hexagonal oil-stoves, to which they applied a design similar to that of the plaintiffs, though the church window was of a different style of architecture, and the tracery above and below it was different.

The defendants, by their defence, alleged that the plaintiffs not only sold stove frames made according to the drawing deposited on the registration of the first design and marked with the registered number; but also sold stove frames differing in some particulars from the said drawing and marked, on such parts of the same stove frames as agreed with the said drawing, with the number aforesaid, and on other parts thereof with certain other numbers, which were numbers of alleged designs registered in the names of the plaintiffs.

They alleged that such marking was calculated to mislead the public, and was not in accordance with the provisions of the Patents, &c., Act, 1883.

Kekewich, J., before whom the action came on for trial on the 2nd of July, 1895, held that only the actual design was protected by the registration, and that, as the defendants' design was essentially different from those of the plaintiffs', the action failed.

The plaintiffs appealed.

Bousfield, Q.C., Warrington, Q.C., J. H. Fisher, and *E. T. Slater*, for the appellants.—The defendants' design is an "obvious imitation" of the plaintiffs' within the meaning of section 58 of the Patents, &c., Act, 1883: *Hecla Foundry Co.* v. *Walker, Hunter, & Co.*, 14 App. Cas. 550, 38 W. R. Dig. 65. It is also a fraudulent imitation, for it is shown that the defendants' designer had the plaintiffs' design before him.

They also referred to *Grafton* v. *Watson*, 50 L. T. N. S. 420, *Ibid.* 141, 32 W. R. Dig. 65.

Marten, Q.C., Moulton, Q.C., and *W. N. Lawson*, for the respondents.—The differences between the plaintiffs' and defendants' designs are very conspicuous, and there has been no infringement. The plaintiffs by their application have claimed "shape" and "configuration" independently of "pattern," and the registration is therefore invalid: Patents, &c., Act, 1883, s. 60; Designs Rules, 1890, r. 9. The marking of their stoves by the plaintiffs is contrary to sections 51 and 52 of the Patents, &c., Act, 1883, and leads the public to suppose that that is registered which is not registered. As to the second registration, the design is so like the first that the registration must be invalid except in respect of details, and those details the defendants have not infringed.

They referred to *Clark* v. *Adie*, 2 App. Cas. 315, 25 W. R. Dig. 174.

Bousfield, Q.C., replied upon the last point.

Lord HERSCHELL.—In this case the plaintiffs bring an action against the defendants alleging that they have infringed two designs which they, the plaintiffs, registered. I will deal with the two designs separately. The first design was registered in April, 1891. The registration was accompanied by a photograph showing a stove such as the plaintiffs have since sold, and which they allege the defendants have copied. I leave till a later stage the questions

raised with regard to the form of the registration, beyond saying this, that whatever else is covered by that registration it appears to me that the design is covered, that is to say, the design as a whole as shown by that photograph.

The defendants, in the season subsequent to the plaintiffs bringing this stove before the public, brought out a stove of which the plaintiffs complain as an infringement of that first registered design. At the trial the learned judge, at the close of the plaintiffs' case, came to the conclusion that there was no infringement, and gave judgment for the defendants. The defendants' case, therefore, was not gone into. But, inasmuch as it seemed to the interest of all parties expedient, if we thought that there was an infringement shown by the plaintiffs' case, that the whole case should be disposed of here, we permitted the defendants' counsel to state all the facts which they could have proved if the defendants' case had been heard by the learned judge in the court below. And those facts being admitted by the counsel for the plaintiffs, we have now the whole case before us, and therefore we are able to deal with it without sending it down for a new trial. The learned judge thought that the plaintiffs had not proved an infringement by the defendants of their design. Now, how is a question of that sort to be tested? That point was dealt with in the House of Lords in the case of *The Hecla Foundry Co.* v. *Walker Hunter & Co.* I will read a passage from the opinion which I expressed to the House of Lords in that case. "It seems to me, therefore, that the eye must be the judge in such a case as this, and that the question must be determined by placing the designs side by side, and asking whether they are the same or whether the one is an obvious imitation of the other. I ought, perhaps, to qualify this by saying that, as the design to be registered must by section 47 be a 'new or original design, not previously published in the United Kingdom,' one may be entitled to take into account the state of knowledge at the time of registration and in what respects the design was new or original, when considering whether any variations from the registered design which appear in the alleged infringement are substantial, or immaterial." Now, here the two designs have been placed side by side. The eye has been left to judge. The impression produced upon all the members of the court has been this, that the one design is an "obvious imitation" of the other, that in all their essential features they are alike, and that in those essential features they both of them differ from anything that had been previously known. No better proof than that that the one design is an obvious imitation of the other, it seems to me, it would be possible to give.

On what ground do the defendants say that the one is not an obvious imitation of the other? They point to the different details, the different parts of the design, and they show in each part of the design differences of detail. They undoubtedly show that; but to my mind that has no bearing upon the question whether the one is or is not an obvious imitation of the other. You may produce precisely the same design in all its essential features, though you make differences in all, or almost all, its details. Now, what are the essential features of the design? It is always difficult to give reasons in a case of this sort, beyond saying, "I look at the two, and the one seems to me an obvious imitation of the other." But I will endeavour, so far as I can, to do so. The general features of the plaintiffs' design are these. Supported upon feet, above which is a base sloping upwards, there is a stove, hexagonal in form, with open iron tracery to a height of about a fourth, or something less than a fourth, of the total height of the stove. Above that there is a Gothic window, and above that again tracery corresponding to that which is below the window. Then there is a projecting cornice, with the six sides of the cover sloping upwards to an apex surmounted by a knob, with a brass ball at the top. That would, perhaps, be a tolerably adequate description, I should say, of the design of the plaintiffs' stove. Now, the whole description that I have given would be equally applicable to the defendants' stove, and it would be inapplicable to any form of stove previously known. That seems to me to go a long way to show that the one is an obvious imitation of the other. If anyone, having seen the plaintiffs' stove, had described its general features to a tradesman, and had asked to be supplied with such a stove, the tradesman, if in possession of one of the defendants' stoves, would have supplied that stove, and it would have been recognized as answering the description of the stove ordered. Yet when you come to look at the kind of ornamentation, and even to a certain extent in some respects to the form also, you can point to notable differences when the two are placed side by side. The cover of the plaintiffs' stove is concave; there is a convexity about the cover of the defendants. But all these differences in detail do not prevent the two designs from being essentially the same.

That is the conclusion at which I should arrive, seeing the two designs side by side and knowing nothing of the history of the case. But what is the evidence? It appears that the defendants employed a designer, and, after putting him in possession of the plaintiffs' stove, instructed him to make an original design for a similar article. Now, what was the meaning of that? In what respect was it to be a similar article? It was to be a stove. That could not be the meaning of it; there were many stoves. It could not merely mean that it was to be a hexagonal stove, because the defendants could have told their designer to make a hexagonal stove of a certain height without ever showing him or calling his attention to the plaintiffs'. It could not be merely that it was to have some open iron tracery about it, because instructions for a hexagonal stove with iron tracery and of a certain height would have been enough. What was the meaning of giving him the plaintiffs' stove, and telling him to make a similar article? Why, that the stove was to be similar in its essential features, and in that which made it attractive to the public, and in that which made it a good article of commerce. But it was to be original in design—that is to say, the defendants, although manufacturing an article which would appear to the public to be like the plaintiffs' stove, were to be able to point to originality in all its details. A clearer direction to a designer to make an obvious imitation, it seems to me, it would be difficult to find. That is what I understand the instructions to have been, and that is what the designer understood the instructions to be. It seems to me he followed out his instructions extremely well. Therefore we are not here left to the mere judgment of the eye. The history of the case shows that what was intended is what has been produced.

I can entertain no doubt, therefore, that in this case one of these is an obvious imitation of the other. I think that the learned judge in the court below erred in considering too much the details as essentials of the design. The designs may be the same, although the details largely differ. He pointed out that although in each case there was a cathedral window, it was a cathedral window of a different order of architecture in the two. No doubt, if the whole point of the design had consisted merely in a cathedral window of a particular style of architecture it would

have been an answer to say, "I have made a cathedral window of a different kind; therefore my design is not the same as yours." But the design consists of the whole thing, in the proportion of the parts, the relation in height of the lower tracery to the window, and of the upper tracery to the window, and in the form of the lid. All these matters together make the design, and being able to point to a particular part or parts and show that the differences are manifest does not answer the allegation that the one design is the same as the other. The learned judge in the court below said that there was originality in the plaintiffs' idea of putting in a cathedral window. He added, however, that "the plaintiffs unfortunately have lost the benefit of their original idea, but they have lost it through another design, which is original except in so far as the idea was borrowed from their design." But, if that which was certainly a part at least of the originality of their idea was copied from them, then it is difficult to see how the second can be an original design. The truth is that the defendants took all the essential elements of the plaintiffs' design.

The learned counsel for the defendants have contended that even if the conclusion be arrived at that the defendants design as a whole was an infringement of the plaintiffs', yet the plaintiffs cannot succeed on several grounds. First, it is said that when the plaintiffs registered their design they registered it with a statement of the nature of the design as applicable for the pattern and for the shape and configuration; and that therefore they claimed it for each of those apart from the other. The defendants contend that if you take the shape there is not sufficient originality about the shape to make it a good design for a new design for the shape alone, and that therefore the registration is bad, and the plaintiffs have no rights.

The rules of 1890 relating to the registration of designs contain a rule (rule 9) which prescribes that there shall be a statement of the nature of the design accompanying the application for the registration of the design, whether it is applicable for pattern, shape, or configuration. That rule makes it essential for the person claiming the design to distinguish between those several things named in the rule, and to show for which of them he makes his claim. Well, the rule is not a very intelligible one. The thing to be registered is the design, which, of course, is speaking of the design as a totality. Then the applicant is to state the nature of the design, whether applicable for shape, pattern, or configuration. That is not very intelligible. It would be intelligible if the rule said that the applicant shall state whether what he claims as novel is shape, pattern, or configuration. But the language used—whether the design is applicable for either one or other of those things—according to its literal interpretation, is certainly not very intelligible. But I do not, in the present case, intend to decide whether this amounts to a separate claim by the plaintiffs for the pattern, and for the shape, and for the configuration. It is unnecessary to decide it. It might have been necessary if the infringement had been something different from what it is. Whether the plaintiffs claim these several parts or not, they claim the whole—they claim the design. Whether the insertion of those words which the rule requires to be inserted has the effect contended for I do not know, and I do not propose to say. It is unnecessary to say so here. But whatever they mean they do not, to my mind, prevent the registration from being a registration of the design as a whole. What is registered is the design; and there is no difficulty here, to my mind, in determining what the design registered was. That design, I think, has been obviously imitated by the defendants. Therefore I do not say more upon that point.

Then it is said that the plaintiffs are disentitled to relief because they have misled the public. It is said that they have obtained registration for their handles to the stove and for a cover to the stove—a particular pattern of ornamentation of the cover—and that they have first of all on stoves which they have sold put the registered number of the original design and also put the registered number of the designs which they registered subsequently as applicable to particular parts of the stove. It is said that that was misleading, and that the public would not know to what those numbers referred; and if the lid was a new registered lid, then they ought not to have put on the number of the original design, because that was a different design.

Now, there is nothing in the Act of Parliament which deprives a person who has registered a design of his right to protection and to prevent infringement of it if he puts on articles that he sells registered numbers which ought not to be there. If he sells without putting the registered number on a design which is within his registration, then no doubt he loses his protection; and it may sometimes be a difficult question to know exactly what numbers he ought to put on, and on what parts of the articles sold. It is only natural that a person who has registered designs should err on the side of caution, because if he does not put the number there, he certainly loses his rights. But there is no clause in the Act of Parliament which deprives him of his rights if he mistakenly puts numbers on the articles which he sells which have no business there. Now, what might be the case if a person were fraudulently to put numbers on with a view to misleading the public it is unnecessary to say. But it appears to me to be a most hopeless contention to suggest that a person owning registered designs, who in the course of his business may sell some articles bearing registered numbers which should not be there, thereby, without any such provision in the Act of Parliament, loses his rights as a registered proprietor. If the courts were so to hold, they would be making the law; they would not be interpreting it. There is no authority for making it the law, and it seems to me that it would be a very bad and very senseless law, and one tolerably certain in some cases to work great injustice. Therefore, I have no disposition to make any such law, even if I felt myself entitled so to do. The whole of these matters were quite unconnected with the defendants or their infringement, and are as straws seized by a drowning man to save himself if he can, and have about the same value as straws have for that purpose.

I think that that disposes of the whole of the arguments addressed to us upon the first claim in respect of the first infringement. Then what happened was this. The plaintiffs made what they considered an improved design. It had many of the essential features of their first design, but they considered it an improvement. In it the stove had an extended base, and was considered by the plaintiffs to be in that respect advantageous. The year after the plaintiffs had brought out their new design, and had placed their new stove made according to that design upon the market, the defendants brought out a cathedral stove with all the upper part of it and with all the substantial features which existed in the plaintiffs' original stove and with the extended base. Now, the argument is that although the defendants' stove may be an infringement of the plaintiffs' first registered design because it contains its essential features, yet it is not an infringement of the plaintiffs'

second registered design. It is said that the second registered design, having regard to the existence of the first, can only be maintained in respect of the details of the modification, and that the details of the modification are not the same in the defendants' as they are in the plaintiffs'. If that could be made out, it might well be a good defence. First of all, was there anything to prevent the plaintiffs from obtaining protection for their second as a new and original design? I cannot see that there was. It is a new design. It is not a design identical with the design already registered. No doubt it is largely founded upon it. That is admitted. It professes to be largely founded upon it. But you may have a new design, though the design is founded upon one which you have previously registered. Nothing has been produced which to my mind shows that there was such a common knowledge before the date of the second registration as to prevent that design then registered from being a new and original design.

Then, has the defendant infringed? Now, I quite agree that on this part of the case the matter is not so clear as, to my mind, it is on the question of what I will call the first infringement. There is more to be said; but still, applying the test which has been applied in previous cases as the proper test, I own it appears to me that the design complained of, the defendants' design, is an obvious imitation of the plaintiffs.' Now, the defendant might have enlarged the base of a stove without infringing the plaintiffs' design. There is a multitude of ways in which it might be done. But whether they would be appropriate, whether they would be good designs, whether they would make a design which as a whole was effective, would depend upon the way in which this was done. Now, the scheme or idea of the plaintiffs' modification, which they registered, was to provide this enlarged base by a sloping projection immediately under the windows which formed the feature of the stove—making, as Mr. Bousfield has said, something that may be called a window-sill—and then from that point having the sides of the stove again perpendicular, and bringing the line and making the continuity between the line at each corner of the hexagonal and a line as found again below this window-sill. It is difficult to describe the thing, but that one may call the general feature of the design.

Now, the same features are found in the defendants' design. There might be hundreds of ways in which you might make an enlarged base without infringing that, and very possibly no other way would have produced the same general and pleasing effect. If I look at these two side by side, it seems to me that the same essence of the design is to be found in each of the two. Therefore I come to the conclusion that a case of infringement is made out as regards the second infringement claimed, as well as the first. Mr. Moulton suggested it would be very hard on the public that a person who had registered a design could, by insignificant variations, registered from time to time, extend the term for which he obtained protection. What seems to me to be the complete fallacy in the argument is that it does not extend the term, but as soon as the original registration expires everybody can exactly copy what was originally registered. If those variations are immaterial, and not improvements, and not advantageous, and do not make a wholly new and desirable design, anybody desiring to manufacture the article represented has only to avoid those variations. He is at full liberty to make use of the original design as he pleases. Therefore I cannot see that the public is in the slightest degree affected if those alterations and modifications are immaterial, slight, and unimportant, and do not make the thing as a whole a desirable thing, which the public will seek to become the owners of. If they do, what better proof can you have that it was a new and original design, which the person designing ought to be entitled to have the benefit of? In the present case there has been nothing to show that enlarged bases for stoves, anything like either those of the plaintiffs or the defendants, had been before the public previously. The plaintiffs follow the introduction to public notice of their first design by a second. The following year the defendants introduce their second design, the first being copied from the plaintiffs, and bearing a strong resemblance to it. Now, that seems to me certainly to assist the conclusion, which I should arrive at independently, that there was a novelty in the plaintiffs' second design—in that modification something which made the thing as a whole a desirable design—and that the defendants, seeing that, sought to put before the public something which they might sell which contained the essential features of the plaintiffs' second design. For these reasons I think that the case is made out as regards the second design, as well as the first. I think, therefore, that the judgment of the learned judge in the court below must be reversed, and that judgment must be entered for the plaintiffs in the action, with an injunction in the usual terms, and the usual inquiry as to damages. There will also be an order for delivery up or destruction, as is usual in these cases. The defendants must, of course, pay the costs of the action and the costs of this appeal.

A. L. SMITH, L.J.—The plaintiffs in this action are a limited company, and the proprietors of two registered designs, one registered in April, 1891, and the other in June, 1892.

They bring this action against the defendants for having infringed those registered designs. The case came on for trial before Kekewich, J., when, having heard the plaintiffs' case, he arrived at the conclusion that they had made out no infringement. Being of that opinion, all other matters became immaterial, and accordingly the learned judge gave judgment for the defendants. The plaintiffs appeal to this court, and other matters have been argued before this court, we being of opinion that if we came to the conclusion that there had been an infringement we could settle those other matters which would, I understand, have come before Kekewich, J., if he had not stopped the case in the manner in which he did.

Now, the points seem to me to arise in this order: First, the plaintiffs must show as regards both their registered designs that they had a new and original design which had not previously been registered; and they must show some substantial novelty in the design, having regard to the nature of the article itself. Many printed documents were put in in this court for the purpose of showing that the design which was registered in April, 1891, was not a new and original design, because of matters which were well known to the trade and to the public prior to that date.

Now, in my opinion, they wholly failed in this. Nothing prior to April, 1891, was shown to lead the court to the conclusion that any stove similar in design to that which the plaintiffs had registered in April, 1891, had been in vogue, or known at all; and therefore that part of the case fails for the defendants.

The next point which arises is this: The defendants say that the plaintiffs' claim is bad, because what they claimed in their application for registration was in respect of pattern, ornament, shape, and configuration. They claimed in respect of each of those separately; they did not claim for those collec-

tively. And defendants went on to say that as regards shape that would be a bad claim; because, as they alleged, a similar shape for a hexagonal stove standing upright was known before. But, in my opinion, whatever this claim may embrace, it does embrace these matters collectively. The plaintiffs' claim is in respect of the design, and they claim as part and parcel of that design the pattern, ornament, shape, and configuration. The word "totally" has been used more than once during this case. I adopt that word. The plaintiffs claim the design—the pattern, ornament, shape, and configuration—that is to say, the totality of the design. When that was put to Mr. Moulton, because he took the point that the claim was for separate and distinct matters and not for a totality, he said: "If that is the view of the construction which is to be put upon this registration, then I have nothing to say as regards the infringement of the registration No. 1." I think Mr. Moulton was wise as regards that. Speaking for myself, I never saw a more palpable infringement. Speaking for myself, I say this—I said it in the course of the argument—that if I went into a shop and saw the plaintiffs' cathedral stove, and ordered it, and the shopkeeper sent me home the defendants', I should not have the slightest idea that I had not got what I had ordered. At a distance they are entirely similar. One is an obvious imitation of the other. But I agree that if they are brought into close proximity, and the tracing and so on pointed out, of course one can see a dissimilarity between the one stove and the other. But it is such a dissimilarity that in my judgment, if they were not together, no one could carry those dissimilarities in his mind. Therefore to say that one is not an infringement of the other is to say what, in my judgment, in the face of the facts of this case, is not the truth.

I desire to add a few words also upon a matter which has been touched upon by Lord Herschell. It is the manner in which the defendants set about making their stove which we have held to be an infringement. Mr. Priest, who was a witness, and who, my brother Kekewich remarked, gave his evidence very fairly, said this: "The defendants brought me the plaintiffs' stove." What did they do that for? They brought or sent to him the plaintiffs' stove. The witness proceeded: "They gave me instructions to make an original design for a similar article, and to make it of similar size to the plaintiffs'. And, as I understood, it was to have the same number of sides." Put that together, and ask what is the meaning of that. You make an original design. You make a design which will stand attack, but make it as near to the plaintiffs' "as ever you can." That is the meaning of that order, and the result of Mr. Priest's work is that we have these two stoves, which are as similar as possible to each other, except in some parts of the tracery. That the one is a mere colourable imitation of the other I have not the slightest doubt. Therefore it seems to me that as regards this first registration of April, 1891, the plaintiffs have made out their case.

There was a point taken about the plaintiffs having placed some numbers upon some other stoves which they subsequently made, and after the infringement had taken place complained of in this action. It is said that that was not right. Lord Herschell has dealt with that point. He himself has said that it is catching at a straw. I quite agree with him in that. I am not quite clear that I ever grasped the point, because I do not think any point in substance existed in it as regards the defence to this action.

I now come to the second part of the case, and that is as regards the registration in June, 1892. That is a registration for an improvement on the original registration of April, 1891. It is an improvement on the plaintiffs' original registered design, applicable for pattern and shape. Now, I understand that the plaintiffs wanted a stove which would carry a heavier lamp, and therefore afford a better heat. They wanted the stove to be enlarged, and therefore, as an improvement on the original design, the plaintiffs brought out the design of June, 1892, and got that registered as an improvement upon the first. It is said that that was not novel. I think that the improvement is novel. It is said that it is only an enlargement of the base of the original design. But, as was pointed out by Mr. Bousfield, the object was to keep the same semblance of the cathedral stove which was in the design of April, 1891, and not to depart from that. That idea was adopted of enlarging the base in the manner in which it was in the registered design in June, 1892. I think that there was novelty, and I think that it is a good registration.

Now, what do we find the defendants doing? The original design was, as I have already said, brought out in 1891. The defendants subsequently brought out that which this court holds now to be an infringement. When the second design, of June, 1892, was registered, and the stove was brought out in the next year, we find the defendants, with regard to that, doing the same thing as they had previously done.

But it is said by Mr. Moulton that the two stoves are different, and that if we hold design No. 2 to be good on account of the improvement as regards the base, you must take it as it is improved; and when you look to that which is said to be an infringement of No. 2, it is not an infringement at all. Now as I look at the plaintiffs' No. 2 it seems to me that they make a wider base by means of a sloping shelf; whereas the defendants make a wider base by means of sloping steps. The same kind of exterior is kept; the same look remains in the one as in the other. and I think, therefore, that an infringement has been made out by the plaintiffs of the registration of June, 1892, as in the case of the registration of April, 1891.

It therefore follows that there must be an injunction, and an inquiry as to damages, and an order giving up the articles in the ordinary form.

RIGBY, L.J.—I set aside in this case all the evidence as to the state of knowledge at the time when the plaintiffs registered their first stove; or, rather, I treat all that evidence as no importance. None of the articles produced at all resemble, to my mind, the design of the plaintiffs. We have therefore simply to trust to the eye, and, looking at the two stoves of the plaintiffs and defendants respectively, I am not only satisfied that one is an obvious imitation of the other, but I am also satisfied, quite independently of the evidence—though, that, of course, assists the conclusion—that the design of the defendants would never have come into existence if it had not been for the design of the plaintiffs.

Again, considering the second registered design of the plaintiffs, taking into account what has been said about its resemblance to the first, I judge when I look at it that it is a novel design. Looking again to the alleged infringement of the copyright in that design, I come to the same conclusion—namely, that the defendants' stove would not have existed as it does but for its being an imitation of, and in fact copied colourably from, the second registered design of the plaintiffs. That being so, I make no question about the validity of the registration in each case, or the fact of infringement.

I would only say, with regard to the question

that was raised as to shape and configuration, that what is the subject of protection under this Act is a design. But it is not every design that can be protected. According to the definition contained in section 60 of the Act, a design is to be "applicable to any article of manufacture or to any substance artificial or natural or partly artificial or partly natural." Then the section goes on to say (in order that there should be no doubt as to the meaning of the word "applicable") "whether the design is applicable for the pattern or for the shape or configuration or for the ornamentation thereof, or for any two or more of such purposes." Now, that is a limitation. There is no question in the first part of the section as to the meaning of the word "design," and then follows an explanation of the word "applicable" in order that any mistake about the meaning of that word should be avoided. When Rule 9 of the Designs Rules, 1890, is looked at, you find that the application is, of course, for the registration of a design. The claim is to be a claim for a design. But the rule does go on, in somewhat curious language I think, to say that in making that claim for a design the applicant shall state whether it is applicable for the pattern or for the shape or configuration of the design. It appears to me that there are very many cases in which that would be appropriate and useful. But whether the statement there made would limit the claim of the plaintiffs for protection in the design we have not now to determine at all. In the case before us the claim is for the pattern, the configuration, the shape, and so on, but not as applied to anything except their stove. I have no doubt that the plaintiffs have in no way limited their rights to protection for that design by stating the shape, pattern, or configuration, and so on, to which it is altogether applicable. The design is applicable in its totality in every way in the present case, and the argument founded on that rule I think comes to nothing.

With reference to the other and more general point, that the plaintiffs have in some cases misused their registered designs, I look in vain in the Act to find that any such misuser would cause a forfeiture of their right. I do find a very stringent obligation upon them in every case and upon every article sold which represents their registered design that they shall, under pain of forfeiture, make a reference in the words of the Act to registration. But I can understand that in many cases a person who has a registered design may be in great difficulties. He would always want to be quite safe, and as long as he does nothing more than make himself quite safe under the Act I cannot see that he is doing anything wrong.

But even if he put a reference to the register upon a thing which it was impossible to suppose that he thought to be covered by that registration, it may be provided for (I have not referred to the Act) in some way by penalties or otherwise. But the Act does not say that even in a strong case like that he should forfeit his protection for the design actually registered. And I cannot find that, even if we wish to introduce any such clause, we have any jurisdiction to do so.

Appeal allowed.

Solicitors, *E. Flux, Leadbitter, & Paterson*, for *Slater & Co.*, Darlaston; *Burton, Yeates, & Hart*, for *Johnson, Barclay, Johnson, & Rogers*, Birmingham.

High Court of Justice.

Chan. Div. / North, J. — Jan. 29.

In re RICHARDSON.
MORGAN *v.* RICHARDSON. (*a.*)

Executor—Legacy—Appropriation.

An executor may appropriate specific shares to a legatee, and even to himself if he is a legatee; and it is not necessary to the validity of such appropriation that a proportionate amount of the specific shares should at the same time be appropriated to the other legatees.

Adjourned summons.

By his will, dated the 13th of December, 1889, Charles Richardson appointed his son, Charles William Richardson, and Percy Fenwick executors and trustees, and in case either of his executors should object to act or die he appointed Walter Norman Richardson in his stead; and, after certain specific and pecuniary legacies, gave one-fifth of the residue to Charles William Richardson and one-fifth to Walter Norman Richardson absolutely, the remaining three-fifths being settled upon his daughters for life with remainder to their children; and as regarded the nature or quality of the securities in which the testator desired his executors or trustees to invest the residuary trust funds, he directed that one half of the residue should be invested in Consols, Reduced or New Annuities, and no other bank shares or commercial undertakings, and that the other half of the residue might remain invested in the City of London Brewery Co., either in preference shares or stock.

The testator died on the 9th of August, 1892, and his will was proved on the 12th of October, 1892, by Charles William Richardson and Walter Norman Richardson; Percy Fenwick having renounced probate.

The testator's estate consisted of a freehold house and premises called Torwood, £18,586 10s. 10d. ordinary stock in the City of London Brewery Co., £1,000 Great Indian Peninsular Railway, £800 Lancashire and Yorkshire Railway Co. 4 per cent. Debenture Stock, £1,019 1s. 2d. Consols, and certain cash at the bank.

On the 3rd of May, 1893, an order was made upon a summons taken out by the trustees that one half the residuary estate might be invested in investments authorized by the Trust Investment Act, 1889, other than bank shares or commercial undertakings, that the ordinary stock of the City of London Brewery Co. might be retained in respect of the other half, but that the Lancashire and Yorkshire and Great Indian Peninsular Railway Stock could not be retained.

The trustees proceeded to act upon this order.

On the 19th of January, 1894, £3,600 City of London Brewery Co. was appropriated to Walter Norman Richardson at the market price of £5,283 in respect of his one-fifth, and Charles William Richardson was paid £3,500 on the 23rd of January, 1894, and £2,300 on the 23rd of February, 1894, on account of his one-fifth share.

The value of the City of London Brewery shares had since increased.

This summons was taken out by one of the daughters, who contested the validity of the appropriation to Walter Norman Richardson.

Macaskie, in support of the summons.—All the

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

beneficiaries should have been treated alike, and appropriation made to all at once.

Swinfen Eady, Q.C., and *Begg*.—The infants would not have been bound by an appropriation: *Stewart* v. *Sanderson*, 18 W. R. 278, L. R. 10 Eq. 26. But a trustee can agree to appropriate a certain asset to a beneficiary who is *sui juris*.

They cited *In re Outhwaite*, 40 W. R. 38, [1891] 3 Ch. 494; *In re Lepine, Dowsett* v. *Culver*, [1892] 1 Ch. 210, 40 W. R. Dig. 89.

Macaskie replied.

NORTH, J.—I do not see my way to grant the relief asked. Two-fifths of the testator's estate were left to the sons absolutely, three-fifths were settled upon trust for the daughters, with remainder to their children. The testator held shares in the City of London Brewery Co., of which he thought a great deal; but his will directs that one half of the three-fifths shall be invested in Consols, the other half being invested as at present in the City of London Brewery Co., either in shares or stock. In consequence of this direction it became necessary to realize a considerble portion of the shares in the brewery company. One year after the death one son was paid rather less than his share. It is not suggested that he received more than his share, although he received almost the whole. The other son, instead of having the stock sold and buying it back with the proceeds, which he would clearly have been entitled to do, took it at the market price as part of his share, and I do not think it was necessary to go through the form of selling the stock belonging to the estate, and then buying it back. What has happened is this. This son has received less than his share. The stock has risen in value, and has produced income in the meantime. It is not suggested that the appropriation was *mala fide*, or that at worst there was more than a mistake. It is said when a share of stock was appropriated to the son a corresponding share should have been appropriated to the daughters. If a similar appropriation had been made to them, I have no doubt that it would have been perfectly good, if it did not exceed one moiety.

If the estate has to be divided in a proper state of investment, I see no reason the part already in a proper state of investment should not be divided. It would have better if the executors had made a similar appropriation to the daughters, but they were not bound to do so. I cannot say that the estate is to be divided on the footing that that was done which I do not think was done. Costs must be allowed out of the estate.

Solicitors, *Weston & Sons; Twisden & Co.*

Chan. Div. } Nov. 30.
North, J. }

In re LAWSON'S TRUSTS. (*a.*)

Administration—Insolvency in India—11 & 12 Vict. c. 21, s. 7—Fund in court—Payment out.

Administration need not be taken out in England to the estate of an insolvent who died intestate in India. Administration having been taken out in India to such intestate's estate, the official assignee of the insolvent court of Bombay, in whom the property of the insolvent had vested under the insolvency, held, entitled to payment out, of a fund in court in England standing to the credit of the deceased.

In re Davidson's Settlement Trusts, 21 *W. R.* 452, *L. R.* 15 *Eq.* 383, *followed*.

Petition.

H. W. Lawson became insolvent in India, and, by virtue of section 7 of 11 & 12 Vict. c. 21, being "An Act to consolidate and amend the laws relating to insolvent debtors in India," all the interest of the debtor in any real or personal estate which might revert, descend, be devised or bequeathed, or come to him, vested instantly and without any conveyance or assignment in the official assignee, who shall have full power for the recovery thereof.

The debtor died intestate without having obtained a certificate of discharge, and administration to his estate was granted to the Administrator-General of Intestate Estates at Bombay. The debtor's father died after the debtor, and by his will bequeathed him £1,500. The trustees of the will had paid the legacy into court, and this was an application by the official assignee of the Court for the Relief of Insolvent Debtors at Bombay for payment out of the fund. As the fund had not been dealt with for fifteen years, notice had been served on the official solicitor.

The debts proved for in the insolvency largely exceeded the assets.

Everitt, Q.C., and *T. L. Wilkinson*, for the petition.

F. T. Proctor, for the respondents, did not object.

Method, for the official solicitor.—The only question is, Ought not administration to the intestate to be taken out in England? Duty is clearly payable by representatives of the son: *Executors of Perry* v. *Reg.*, 17 W. R. 382, L. R. 4 Ex. 27.

Everitt, Q.C.—Administration in England is unnecessary: *In re Davidson's Settlement Trusts*, 21 W. R. 452, L. R. 15 Eq. 383.

NORTH, J.—I think that case is in point. Administration over here need not be taken out. I shall make the order prayed for by the petition.

Solicitors, *A'Becket, Terrell & Co.; Hanbury & Withing; Official Solicitor.*

Chan. Div. } Nov. 27.
North, J. }

In re ARNOLD.
ARNOLD *v.* SMITH. (*a.*)

Will—Trust for sale—Power to postpone—Business—Time.

A testator gave his residuary real and personal estate (which included a business carried on by the testator) to trustees to sell and convert, and that they "particularly shall with all convenient speed sell" the business aforesaid; the will contained a general power for the trustees to postpone the sale of any part of the testators real and personal estate for so long as they should think fit.

Held, that this power did not authorize the sale of the business to be postponed for an indefinite time. Under the special circumstances the court authorized the postponement of the sale for two years.

In re Crowther, 43 *W. R.* 571, [1895] 2 *Ch.* 56, *considered*.

Originating summons.

Thomas Smith, by his will, gave his trustees all his residuary, real, and personal estate upon trust to sell and convert, and that they "particularly shall, with all convenient speed after my decease, sell and

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

dispose of my business as a pawnbroker (as a going concern) carried on by me at (X. and Y.), together with the leases under which the premises are held, for the best price that can be obtained for the same." The testator then directed the trustees to invest the proceeds, and out of the income to pay the widow an annuity for life, reducible on remarriage. He then gave directions for the trustees to maintain his infant children during the life of the widow, in case of her remarriage, and to accumulate the surplus income, and to stand possessed of his residuary estate, including the proceeds of the sale of the business, upon trust for all his children who being sons should attain twenty-one or being daughters should attain that age or marry. Then the will continued: "I also empower my trustees or trustee to postpone the sale and conversion of my real and personal estate, or any part thereof, for as long as they or he shall think fit, and in the meantime to let or demise any real estate, including chattels real, for any term of years not exceeding twenty-one years, to take effect in possession, at such rent and subject to such covenants and conditions as my trustees or trustee shall think fit." The trustees had sold the business carried on at X., but as to the other business the trustees were of opinion that it was desirable that that business should be retained until the second son attained twenty-one, which would be in two years. This would give the two elder sons a chance of purchasing it. The main portion of the testator's estate consisted of these two businesses and the assets employed therein.

The defendants were the testator's infant children, and the court was asked (1) whether on the true construction of the will the trustees were authorized to carry on the business until the second son attained twenty-one, or during some other and what period; (2) and whether, under the circumstances of the case, they were justified in so doing.

Swinfen Eady, Q.C., and *Micklem*, for the plaintiffs, relied on *In re Crowther*, 43 W. R. 571, [1895] 2 Ch. 56; and *In re Chancellor*, 32 W. R. 465, 26 Ch. D. 42, as justifying the postponement of a sale directed to be carried out with all speed, when the delay is manifestly for the benefit of the beneficiaries and estate.

Harman, for the defendants, took the same view.

NORTH, J., after intimating that the proposed postponement seemed to be for the interest of the estate, and that the immediate power of sale was not limited by the proviso giving the power of postponement, continued:—I think that the testator did not consider it desirable that the business should be continued by the trustees, but that it should be sold with all convenient speed. On the other hand, he did not wish it to be sacrificed by a forced sale. I do not think that *In re Crowther* is an authority that the sale could be postponed for an indefinite period. There were no such special words in that will as there are here. What is suggested here seems to me to go beyond that case. But I will do what the Court of Appeal did in *In re Chancellor*. I can authorize the trustees to postpone the sale for two years from the testator's death. Of course, if a favourable opportunity arose in the meantime, it should not be thrown away. There will be liberty to apply at the end of two years. The sons may probably buy the business; it would be worth more to them than to anyone else.

Solicitors for all parties, *May, Sikes, & Co.*

Chan. Div. } Jan. 25.
Stirling, J. }

In re GEORGE ARMSTRONG & SONS. (*a.*)

Solicitor—Costs—Common order for taxation obtained on behalf of a client of unsound mind not so found—Client subsequently found lunatic—Discharge of order—Duty of solicitor to disclose facts.

A summons in lunacy having been issued against A. for the appointment of a receiver and manager of A.'s estate, A. instructed B., a solicitor, to act for her. B., on behalf of A., obtained ex parte *against C. & Co., A.'s former solicitors, an order for the delivery and taxation of C. & Co.'s bill of costs against A., but did not disclose the pendency of the summons in lunacy. A. was subsequently found a lunatic. C. & Co. applied for the discharge of the said order, and that B. should pay the costs.*

Held, that the order must be discharged; but

Held, that as there was no evidence that B. at the time he obtained the order knew that A. was of unsound mind, and as he acted in good faith, he ought not to be ordered to pay the costs.

This was a motion by Messrs. Geo. Armstrong & Sons, a firm carrying on business as solicitors, asking that a common order for the delivery and taxation of their bill of costs against Miss Sarah Watson, obtained on the 8th of April, 1895, on behalf of Miss Watson, by Mr. G. B. Wilson, solicitor, might be discharged for irregularity, on the ground that it had been obtained by the suppression by Mr. G. B. Wilson of the fact that Miss Watson was at the date of the order in question of unsound mind and incompetent to manage her affairs or to employ or instruct Mr. Wilson to apply for the said order, and also of the fact that a petition in lunacy for an inquiry into her state of mind was at the date of the said order and to the knowledge of Mr. G. B. Wilson pending; and for an order for the payment of costs by Mr. G. B. Wilson as between solicitor and client.

Miss Watson for some time prior to 1895 employed Messrs. Geo. Armstrong & Co. as her solicitors, and they, having reason to believe that Miss Watson's mental powers were failing, communicated with her nephew Mr. Milburne. Mr. Milburne, on the 4th of March, 1895, took out a summons in lunacy asking for the appointment of a receiver and manager of Miss Watson's estate, and for the application of the income therefrom for her maintenance and benefit. On the 15th of March, 1895, that summons was served on Miss Watson personally.

On the 16th of March she, with Mr. W. Watson, called on Messrs. Geo. Armstrong & Co. with reference to the summons, which she then told them she should oppose, and she then required them to hand over to her certain moneys belonging to her; but they refused to do so. Miss Watson thereupon retained Mr. G. B. Wilson to act for her in opposing the lunacy summons and also for the purpose of obtaining the delivery to her of certain personal property in the possession or control of Messrs. Armstrong & Co.

On the 20th of March, 1895, Miss Watson filed a notice of objection to the summons. On the 29th of March, on the summons coming on, the master intimated that in consequence of the notice of objection a petition must be presented. On the 1st of April Mr. Milburne presented a petition asking for an inquiry as to Miss Watson's state of mind, and on the 3rd of April that was served on her personally. On the 8th of April Mr. Wilson obtained *ex parte* the

(*a.*) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

order in question for the delivery and taxation of Messrs. Armstrong & Co.'s bill of costs, but without telling the officer of the court that Miss Watson was alleged to be of unsound mind or that a petition against her was pending. On the 23rd of April the present notice of motion to discharge that order was given.

On the 24th of April an order for an inquisition was made, and on the 11th of June it was found that she was of unsound mind and incapable of managing her affairs, though capable of taking care of herself. The notice of motion was then amended by making the committee a respondent, and he made no opposition to the order. The amended notice was dated the 6th of December, 1895. The nature of Miss Watson's lunacy was that she was subject to hallucinations. It appeared from Mr. Wilson's evidence that he first became acquainted with Miss Watson on the 16th of March, 1895, and that though she seemed eccentric she gave him clear and rational instructions, and during several conferences conversed with him without indicating that she had any hallucinations, and it was not until the 3rd of April that he became aware that she was subject to them. And he stated that it was his opinion at the time that she was quite competent, with the assistance of Mr. W. Watson, to take care of herself and her affairs, and was not of such unsound mind as was alleged.

Buckley, Q.C., and *Fellowes*, for the applicants, referred to *Beall* v. *Smith*, 22 W. R. 121, L. R. 9 Ch. App. 85, where James, L.J., says: "The bill purports to be the bill of a person of unsound mind, not so found by inquisition, suing by his next friend. It is essential to any such suit that the plaintiff should be of unsound mind, and that he should not have been found so by inquisition. What is the effect of that state of things ceasing to be? I am of opinion on principle, and there is no authority to the contrary, that the suit is absolutely paralyzed thereby"; and to *Hartley* v. *Gilbert*, 13 Sim. 596, as showing that the order ought to be discharged. They also urged that the costs ought to be paid by Mr. Wilson personally.

Hastings, Q.C., and *Gatey*, for Mr. Wilson, argued that upon the facts their client had been guilty of no such misconduct as a solicitor as would justify the court in making him pay the costs personally.

The committee did not appear.

Buckley, Q.C., replied.

STIRLING, J., referred to the notice of motion, and continued:—The discharge of the order to tax is a matter of course, there being no opposition, owing to the fact of the lady being of unsound mind.

The only question is whether Mr. Wilson is liable for the costs. It cannot be disputed that the court has jurisdiction to order him to pay them. It was done in *Beall* v. *Smith*; but of course it is a serious thing to make an order of that kind, and the jurisdiction is not one to be exercised lightly. Let us see what the facts are here. [His lordship then stated the facts, and continued:—] The question is whether Mr. Wilson has been guilty of professional misconduct in obtaining *ex parte* the order to tax without disclosing that his client was alleged to be of unsound mind, and that a petition in lunacy was pending against her. If, on the evidence, I could come to the conclusion that he knew on the 8th of April that she was of unsound mind, then I should say that he was guilty of misconduct and ought not to have obtained the order; but I cannot come to that conclusion. I must take it that on the 3rd of April he was aware that she was subject to hallucinations; but it does not follow that he was then aware that she was of unsound mind so as not to be able to manage her affairs. It is a difficult thing to ascertain a person's state of mind, and the border line between sanity and insanity is not easy to fix. No doubt the lady was insane, but there is no evidence that he knew it or that he was party to any improper conduct, if there was any, on the part of Mr. Wilson Watson, who assisted Miss Watson in instructing him; I cannot therefore hold Mr. Wilson guilty of misconduct in instituting legal proceedings on behalf of a client whom he believed to be of sound mind.

It was said that Shadwell, V.C., in *Hartley* v. *Gilbert*, held that to take or continue proceedings in a suit after a petition in lunacy had been presented against the party, was in one sense a fraud upon the lunacy jurisdiction. In that case, after the decree in the suit, a commission of lunacy was issued against the plaintiff, a married woman suing by her next friend. The plaintiff's husband moved that all proceedings in the suit might be stayed until after the opening of the commission and the result of the inquiries directed by the commission was known. Shadwell, V.C., said: "The only question is whether I shall allow a sort of fraud (using the word in the sense in which it is used in this court) to be practised on the jurisdiction in lunacy. *Primâ facie* there is good ground for supposing that the suit, instead of being conducted by the next friend, will be conducted under the jurisdiction in lunacy. Therefore nothing ought to be done in the master's office until the court has been informed what has been the result of the proceedings under the commission of lunacy." The Vice-chancellor there does use the word "fraud," but it does not seem to me that he meant to go the length of saying that a solicitor who believed his client to be sane could not take proceedings in the name of the client if he knew that a petition in lunacy against the client had been presented. If that were so, it might be very disadvantageous to the client. All that that case goes to, in my opinion, is that the court, when informed of the petition, will, in a proper case, stay the proceedings until the inquiry into the state of mind of the party has been completed. In the present case an application to stay proceedings would have been a proper course to take; but I can imagine a case in which, for the protection of the alleged lunatic, it would be proper that the proceedings in his name should go on.

Another authority referred to was *Beall* v. *Smith*. In that case, after the inquisition had been held, proceedings in the name of the lunatic were prosecuted without the committee being communicated with, and the Court of Appeal held that there had been professional misconduct on the part of the solicitor. I am bound by the decision in that case. Moreover, I agree with what was laid down by it, and in no way desire to depart from it. In the present case, when the proceedings were instituted, there had been no inquisition, and the case of *Beall* v. *Smith* is only relied upon because James, L.J., in his judgment, said: "We were referred to some decisions or *dicta* to the effect that a suit becomes abated by the appointment of a committee; and it was contended from this that there was no abatement until such appointment. But there is no decision that it can go on in the interval between the inquisition and the appointment; and Shadwell, V.C., expressed a clear opinion that going on, even after the commencement of proceedings in lunacy, would be a fraud on the jurisdiction." The Lord Justice there adopts the language of Shadwell, V.C., who, as I have said, used the word "fraud" in a qualified sense, and meant no more than that the court would, in a proper case, stay the proceedings until the result of the inquiry was ascertained.

Then it was said that the solicitor was guilty of

professional misconduct in not disclosing that the petition was pending when he obtained the common order to tax. I express no opinion as to whether it would not have been better that he should have disclosed it; but if it was anything more than a mistake it was not such misconduct as to make Mr. Wilson liable for the costs.

I think there is no reason for supposing that the proceedings here were taken otherwise than in good faith, and in the interest of the lady by the person advising her. I discharge the order to tax, with costs, to be paid out of the trustee's estate; and dismiss the motion as against Mr. Wilson, with costs, to be paid by the applicants, who can apply in the lunacy to be recouped such costs out of the estate.

Solicitors, *King, Wigg, & Co.; J. E. & H. Scott*, for *G. B. Wilson*, Newcastle-on-Tyne.

Chan. Div.
Kekewich, J. } Feb. 12.

In re GILES.
JONES *v.* PENNEFATHER. (*a.*)

Administration — Executor — Retainer — Surety — Promissory note — Money due, but not paid — Receiver — Claim after chief clerk's certificate filed.

A surety who is one of the executors of a testator is entitled to exercise his right of retainer in respect of the debt for which he is surety, if due though unpaid, out of the assets of the testator paid into court by the executors in an administration action; and such claim is not made too late even if first made after the chief clerk's certificate has become binding.

Summons.

On the 28th of March, 1891, the defendant Colonel Pennefather, who was one of the executors of Thomas Giles, the testator in this action, gave jointly with the deceased a promissory note for £1,000 to Messrs. Pomfret, Burra, & Co., the deceased's bankers, payable six months after date with interest at 5 per cent. The defendant Pennefather joined in the note simply as surety for T. Giles.

The bankers made a claim in this action, which was an ordinary creditors' administration action, and their claim had been allowed. The usual administration decree had been made, and the chief clerk's certificate had been filed and become binding, from which it appeared the estate was insolvent.

The executors had paid into court £5,000, proceeds of the realization of the personal estate, and had subsequently paid £770 to the receiver, who was appointed in the action.

The defendant Pennefather had not paid the amount due on the note, but now applied by summons, which came on with the further consideration of the action for liberty to prove against the estate of the testator for the sum of £1,000 and interest thereon from the 28th of March, 1891, at the rate of 5 per cent., notwithstanding the time limited for entering claims had expired, and for liberty to exercise his right of retainer as one of the executors of the testator.

Warrington, Q.C., and *Sebastian*, for the defendant Pennefather.—An executor who is a surety and pays moneys into court is entitled to the right of retainer, although he has not actually paid the debt. The surety, if he were not the executor, could sue the executor and could have paid the debt out of the £5,000 in hand before it was paid into court: *Nisbet* v. *Smith*, 2 Bro. C. C. 579; *Ferguson* v. *Gibson*, L. R. 14 Eq. 379, 21 W. R. Dig. 6. Though *In re Harrison, Latimer* v. *Harrison*, 34 W. R. 736, 32 Ch. D. 395, is *primâ facie* against him, the question as to present right of indemnity was not argued nor were the former two cases cited. Payment into court makes no difference: *Chissum* v. *Dewes*, 5 Russ. 29; *Richmond* v. *White*, 27 W. R. 878, 12 Ch. D. 361.

Renshaw, Q.C., and *Waggett*, for the plaintiff.—The claim is too late: *Player* v. *Foxhall*, 1 Russ. 538; *Ex parte Campbell, Campbell* v. *Campbell*, 29 W. R. 233, 16 Ch. D. 198.

They also cited *In re Orme, Evans* v. *Maxwell*, 50 L. T. N. S. 51, 32 W. R. Dig. 6.

KEKEWICH, J.—There is no doubt as to the general law that persons claiming to be creditors are allowed to come in at any time on reasonable terms, so long as there are funds available and so as not to disturb any prior division that may have been made; and this has been allowed even after a second further consideration.

Under an order for the administration of an estate the executors' right to retain is preserved. But it is said here that he is too late, and reliance was placed on the case of *Player* v. *Foxhall;* but that case is explained and dealt with by Bacon, V.C., in his judgment in *Ex parte Campbell*, where the Vice-Chancellor says that "the executor's right is one which, like any other, may be lost, forfeited, or released. But I cannot entertain any doubt that under an order that the estate shall be applied in payment of debts in a due course of administration the executor's right to retain is preserved. His right is a plain legal right, and he has done nothing either by instituting a creditor's suit or by submitting to account in the ordinary form, which shows any intention to relinquish it." Here I can see no intention on the part of the applicant to forfeit or release it. The delay on his part is amply explained. The bankers proved for the full amount. The estate has not been distributed, and there is no difficulty as to the proof. As executor he may claim to retain, if he has a present debt. In *In re Orme* Kay, J., directed the application to stand over to see if, in fact, the applicant had to pay the debt; but here that course would be absurd, as Colonel Pennefather would, of course, be at once called on to pay. He has the right to prove; there is therefore no convenience to be obtained in causing it to stand over.

But then it is said that until he has paid he has no right to retain, and for this proposition the case of *In re Harrison, Latimer* v. *Harrison*, is relied on; but in that case neither *Ferguson* v. *Gibson* nor *Nisbet* v. *Smith* was cited, and it does not really touch the point. Pearson, J., in that case said that there was no debt due to the surety before payment, which is true, for the right to indemnity is not a debt; and then he devotes his mind to the question whether there could be a right of retainer, as there were no moneys in his hands at the time when the debt matured. Whatever may be the value of that case, it is entirely unaffected by anything I say on the present question, as it does not affect the point in this case. Colonel Pennefather has an equitable debt which can be converted into a legal debt by payment. The bank debt should be paid in full, and the applicant is entitled to his costs.

Solicitors, *Kingsford, Dorman, & Co.*, for *James Bannon*, New Romney, Kent; *Warren, Murton, & Miller*, for *Hallett, Creery, & Co.*, Ashford, Kent.

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

Chan. Div.
Vaughan Williams, J. } Jan. 17.

MID-KENT FRUIT FACTORY. (*a.*)

Company — Winding up — Set-off — Mutual dealings — Money on deposit — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 38 — *Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

A company which was being pressed by its creditors deposited certain moneys with a firm of solicitors to settle certain claims, and after the claims had been paid a balance remained in the hands of the solicitors. Shortly afterwards the company passed resolutions for voluntary winding up, which was continued under supervision. No account had been rendered to the company by the solicitors, though they kept an account in their books showing the various receipts and payments, and there was no evidence that the company had in any way consented to any portion of the money being applied to any purpose other than that for which it had been originally deposited with the solicitors. The solicitors claimed to set off a debt for costs against the liquidator's claim in the winding up for the balance.

Held, that there was no set-off.

Observations on the meaning of section 38 *of the Bankruptcy Act*, 1883.

The above-named company was being wound up under supervision of the court, and a question arose in the winding up as between the liquidator and a firm of solicitors with whom moneys had been deposited by the company to settle certain claims whether a balance of these moneys, after the claims had been paid, could be set off by the solicitors against a debt for costs, or whether they belonged to the liquidator.

Early in the year 1892 the company was pressed by some of their creditors, who had got judgments, and they deposited certain moneys with their then solicitors and instructed them to settle the claims of the creditors. The solicitors settled some of the claims, and had a balance in their hands. The solicitors kept an account of these transactions with the company in their own books, showing the various receipts and payments, but there was no evidence that they ever rendered an account to the company. In March, 1892, the company went into voluntary liquidation, which was afterwards continued under supervision. The solicitors claimed to set off the balance above mentioned against the amount of their costs incurred prior to the winding up.

This was a summons taken out in the winding up by the liquidator to determine the question whether the said balance could be properly set off against the amount due for costs.

Micklem, for the summons.—The money was given to the solicitors for a specific purpose, and the balance belonged to the company and ought to be paid to the company. There can in these circumstances be no set-off.

He referred to *In re Pollitt*, 41 W. R. 89, [1893] 1 Q. B. 175.

C. E. E. Jenkins, for the solicitors.—The specific purpose came to an end when the claims had been paid. After that the balance was in the hands of the solicitors as a mere debt due to the company, and the provisions contained in section 38 of the Bankruptcy Act, 1883 (which by section 10 of the Judicature Act, 1875, are extended to companies), as to "mutual dealings" apply, and the balance can be set off against the sum due to the solicitors for costs.

He referred to *Palmer* v. *Day*, *ante*, p. 14, [1895] 2 Q. B. 618; *Jack* v. *Kipping*, 30 W. R. 441, 9 Q. B. D. 113.

Micklem replied.

VAUGHAN WILLIAMS, J.—In this case a set-off cannot be allowed. The summons is raised in a very convenient form—*i.e.*, on an agreed statement of facts, the substance of which is that certain sums were deposited by the company with its former solicitors for a specific purpose, and it is not denied that so long as they were retained by the solicitors for that purpose there was no right on the solicitors' part to any set-off; but it is said that before the date of the winding up the purpose for which the moneys had been deposited had failed—*i.e.*, the moneys had been applied as far as they could be. That is, the judgment creditors of the company are said to have agreed to accept a composition on their debt, the composition and the costs have been paid, and there is no purpose to which the balance remaining in the solicitors' hands can be applied. It remains in the solicitors' hands as a debt due to the company, and the liquidator now claims payment of it. The solicitors say they are entitled to set it off against their costs, and I agree with them to the extent that if it can be shown that the moneys in question remained in the hands of the solicitors with the knowledge and consent of the company after the judgment creditors had been paid their composition, the solicitors would be entitled to set off. It would be a mere debt due to the company from their solicitors. But it is denied that it ever did so remain in the hands of the solicitors of the company. *Primâ facie* the moneys were paid for a specific purpose, and *primâ facie* they would be held for that specific purpose, and when that purpose had been satisfied the solicitors would have to return the balance to the company. The onus is therefore on the solicitors to show consent by the company to their retaining the moneys in question, and I fail to find evidence of such consent. There is nothing to show that the solicitors ever communicated to the company the fact of their having a balance in their hands, or that they rendered any account to the company before the company went into liquidation. Nothing, therefore, happened to change the purpose for which the moneys were originally paid, and no set-off can therefore be allowed.

That is sufficient to decide the present case, but I wish to say a word on the "mutual credit" section in the Bankruptcy Act of 1883. The law has been modified by the insertion of the word mutual "dealings" in this Act. Many matters now fall within the section which formerly did not, but the necessity for mutuality has not ceased. At one time there had to be mutual debts; then it was held that mutual transactions resulting in debts would be sufficient, and then mutual transactions which would probably result in debts. Finally there came the Bankruptcy Act, 1883, which (section 38) includes all "mutual dealings" between the bankrupt and others, but mutuality must always appear. *Palmer* v. *Day* has been cited to show that no mutuality is necessary, and that every provable debt in bankruptcy falls within the section. I am of opinion that *Palmer* v. *Day* did not decide that. The Lord Chief Justice said: "The section, however, in its present shape has been held applicable to all demands provable in bankruptcy and so as to include claims as well in respect of debts as of damages, liquidated or unliquidated, provided they arise out of contract." The Lord Chief Justice clearly limits the operation of the section. The present claim does not arise out of contract at all. It is a claim to retain moneys paid to the solicitors. It has been said

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

that the section covers claims for costs, but in the case of *Jack* v. *Kipping* the claim for costs was only allowed to come within the section on the ground that, the claim of the trustee being for the price of goods, the misrepresentation by the vendor leading to the purchase was, as between vendor and purchaser, a "mutual dealing" within the section. In the present case no set-off can be allowed, because the money was received under a contract to be applied for a specific purpose, the contract was never determined, and the company never consented to the money being applied to any other purpose.

Solicitors, *Waterhouse, Winterbotham, Harrison, & Harper; Saunders, Hawksford, & Bennett.*

Q. B. Div.
(Lindley and Kay, L.JJ.) Feb. 10.

HANKS *v.* BRIDGMAN. (*a.*)

Tramway — Bye-law — Refusal to pay the fare in default of producing ticket.

A bye-law made by a tramways company provided as follows: "Each passenger shall show his ticket (if any), when required so to do, to the conductor or any duly authorized servant of the company, and shall also, when required so to do, either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger;" another bye-law imposed a penalty for breach of any of the bye-laws. A passenger, who had already paid his fare, was unable to produce his ticket, having inadvertently torn it up, and refused to pay the fare a second time. He was summoned under the penalty bye-law.

Held, that the magistrate was bound to convict him.

Case stated by a metropolitan police magistrate.

The bye-law in question was made, in pursuance of the Tramways Act, 1870, by the North Metropolitan Tramways Co. Another bye-law imposed a penalty of £2 for the breach of any of the bye-laws of the company.

A summons was taken out against the respondent under the bye-laws for refusing to deliver up his ticket or to pay the fare. It appeared that the respondent had already paid his fare, but he had inadvertently torn up his ticket.

The magistrate found that the respondent had no fraudulent intent, and dismissed the summons, but stated a case.

C. W. Mathews, for the Tramway Co.—The bye-law was made for the purpose of protecting the company from the dishonesty of their servants. The case of *Heap* v. *Day*, 34 W. R. 627, 51 J. P. 213, is exactly in point, in which it was held that a bye-law in exactly similar terms was a valid bye-law, and that a person who refused to deliver up his ticket or pay the fare was rightly convicted under it.

The respondent was not represented.

LINDLEY, L.J.—The appeal must be allowed. One sees the reason for a bye-law of this kind. It is not very happily worded, but the appellant's construction of it is right. It is quite obvious that it would be destroying the utility of the bye-law to follow the suggestion I made—namely, that a person could not be called upon to pay the fare twice over. The case does not find whether the respondent had the means to pay. If he had lost not only his ticket but his money too—if, for instance, he had had his pocket picked—I do not know what effect that would have. But here there was nothing to show that he had no money, and he ought to have paid.

KAY, L.J.—This bye-law has the force of an Act of Parliament. The respondent ought to have paid the fare demanded. If he had already paid it before, he might, perhaps, have recovered back the second payment; but to refuse to pay was to commit an offence against the bye-law.

Solicitor for the appellant, *Hugh Godfrey.*

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Q. B. Div.
(Wright and Kennedy, JJ.) Jan. 14, 15.

HODDINOTT, SURVEYOR OF TAXES (*Appellant*), *v.* THE HOME AND COLONIAL STORES (LIMITED) (*Respondents*). (*a.*)

Inland revenue—Inhabited house duty—Tenements—Lessee dividing premises into a dwelling-house and a shop respectively—Lessee retaining the shop and subletting the dwelling-house—Assessment made on the whole of the premises—House Tax Act, 1803, *s.* 10—48 *Geo.* 3, *c.* 55, *schedule B, rr.* 3, 6, 14—*Land Tax Act*, 1851—*Customs and Inland Revenue Act*, 1878 (41 *& 42 Vict. c.* 15), *s.* 13 (1) *and* (2).

A trading company became the lessees of a house, which they had divided, before taking possession, into two distinct and separate tenements. The lower tenement they retained themselves, but used it solely as a shop for the purposes of their trade, the upper tenement they let for residential occupation to a tenant, who was not a servant of the company.

The whole of the premises having been assessed to inhabited house duty:—

Held, that the assessment was right, as the exemption conferred by section 13 *of the Inland Revenue Act*, 1878, *in respect of business premises, was intended to extend only to the case of a person who let the whole of a house in separate tenements, and did not apply where the landlord or lessee retained the occupation of part of the premises for the purposes of his own business or trade.*

Appeal by the surveyor of taxes for the Finsbury Division of the county of Middlesex against a decision of the Commissioners for General Purposes.

The facts, as set out in the special case stated by the commissioners, were as follows. The Home and Colonial Stores, Limited, the respondent company, was a company with a registered office at No. 114, Paul-street, Finsbury, having some 270 branch establishments at various places in London and the provinces. In 1892 they wanted to open another branch shop in Finsbury, and, being unable to find a shop only to let, they decided to take, on a twenty-one years lease, the whole of 152, Stroud Green-road. This house consisted of a shop and parlour on the ground floor, with a side door and passage from the street, and two floors over. Before they took possession they had the premises divided into two portions, by putting up a matchboard partition and barring and screwing up two doors, so as to cut off entirely the residential part of the house from the shop and parlour. That portion so divided off for residence, they sublet to a Mr. Hawke, who was in no way connected with the company, at a weekly rental of 15s., which included all rates and taxes. The other part of the house the company retained for their own use, occupying it in the daytime only, and then solely for the purposes of their business. Each

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

part was thus an entirely separate tenement, there being no internal communication or means of access between the two portions, which had each a separate entrance from the street and separate sanitary arrangements.

The company had been assessed for inhabited house duty for the year 1894-5 on the full value of the whole of the premises, 152, Stroud Green-road. The company, considering they were not liable to pay inhabited house duty on the whole of the premises, but only on the residential portion of them (under the agreement to pay all rates and taxes with their sub-tenant), appealed to the commissioners. The commissioners allowed the appeal, and reduced the assessment from £100 at 6d. in the £ to £32 at 3d. in the £.

The surveyor of taxes appealed against this decision.

Sir R. E. Webster, A.G. (*Danckwerts* with him), for the Crown.—The question here is whether the whole or only a part of these premises are chargeable with inhabited house duty. No question arises as to the party by whom that duty is to be paid. I submit that the company is liable to pay duty on the value of the whole house, for it is neither "divided into nor let in different tenements" within the meaning of section 13 (1) of 41 & 42 Vict. c. 15 (Inland Revenue Act, 1878). That exemption does not apply to the case of a special letting off of any part of the premises by a person who has the right to occupy the whole, so long as he actually occupies the premises himself: *Russell* v. *Coutts*, 19 Sco. L. R. 197, 1 Tax Cas. 469. The mere barring and screwing up of internal doors does not constitute a structural separation or division.

The following cases were referred to: *The Yorkshire Fire and Life Insurance Co.* v. *Clayton*, 29 W. R. 539, 6 Q. B. D. 557, 1 Tax Cas. 336; on appeal, 30 W. R. 174, 8 Q. B. D. 421, 1 Tax Cas. 479; *The Attorney-General* v. *Mutual Tontine Investment Chambers Association, Limited*, 24 W. R. 9, L. R. 10 Ex. 305; *In re Cowan and Strachan*, 17 Sco. L. R. 314, 1 Tax Cas. 245.

R. M. Bray (*A. Clarke Williams* with him) for the respondent company. — Whether the structural dividing in this instance is sufficient to satisfy the statute or not, is a question of fact. It has been found by the commissioners that there was a physical and *bonâ fide* dividing of the premises, and that point of evidence cannot again be gone into. In *Chapman* v. *The Royal Bank of Scotland*, 30 W. R. 81, 7 Q. B. D. 136, 1 Tax Cas. 363, Hawkins, J., said: "I do not apprehend that any particular mode of division is essential, provided that there is an actual division into separate tenements. It does not matter whether the division is by brick wall or by lath and plaster, or by matchboarding; but there must be such a division that anyone going over the premises would say, 'This is one tenement; that is another.'" [WRIGHT, J.—We are agreed that the structural dividing in this case may be assumed to be sufficient.] Then, the premises being divided into two rateable distinct tenements, the exemption given by section 13 of 41 & 42 Vict. c. 15 is rightly claimed for that part used solely for business purposes. In *Allan* v. *Thomson*, 21 Sco. L. R. 741, 2 Tax Cas. 52, where, in a common tenement, the same person occupied, as a dwelling-house and as a shop respectively, two separate tenements, the value of the shop was not included in the assessment value of the premises. [WRIGHT, J.—The difficulty you have to get over is the question of letting.] That is so. The exemption has been granted to the freeholder where premises have been let under similar circumstances to the present, and the exemption is by inference intended to be extended to the leaseholder.

He cited *Nisbet* v. *McInnes*, 21 Sco. L. R. 740, 2 Tax Cas. 55; *Smiles* v. *Crooke*, 23 Sco. L. R. 489, 2 Tax Cas. 162; *Corke* v. *Brims*, 20 Sco. L. R. 778, 1 Tax Cas. 531; *Allan* v. *Miller*, 26 Sco. L. R. 491, 2 Tax Cas. 446.

Sir R. E. Webster, A.G., in reply.—In all the Scotch cases the whole of the premises were "let," and they are no authority in support of the respondent's case. The only exception is the case of *Allen* v. *Thomson;* but that is distinguishable, and was decided on other grounds applicable to Scotch law only.

WRIGHT, J.—In this case there was a building which was a dwelling-house unquestionably, and was inhabited at the same time as a dwelling-house. The respondents, desiring to take the benefit of the exemption conferred by the Inland Revenue Act of 1878, barricaded off a portion of the building which was properly speaking the inhabited part, and kept for themselves the part of the building which they desired to use for a shop; and they let to a weekly tenant, or, at any rate, to a tenant paying a weekly rent, the other or upper part; and the question is whether that brings them within the exemption.

The liability to the inhabited house duty depends in the first place upon the Land Tax Act of 1851, which fixes the amount to be paid on inhabited houses, and enacts that the provisions of the former Acts shall be applicable. Then the provisions of the former Acts that are applicable are, first, the 10th section of the House Tax Act, 1803, which says that every dwelling-house, and so forth, shall be brought into charge; and the next Act is the Act of 1808, Schedule B, the schedule of duties made payable on all inhabited dwelling-houses according to the value thereof. Rule 1 directs that "The duties are to be charged annually on the occupier or occupiers for the time being of every such dwelling-house." Then by rule 3 all shops and warehouses which are attached to a dwelling-house, or have any communication therewith, shall, in charging the duties, be valued together with the dwelling-house, and so forth. Passing by rule 6 for the moment, I need only refer to rule 14 in order to exclude it. It was contended that rule 14 applies in this case, but it clearly has no application whatever, because rule 14 applies only where the different tenements in the dwelling-house are distinct properties. Therefore there remains only rule 6 to mention. Rule 6 is the only rule providing for different parts of a house being let to different tenants. It says: "Where any house is or shall be let in different storeys, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be charged as if such house was inhabited by one person or family only, and the landlord or owner shall be deemed and taken to be the occupier of such dwelling-house, and shall be charged with the said duties." So the law stood until 1878. If it had stood there, it seems to me to be plain that the respondents here would have been liable to the duty which the Crown claims. They were occupiers of that which was an inhabited dwelling-house. By rule 3 the part used as a shop was to be valued in with the inhabited part, and as it seems to me rule 6 would have been inapplicable. Whether or not rule 6 means by the words "where any house shall be let in different storeys," where the whole house shall be let in different storeys, I do not know, and it is not necessary to decide. But rule 6 taken by itself does not require that there shall be more than

one set of inhabitants in order for it to apply at all, and therefore whether that rule applied or not the respondents would be liable. Then comes the Act of 1878, which says (section 13): "Where any house, being one property, shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purpose of any trade or business . . . the person chargeable as occupier of the house shall be at liberty to give notice in writing . . . and after the receipt of such notice by the surveyor the commissioners acting in the execution of the Acts relating to the inhabited house duties shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid or are unoccupied."

On this and the applicability of this enactment various questions have been raised. It is not necessary absolutely to decide whether there was a sufficient division here. Some of the expressions in *Yorkshire Fire Assurance Co.* v. *Clayton* no doubt indicate that there must be what is called a structural division, whatever that is. I should think that such a division as existed in this case might be sufficient. I believe my brother Hawkins, in the case of *Chapman* v. *Royal Bank of Scotland*, said he could not see why a carpentry division may not be just as effectual as a bricklayer's division of the premises. I certainly should not, therefore, be inclined to decide the case in favour of the Crown on that point.

But then there comes another question. There has been a division of judicial opinion as to whether this section has any application so long as the lessor remains in occupation of any part of the house. It is very difficult to discover the real meaning of the Legislature on the subject. I am inclined myself to think, with the majority of judges who have expressed opinions upon it, that the section ought to be construed according to its strict literal meaning, where the whole of the house, being one property, is altogether divided into and altogether let out into different tenements. The respondents actually occupy a part of this building, though not the part which is actually inhabited; and, as it is an inhabited dwelling-house and they substantially occupy the house, they are liable, unless they bring themselves strictly within the terms of the exemption. I do not think the exemption relied on is applicable to this case, as I think the words "let in different tenements" mean let to different persons by the general lessor, and do not include a case where the general lessor has let the whole of the premises to one tenant, and that tenant sublets a part and occupies the rest as here. If you read the section as if it referred to the letting by the superior landlord, then it does not apply, because the superior landlord has neither divided the house nor let it to different tenants. If you read the section as referring to the inferior landlord—the respondents—then it cannot apply, because they have not let nor tried to let the shop at all. The exemption asked is for a shop in the case of a person who does not become chargeable to the inhabited house duty as occupier, by reason of his letting out the whole of the building which is called a house. In my opinion, neither rule 6 nor section 13 applies in cases where the whole of the building is not let out in separate lettings; and the case of a landlord taking part of the premises for himself is not a case within section 13 at all. It is conceded, and, indeed, must be conceded on the facts, that that part retained by the respondents is not let as a different tenement from the other part of the house; it is retained by the landlord, and was never let as a different tenement, and only came into his occupation as part of the letting of the whole house. It was not, therefore, "such a tenement as was occupied solely for the purposes of trade," because "such a tenement" means a tenement which has been divided from the other tenement or tenements in the house, and has not only been divided but has itself been let as a separate tenement. But this shop has not been let by the party claiming the exemption, and that it should be let as well as divided is a condition to the claim being allowed. For these reasons judgment must be for the Crown.

KENNEDY, J., in concurring, said: — It is unnecessary for me to express any opinion whether the dividing was a sufficient structural division of the house to satisfy the statute or not, and I prefer to assume that it was. On that assumption, I think that the case does not come within either rule 6 of Schedule B of the Act of 1808 nor within section 13 of the Act of 1878. I agree with the very clear and definitely expressed opinion of Lindley, L.J., in *The Yorkshire Fire Assurance Co.* v. *Clayton*, and with the view that Huddleston, B., stated he was very much inclined to take in *Chapman* v. *The Royal Bank of Scotland*, that neither that rule nor section 13 are applicable to cases where the landlord occupies part of the premises for his own business or trade.

Judgment for the Crown, with costs.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Slaughter & May.*

Q. B. Div. (Pollock, B., and Wright, J.) Aug. 2, 1895.

STODDART AND OTHERS *v.* SAGAR. (*a.*)

Lottery—Newspaper competition—Naming the winners of horse races—Lottery Acts, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2, *and* 1823 (4 *Geo.* 4, *c.* 60), *s.* 43.

The proprietor of a weekly paper offered £100 *to anyone who should correctly fill in a coupon, provided for the purpose in an issue of the paper, with the names of the first four horses in a race about to take place.*

Held, that this was not a lottery within the meaning of the Lottery Acts.

Case stated by the alderman sitting at the Mansion House.

The appellants were convicted of offences under the Lottery Acts upon three separate summonses, which charged them with "opening and keeping an office to exercise by a certain contrivance or device a lottery" contrary to 42 Geo. 3, c. 119, s. 2, and for "selling tickets and chances in an unauthorized lottery," and for "publishing a proposal or scheme for the sale of tickets and chances in a lottery" contrary to 4 Geo. 4. c. 60, s. 43; and two of the appellants were also charged with aiding and abetting in these offences.

The facts on which these convictions were obtained were as follows.

The appellant Ada Stoddart was the proprietor of a weekly sporting paper known as *Turf Life*, the busi-

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

ness of which was carried on at an office at 53, Fleet-street.

The appellant Joseph Stoddart, her husband, was the owner of the office at 53, Fleet-street; and the appellant Frederick Brandon was the publisher of the paper, and jointly with Joseph Stoddart managed the business.

In connection with the paper the appellants organized competitions called "coupon competitions," which consisted in their offering a prize of a large sum of money to anyone who should correctly fill in a coupon published in the paper with the names of the winners of two or more specified horse races about to be run. Twenty-five blank coupons were supplied with each copy of the paper, and the purchaser was entitled to send in one of them free of charge; and he might use any number of the remaining twenty-four on payment of one penny for each one sent in.

The competition in respect of which the summonses were issued was announced in the issue of the 26th of March. The prize was £100, and competitors were invited to attempt to fill in the coupons with the names of the first four horses in the Grand National Steeplechase, which was to take place during the ensuing week.

Carson, Q.C. (*Grain* and *Kershaw* with him), for the appellants.—To be a lottery no room must be left individual skill, as was held in *Barclay* v. *Pearson*, [1893] 2 Ch. 154, 41 W. R. Dig. 83, the "missing word" case, where the missing word was arbitrarily chosen, and was not necessarily the most appropriate one. It cannot be suggested that naming the winner of a horse race is a matter of mere chance.

He also cited *Caminada* v. *Hulton*, 60 L. J. M. C. 116, and *Taylor* v. *Smetten*, 11 Q. B. D 207, 31 W. R. Dig. 115.

R. D. Muir, for the respondent. — *Caminada* v. *Hulton* is distinguishable on the ground that in that case one 'price was 'paid for the paper and the coupon, and the competition could justly be described as only a device to increase the sale of the paper; but here, after the first coupon was exhausted, a separate sum was paid for each coupon used. Though the selection of one winner might afford opportunity for the exercise of skill, yet when it came to naming three winners, it could be nothing more than chance; the very fact of twenty-five coupons being supplied for twenty-five separate attempts showed this.

POLLOCK, B.—I am satisfied as to the question of a lottery that there was no contrivance or device to obtain money by chance. Naming the winners of horse races is not necessarily a matter of chance. I am clear that this is not a lottery.

WRIGHT, J., concurred.

Solicitors for the appellants, *Humphreys, Son, & Kershaw.*

Solicitor for the respondent, *The City Solicitor.*

Prob. Div. & Adm. Div. / Admiralty. } May 28, 1895.

"THE HEREWARD." (*a.*)

Admiralty—Ship—Restraint—Sale of ship against the consent of part owners having a majority in interest —Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 8.

Where the owners of twenty sixty-fourth shares in a ship, having instituted an action of restraint against the ship, applied to the court for a sale of the ship under the eighth section of the Admiralty Court Act, 1861, *and it appeared that thirty-eight sixty-fourth shares of the ship had, against the wishes of the applicants, been transferred to a limited liability company which opposed the sale, and that it was impossible that the ship could be profitably employed in the general interest of all the co-owners unless the whole ship belonged to the company, the court decreed a sale of the ship, but ordered the decree to lie in the registry for four days to give the company the opportunity of purchasing the share of the applicants.*

This was a motion on behalf of the owners of twenty-four shares in the vessel *Hereward*, the plaintiffs in an action of restraint instituted against the *Hereward* and the Hereward Sailing Ship Co., Limited, defendant intervening for, *inter alia*, a sale of the *Hereward* against the consent of the company, which was registered as the owners of thirty-eight sixty-fourth shares in the *Hereward*.

It appeared that the Hereward Sailing Ship Co., Limited, had been created after the plaintiffs had become possessed of the shares they held in the *Hereward*, and that they had refused to become members of the company.

May 27.—The motion was now heard before the judge in court (Bruce, J.).

Aspinall, Q.C., and *F. Laing*, on behalf of the plaintiffs, in support of the motion.

Sir Walter Phillimore and *Stokes*, for the defendant company, *contra*.

Cur. adv. vult.

May 28.—BRUCE, J.—In this case I have come to the conclusion that I ought to decree the sale of the ship. I do so upon the ground that it seems to be beneficial to the interests of the parties generally that the ship should be sold. The majority of the owners have, by constituting themselves a limited liability company, made it impossible that the ship can be profitably employed in the general interests of the owners, unless the dissenting owners, the minority of the owners, agree to come into the company. In my opinion the majority of the co-owners of the ship have no right thus to change the character of the ownership, except with the consent of all persons concerned. I am satisfied that the course taken by the majority must be ruinous to the interest of the holders of the twenty-four sixty-fourth shares now applying to me, unless they consent to come into the company. That the court possesses power to direct the sale is beyond question. It is true it has been given by a recent Act, but the reason why the power was given was because it was found that without that power the court was often unable to adjust disputes between part owners. No rules are given in the statute as to how this power is to be exercised. It is left entirely to the discretion of the court; but it is clear from the decision of Sir Robert Phillimore in *The Nellie Scheneider*, 3 P. D. 152, 27 W. R. Dig. 202, that the power may be exercised on the application of the minority of part owners; and it seems to me that when part owners of a ship are unable to agree as to what is to be done with their common property, and there appears to be no way of preventing the sacrifice of the property except by a sale, the court ought to direct a sale.

I was impressed by what counsel for the majority owners said as to the reluctance the court must always have in directing the sale of a man's property against his consent; and I agree that the court ought to be very cautious in directing a sale against the wish of the majority of the part owners; nor

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

should it do so unless it is well satisfied that it is to the interest of all concerned.

In order to guide me in the exercise of my discretion I have tried to find some analogy in other branches of the law. I do not mean to say that the case of the sale of real property is in all respects similar to the case of the sale of ships; but there is some analogy. In the case of *Pitt* v. *Jones*, 29 W. R. 33, 5 App. Cas. 651, a sale of real property on the application of only three-sixteenths of the owners was directed by the Court of Appeal, and sanctioned by the House of Lords, on the ground that it was for the general interest.

One of the matters which guide the discretion of the court in acting under its statutory power is that the majority of the owners are, as in this case, unwilling to purchase the interests of the minority; and when I find that the statute has given general power to decree a sale I do not think I can be wrong in saying that the court may at least exercise that discretion where it is satisfied that it is to the general interests of all persons concerned that the property should be sold.

At the same time, while I make such a decree, I think it is right to give time to see if the parties cannot come to terms. It may be that the majority of the co-owners will be willing to purchase the interests of the minority; and therefore I shall direct that the order lie in the registry for four days.

Solicitor for the plaintiffs, *Harvey*.

Solicitors for the defendants, *Downing & Co.*

Court of Appeal.

From Chan. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) Feb. 4.

In re HUBBUCK.
HART *v.* STONE. (*a*.)

Will—Tenant for life and remainderman—"Property not actually producing income"—Debt due to testator—Realized security insufficient to pay capital—Apportionment.

A testator, after directing his property to be converted and the income to be paid to his wife during widowhood, gave his trustees power to postpone the conversion, and declared that the income produced by his estate previously to conversion should be applied as income under his will. The will then proceeded as follows: "But no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income."

At the death of the testator there was a debt owing to him, in respect of which the trustees subsequently took from the debtor a mortgage of certain policies of assurance as security. These policies, while the tenant for life remained the testator's widow, were realized and produced a sum insufficient to pay the capital of the debt. There were also arrears of interest due.

Held, reversing the decision of Stirling, J., *that the sum realized being, according to the well settled rule of the court, partly capital and partly interest, the widow as tenant for life was entitled to have the sum apportioned between capital and income.*

Appeal from Stirling, J.

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Charles A. Hubbuck, by his will dated the 26th of August, 1890, gave his residuary, real, and personal estate to his trustees upon trust to sell, call in, and convert the same into money, and to invest the moneys produced thereby upon the securities therein mentioned, and to pay the income thereof to his wife during her widowhood; and if she should marry again, in trust out of the said income to pay her an annuity of £750 per annum; and after the death or second marriage of his wife, subject to the said annuity, in trust for the persons therein mentioned. The testator gave his trustees power to postpone the conversion of his estate, and declared that the income produced from his estate previously to conversion should be applied in the same manner as income arising from investments therein authorized. The will then proceeded as follows: "But no property not actually producing income which shall form part of my estate shall be treated as producing income, or as entitling any party to the receipt of income."

The testator died on the 23rd of December, 1890. At the time of his death two sums of £2,000 and £1,500 were owing to him from one Ernest Hart, sen.

On the 1st of April, 1892, the trustees of the testator's will took a third mortgage of three policies on the life of Hart as security for his debt.

Hart died in November, 1894; and on the 9th of January, 1895, the trustees realized from their security the sum of £3,669 14s. This sum, after certain necessary payments had been made out of it, was insufficient to pay the capital of Hart's debt, and there were besides large arrears of interest. The testator's widow subsequently married again.

On the 10th of April, 1895, the trustees of the testator's will other than the widow, who was also a trustee, took out an originating summons against the widow and one of the persons entitled in remainder for the determination of the following, among other, questions—viz., How and on what principle, having regard to the terms of the will, the sum of £3,669 14s. was to be apportioned as between capital and income of the estate, and what part of the said sum was to be paid to the testator's widow as income, and what part was to be retained by the trustees as capital?

On the 13th of November, 1895, Stirling, J., made an order on this summons whereby, after directing certain sums to be paid out of the £3,669 14s., he declared that according to the true construction of the testator's will the testator's widow, as formerly tenant for life under the will, was not entitled to any part of the residue of the said sum of £3,669 14s., and that such residue formed part of the capital of the testator's estate.

The widow appealed.

O. L. Clare, for the appellant.—Except for the clause relied on by the respondent, the circumstances of this case are the same as those of *Turner* v. *Newport*, 2 Ph. 14, and the widow is entitled to have this fund apportioned between capital and income. The clause was intended to meet the case of a reversionary interest, and does not apply here at all.

He also referred to *Cox* v. *Cox*, 17 W. R. 790, L. R. 8 Eq. 343; *Ackroyd* v. *Ackroyd*, L. R. 18 Eq. 313; *In re Earl of Chesterfield's Trusts*, 32 W. R. 361, 24 Ch. D. 643; *In re Duke of Cleveland's Estate*, [1895] 2 Ch. 542; *In re Morley*, *Morley* v. *Haig*, *ante*, p. 140, [1895] 2 Ch. 738.

W. M. Cann, for the respondent.—The rule laid down in *Turner* v. *Newport* is an arbitrary one, and should not govern a case like the present. It is im-

possible to describe the policies as property "actually producing income." At any rate, the fund should only be apportioned as from 1892, the date of the mortgage, and interest at 3 per cent. only should be allowed.

O. L. Clare.—As to interest, that will be at the mortgage rate: *In re Foster, Lloyd* v. *Carr*, 39 W. R. 31, 45 Ch. D. 629.

Stallard, for the plaintiffs.

LINDLEY, L.J.—I confess at first I did not quite grasp the case, but now that I understand it I am bound to say I think Stirling, J.'s, decision is erroneous. By the will the testator directs his property to be converted, and the income to be paid to his wife so long as she shall remain his widow; and if she shall marry again, he directs that she is to have an annuity of £750 a year. Then there is a power enabling the trustees to postpone the sale and conversion, and then there follows this clause respecting what is to be done with the income. [His lordship read the clause dealing with the income of the estate prior to conversion, and continued:—] That is a provision to get rid of *Howe* v. *Lord Dartmouth*, 7 Ves. 137, and to let the widow take the income whatever it is. Then come these words: "But no property not actually producing income which shall form part of my estate shall be treated as producing income, or as entitling any party to the receipt of income." What does that mean? That is put in evidently for the protection of the remaindermen, to prevent the tenant for life requiring any income not actually earned to be made good at the expense of capital. It would protect the remaindermen, for instance, in the case of the income not being sufficient to pay the annuity. The effect of Stirling, J.'s, order is to take from the tenant for life that which according to the rules of the court is income, and give it to the remaindermen, and to produce a result which is just the reverse of what was intended or contemplated.

The position of affairs to which we have to apply this clause is this. The testator had a debt owing to him of £3,500. That debt could not be got in when he died, and the trustees, doing the best they could, obtained a security from the debtor. They took some policies as a security, and there being some charges on them they took subject to these charges. After the testator's death, and before the widow married again, they realized the security, and, after paying off the first charge, the security produced a sum of somewhere about £3,000, that is to say, less than what was due by the security, less by all the interest and by a portion of the capital. Now, what does that sum realized by the security represent? If you asked any commercial man or any accountant or lawyer, he would say that it represented both the arrears of income and capital, and that it ought to be apportioned, so much for the amount of interest due at 5 per cent., and the rest for capital. In that state of things, but for this clause in the will, so much of that money as represents income would go to the tenant for life, and the security would have actually produced it. It produces the money, and if some of the money has to be treated as income, it produces income. It is said on behalf of the respondent, that so much of that money as is income is to go from the tenant for life to the remaindermen, to whom it does not belong; but it appears to me that Mr. Clare, on behalf of the appellant, is right when he says that this money which the security has produced is income, and is income produced during the life of the tenant for life and before she married again. It appears to me that we must allow this appeal, and make an order such as is asked for in the notice of appeal, and declare that the appellant, the widow, is entitled to have the residue of that sum of money apportioned between capital and income in the proportion of what was due in respect of income and what was due in respect of capital.

KAY, L.J.—From respect to Stirling, J., from whom we are differing, I will add a very few words. The sum which has been realized from the security taken by the trustees after the testator's death for a debt due to the testator is not sufficient to pay the capital of that debt.

The debt was £3,500, and the sum realized is only about £3,000. What was due was not merely the sum of capital, but an arrear of interest which accrued during the lifetime of the tenant for life. The ordinary rule of the court is to be applied to that first of all. What is that sum which has been recovered? Is it capital, or is it income, or is it partly capital and partly income? By the settled rule of the court that sum recovered is partly capital and partly income. You cannot possibly alter that. That is the ordinary rule, and it is a very well settled rule. That is independent of the will, and without looking at the will at all. In that state of things you have to apply the will. Now, I find that the will gives to the widow the income produced by the testator's residuary estate, of which this debt formed part, whatever it may be. Whether any portion of the estate is a wasting security or not, the actual income of the whole residue is given to the widow as long as she remains the testator's widow, and if she marries again then she has an annuity. As I have already said, this sum was realized while she was a widow, and the whole arrear of income is an arrear of income which accrued due while she was a widow. Therefore *primâ facie* it cannot be denied for a moment that the widow, the tenant for life, is entitled to so much of this sum as represents income. Is there anything in the will which alters that? If there be, the effect of it is, as has already been said, to give to the remainderman that which is income, and which *primâ facie* belongs to the widow. Where is there anything in the will which does that? The clause relied on is in these words: "But no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income." Did this sum produce income or not? Here is this sum realized during the lifetime of the widow and tenant for life, part of which is income and part of which is capital. If that is not "producing income," I do not know what the words mean. That security, being realized, has produced income; and you cannot say that this clause applies, on the ground that the security did not produce income. Then does this clause mean that if the security does produce income, although it does not produce it year by year, but produces it after a delay and a lapse of time during which there was no income made, can you say the effect of this clause is to give the income to the remainderman and take it away from the tenant for life? I cannot find a word in the will to that effect. The clause seems to me to be intended as a protection to the remainderman in cases of this kind; suppose there was some investment which could not well be realised and which produced no income at all, and suppose the widow were to say: "I am entitled to have that valued as from the death of the testator, and have 4 per cent. out of the capital as my income on that," the clause, I think, is meant to meet such a case as that. The tenant for life would not be entitled, where the investment produced no income whatever, to have an imaginary income paid to her out of capital at the expense of the remainderman. But that is not this case. Another mode of illustrating

the case is this. Suppose the mortgage money realized produced enough to pay both principal and all the arrear of interest, could the remainderman say, "I will take the whole fund, both principal and interest"? It seems to me impossible. If he could not in that case, why should he take that part of the fund which is a portion of the income to which *primâ facie* the tenant for life is entitled? With very great deference to the judgment of Stirling, J., I think this will does not touch the particular facts that have happened in such a way as to deprive the tenant for life of this income, which by the rule of the court she is entitled to, and give it to the remainderman. It would be totally contrary to the meaning of the provision of this particular will. I therefore agree that the decision of Stirling, J., must be reversed.

A. L. SMITH, L.J.—The whole ground has been fully covered by what has been said by the lords justices who have preceded me, and I have nothing to add except to say that I entirely agree with them.

Appeal allowed.

Solicitors, *Few & Co.*, for *A. F. Hart*, Eastbourne; *F. G. Evan Jones; Stones, Morris, & Stone.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) Nov. 27, 28, 29.

SMITH *v.* SOUTH-EASTERN RAILWAY CO. (*a*.)

Negligence—Railway company—Level crossing—Contributory negligence.

The plaintiff's husband was killed by a train at a level crossing on the defendants' line. The crossing was one for vehicles, and also for foot passengers. A man was stationed there by the defendants, and occupied a cottage close to the crossing. It was the duty of this man to go out and signal the trains as they passed, to show that the line was clear. The plaintiff's husband, who was acquainted with the man and lived in the neighbourhood, called at the cottage, and almost immediately after he left it was run over and killed by a passing train. The man gave no warning to the plaintiff's husband that a train was approaching, and did not go out to signal the train. There would have been no statutory duty for the defendants to have a man at the crossing if it had been a crossing for foot passengers only.

Held, that there was evidence to go to the jury of negligence on the part of the defendants.

Held, also, that there was evidence from which the jury might infer that the plaintiff's husband had not been guilty of contributory negligence, and that the evidence was not such that the circumstances were equally consistent with the accident having been caused by the plaintiff's husband's negligence as by the defendants'.

Motion by the defendants that judgments, which had been entered for the plaintiff, should be entered for the defendants, on the ground that there was no evidence proper to be left to the jury; or for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence.

The action was a claim under Lord Campbell's Act for damages for the death of the plaintiff's husband, which was alleged to have been caused by the negligence of the defendants.

On the 16th of December, 1894, Thomas Clark Smith, the plaintiff's husband, was killed at a level crossing on the defendant's railway, called the "Stone Crossing," by a passing train. There was a cottage on the down side of the crossing occupied by a man named Judges, whose duty it was to open and shut the gates for the purpose of allowing carriage traffic to pass. It was also his duty on hearing a gong sound, which announced the approach of a train, to go out and signal to the driver if the line was clear. The only way of getting to Judges' cottage was across the line. Smith, who lived on the opposite side of the line to that on which the cottage stood, on the night in question came to the cottage to inquire whether his wife was there. On being told that she was not, he went out again. Within a very short time after he had left the whistle of the up train was heard. Judges did not go out to signal the train, and the engine-driver did not slow down. The latter, however, whistled 200 yards before he came to the crossing. He was travelling at the rate of thirty-five to forty miles an hour. A man named Skinner, the son of the former attendant at the crossing, was in the cottage at the time of Smith's visit. When this man heard the whistle he looked out of the window, and when the train had passed he went out with a lantern and found the mangled remains of Smith two or three rods beyond the crossing, on the up side. The night was dark, but clear. There were no circumstances of peculiar danger at the crossing. On the gates, or on one of them, there was a lantern which showed a red danger signal up and down the line when the gates were opened across the line. The line was straight for a mile and a quarter one way and for 500 yards the other way. The negligence alleged was the omission of Judges to come out to signal the train.

The jury found a verdict for the plaintiff, damages £200 for the widow, and £200 for each of the children, and judgment was entered accordingly.

Willis, Q.C. (*W. Peel* and *W. O. Willis* with him), for the appellants, the railway company.—The judge ought not to have left the case to the jury. There was no evidence of negligence on the part of the defendants. The defendants were under no obligation to have a man at the level crossing for the protection of foot passengers. 8 & 9 Vict. c. 20, contains the statutable requirements with regard to level crossings. Section 61 deals with the requirements in the case of crossings for foot passengers. These were to supply and maintain good and sufficient stiles or gates. That was done in the present case. Judges was placed at the crossing to comply with the requirements of section 47, which deals with crossings for carriage traffic. Those requirements were, among others, to maintain gates of a certain size, which shall communicate with a servant of the company who shall be employed to open and shut the gates and to keep them constantly closed across the line, except during the time when carts, &c., were passing. *Stubley* v. *London and North-Western Railway Co.*, 14 W. R. 133, L. R. 1 Ex. 13, and *Cliff* v. *Midland Railway Co.*, 18 W. R. 456, L. R. 5 Q. B. 258, were authorities for the proposition that unless there were circumstances of peculiar danger the defendants were under no obligation to keep a man at the crossing as far as foot passengers were concerned, and they were not bound to continue a voluntary precaution: *Skelton* v. *London and North-Western Railway Co.*, 15 W. R. 925, L. R. 2 C. P. 631. Moreover, assuming the negligence of the defendants to have been proved, in the course of the plaintiff's case evidence came out which went to show that the plaintiff's husband must have himself been guilty

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

of negligence, and that was a ground for a non-suit: *Davey* v. *London and South-Western Railway Co.*, 12 Q. B. D. 70, 32 W. R. Dig. 172. Smith had fifteen feet to walk before he came to the up line. Either he looked along the line or he did not look. If he looked, he ought not to have crossed till the train had passed; if he did not, he was obviously guilty of negligence. The burden of proof is on the plaintiff to show that the accident was due solely to the defendants' negligence. In order to do that he must give some *primâ facie* evidence that he himself was not guilty of negligence; and where, at the end of the plaintiff's case, the facts proved or admitted in cross-examination are equally consistent with the accident having been caused by the plaintiff's negligence as by that of the defendants, the plaintiff ought to be nonsuited: *Wakelin* v. *London and South-Western Railway Co.*, 35 W. R. 141, 12 App. Cas. 41, and *Cotton* v. *Wood*, 29 L. J. C. P. 333, 9 W. R. C. L. Dig. 59. The plaintiff must not only give evidence of the defendants' negligence, but also evidence connecting that negligence with the accident. For that purpose he must show that the accident was not due to his own negligence. *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery*, 27 W. R. 191, 3 App. Cas. 1155, shows the sort of facts which ought to lead the judge to the conclusion that the accident was as much due to the plaintiff's as to the defendants' negligence.

Crispe (*A. Bassett Hopkins* and *G. K. T. Purcell* with him), for the respondent, was not called upon.

Lord ESHER, M.R.—The minute and able argument of Mr. Willis in this case has left me without any doubt at all as to what it is right to do. The judge was asked to hold, as a matter of law, that there was no evidence in this case of negligence on the part of the defendants; and, secondly, if there was negligence on the part of the defendants, that there was no evidence of the exercise of reasonable care on the part of the plaintiff, and on that ground he was not asked to non-suit, but, as it is said now, to direct the jury to find a verdict for the defendants. The argument dealt with a great many points of law. With respect to such a matter as this it is obvious that the question is one of law. The question was whether the judge was bound in law to do that which he was asked to do.

Now, I shall not enter into a discussion of what the different points of law were, for, assuming them all to be as argued by Mr. Willis—not that I agree to them—in my opinion there was not sufficient ground upon which the judge was entitled, as a matter of law, to direct that the verdict should be entered for the defendants.

Upon the question of whether there was evidence of negligence on the part of the defendants, Mr. Willis did not argue that there was not. The whole stress of his argument was directed to the question of the contributory negligence of the plaintiff's husband. Now, in one way or another, if there is contributory negligence in such a case as this on the part of the plaintiff, contributory negligence which conduces to the accident, I think nobody doubts that the plaintiff cannot recover. On whomsoever the burden of proof lies, if it is true that, although the defendant was negligent, the plaintiff was also negligent, and both contributed to the accident, it must be admitted on all hands that the common law of England is that the plaintiff cannot recover. He has not made out his cause of action. You may describe that in many phrases: he has not made out that the negligence of the defendant was the sole cause of the accident which happened; he has not made out that the negligence of the defendant was the cause, because upon that finding it would be evident that it was not the negligence of the defendant, but the joint negligence of the plaintiff and defendant, which was the cause. Therefore the question here is reduced to this, Could the judge properly direct the jury in this case, as a matter of law, that the negligence of the plaintiff was proved, or ought to be taken as proved?

I must go further; I must say that it is an admitted proposition of law also that if there is not evidence of any material fact, then the judge is bound to direct the jury so; and therefore it is the duty of the judge to consider whether, upon the facts, he can really say that there is no evidence to go to the jury.

Now, we must look to these facts for the purpose of determining what is the state of the facts as to the alleged want of reasonable care on the part of the plaintiff's husband. There was a level crossing, which seems to be a marked and paved crossing going from one side of the railway to the other, and that level crossing was a highway for the public. It was a highway for carts, carriages, and vehicles, and also for foot passengers. There seems to have been one causeway, upon which carriages and foot passengers would have crossed. There were two gates on each side of the railway. There was a wide gate, and there was a smaller gate; and through the wide gate, when it was free, carts and carriages would go. But, even when that gate was shut, still there was this small gate which would let a foot passenger go on to that causeway. That being the case, a foot passenger had a right to go across. Now, it was proved that this foot passenger was—at least there was evidence before the jury that he was—a respectable man, and that he was on that night an absolutely sober man, and there was evidence upon which a jury might come to the conclusion that he had come across the railway, and had gone to this house or cottage to ask whether his wife was there. He was told she was not. At that time he found the man Judges in the cottage by the fire, I believe reading. When he was told that his wife was not there, and after some conversation, he went out of the cottage. The jury would be of opinion most undoubtedly, from what happened immediately afterwards, that he went out of the cottage with the intent, then and there, to cross the railway again; and they might think that he, in truth, did immediately go on to this causeway to cross the railway.

Some suggestion was made that he was not sober. That would be a question for the jury, not for the judge. The judge cannot say, as a matter of law, whether a man is drunk or not.

Then there is another fact. Judges had a duty to perform, and that was—at all events a jury might come to that conclusion—that when a train, either by day or by night, was to pass over the level crossing, he ought to be outside and ought to signal. Signal for what? To assist the driver of the engine to do that which would be necessary. There was evidence that he habitually did it. Now it is immaterial, for the purpose for which I use it, whether that duty was a duty to the public. It was a duty, at all events, to the railway company, whose servant he was. The plaintiff's husband, therefore, who had been at that cottage before, and who lived in the neighbourhood, the jury might well come to the conclusion, knew—not to whom the duty, according to law, was owing—but knew that that man was in the habit of doing that thing for the railway when a train was approaching; and the jury might very well, therefore, come to this conclusion—that such a man, with such knowledge, had a right to consider that there was no train coming, and that therefore he

might go across the causeway in the ordinary way without any great attention, and that, under the circumstances, even if he did not look up or down the railway, but did neither, yet he was not guilty of a want of reasonable care. They might act upon the very view stated by Lord Cairns in *Wakelin* v. *The London and South-Western Railway Co.*, where he said that the plaintiff, the man who was crossing, had a right to suppose from the practice of the railway company—not from their duty, but from their practice—that if there was a train coming, it would whistle; and that if there was no whistle, the jury might then reasonably come to the conclusion that the plaintiff was thrown off his guard, as it were, and was left in a state of mind in which it was not unreasonable that he should not look to see if there was a train approaching. So here the jury, as it seems to me, might well think that the fact of Judges staying in his cottage when the plaintiff's husband would know that, according to his practice, if there was a train coming, he would not stay in the cottage, but would go outside, the jury might very well think that that would produce in this man's mind a state of partial security, which would prevent it being a want of reasonable care, that he did not look either to the one side or the other for a train, and that he came to the conclusion in his own mind, though in fact it was erroneous, that there was not a train coming; and therefore the jury might be satisfied, as they were satisfied in this case, that the plaintiff's husband was not guilty of a want of reasonable care. I think, therefore, without entering into all the various points which were so ably argued, that this is sufficient to determine the case, and to permit us to say that the judge was right in declining to direct, as a matter of law, that the verdict be entered for the defendants.

I ought to have said that as to the misdirection I cannot see a symptom of it.

I will only say one more thing, which has nothing to do with this judgment really, but with the judgment of the Court of Appeal in that case that went to the House of Lords: *Wakelin* v. *London and South-Western Railway Co.* The judgment of the Court of Appeal in that case, delivered by me, was an effort to state what this court considered that the law as to all these points was at that time. I heard that judgment read yesterday, and, as far as I myself am concerned, I think that it was absolutely correct in every part. It is very minute, it is very carefully stated, and I take notice that that judgment was agreed to by Lord Bowen and by Fry, L.J., who sat beside me; and I only say that I wish that it had been reported, and I wish it now, and I think it would be useful to the profession if it were reported now in some note to some case of this kind.

LOPES, L.J.—There are two grounds upon which the defendants ask for a new trial. One is the ground of misdirection. Perhaps I ought almost to have said that there is properly only one ground, because if the learned judge permitted the case to go to the jury where there was no evidence to go to the jury that was a misdirection; but the misdirection was put on other grounds, and I allude to it for this reason, that on reading the summing up I can see no other ground of misdirection that can for a moment be relied on, except this ground of misdirection, in permitting the case to go to the jury when, as it is said, he ought not. That is the only ground of misdirection that I can see. It is said that the judge ought to have withdrawn this case from the jury as a matter of law. It is said there was no evidence of negligence on the part of the defendants; and if there was negligence of the defendants, then that there was no evidence of the negligence producing the mischief—by which I mean that it led to the death of Smith, and that his death was attributable as much to his own negligence as to any negligence of the defendants. That is how it is put.

Very interesting and difficult questions have been discussed in the course of this case; but I do not propose to express any opinion with regard to them. I am satisfied to say that the plaintiff who brings an action of this kind must give evidence of the negligence of the defendants causing the injury to the plaintiff. Again, what the duty of a man stationed at a level crossing might be when there is a free passage for foot passengers and closed gates which have to be opened for vehicles, whether the duty he has to discharge is a duty to his employers or a duty to the passengers and to those who drive vehicles over the causeway—all that is unnecessary to decide.

Now, the first question is whether there was any evidence of negligence of the defendants. What was the duty of the defendants? Their duty was this: to use reasonable care and apply proper precautions in the management of their railway at that particular spot; and it seems to me that they have determined for themselves what was the reasonable and proper precaution they ought to adopt at that particular spot, because they put there a man whose duty it was to signal each train as it passed. If that was so, I think it may rightly be said that it would not be only a warning to the engine-driver, but would also be a warning to the general public, including in that description not only those who came with vehicles to cross the way, but also foot passengers using it.

On the night in question there was a man placed there, called Judges. I do not desire to say much about Judges. He was not very competent; he was a man of considerable age, and, moreover, he was very decrepit, and he does not appear to have had much experience in the duties he had to perform. What did he do? It being his duty to signal the passing train, he remained in his lodge reading, and did not signal.

Now, if it was the duty of the railway company to use reasonable care and proper precautions, and if they thought that this was a reasonable and proper precaution, it is clear to my mind that their servant failed in doing that which he ought in order to observe that care and precaution. He failed to do that, and he was the servant of the company, and the company therefore are responsible. It seems, therefore, to me, with regard to this part of the case, that there clearly was evidence which ought to be left to the jury as to whether the defendants had used reasonable and proper care and proper precaution in the management of their railway or not.

But then it is said, in the circumstances of this case, nothing is known as to how Smith came by his death; and the case of *Wakelin* v. *The London and South-Western Railway Co.* is relied on. I quite agree with my lord, and I think it was a great pity that that case was not reported. It seems to me that it does lay down very important propositions of law. It is said here that what happened to Smith was fully as consistent with want of reasonable and proper care on his part as it was consistent with the want of reasonable and proper care on the part of the defendants. It is said this train had lights, it whistled, and could be seen for 760 yards; and that Smith must have contributed to his own misfortune by the heedless and reckless way in which he crossed the line with the danger before his eyes. If that could be established, of course the argument which Mr. Willis laid before the court, relying on the case of *Wakelin* v. *London and South-Western Railway Co.*, would be fully

sustained. Can it be said that what happened to Smith was equally consistent with his as with the defendants', negligence having caused it? That is a matter on which I do not hesitate to say that in the course of the case I felt a difficulty, and I have given it the best thought and attention which I can, and it strikes me in this way. Smith knew the crossing; he knew the practice at the crossing; he knew that generally and habitually trains were signalled. Then may not the jury have thought, and may they not be justified in thinking, that Smith, seeing Judges in the lodge, making no attempt to signal any approaching train, might have thought, and might reasonably have thought, that he might safely cross the line without taking such proper precautions for his own safety—namely, looking upwards and downwards, and listening for a whistle, as he would have done if he had not been misled by the conduct of Judges? Now, it seems to me, after careful consideration, that that is a view which a jury might reasonably take, and had I tried this case, and the matter had occurred to my mind as it does now, I feel I could not have withdrawn the case from the jury. It was a matter in respect of which they were entitled to give an opinion, and in respect of which their opinion ought to be asked. It was asked, and they have found for the plaintiff. Therefore I think their verdict cannot be disturbed.

KAY, L.J., after refering to the facts, proceeded:—Now, the gates which closed the carriage way, or one of them, had upon the middle of it a lamp, and when the gate was open it would open across the railway; and then at night the lamp would show up and down the line a red light, which was the danger signal, I understand. Therefore it could not be—at least, I will assume that the jury might say it could not be—only for the sake of the vehicle traffic that the man was to be on the side of the line when a train passed, and show his white light. The jury was surely justified in inferring that that was to show that the line was clear of any kind of obstruction either by vehicles, or by people passing, or by any other danger which might well occur upon a level crossing. In argument this point was put by me: Suppose a school of children were passing across this line on a dark night, and the man was there, and saw them passing, and saw that they were in danger, would it not be his duty to signal the train that there was danger, and to try, if he could, to prevent the train running over those children? I should suppose that the jury might well infer that that was part of his duty. [After continuing the recital of the facts, his lordship proceeded:] The misdirections alleged were these. The first was that "the railway company put persons on the level crossings to take care of them." What misdirection is there in that? It may perhaps be indefinite. It may mean "Judges was placed at this level crossing to take care of the level crossing." Then the second thing objected to was this—that "if the company had not kept, as they ordinarily do, persons at level crossings to take care of them and protect the public, they must necessarily go slowly." Is there any misdirection there? They are bound to take reasonable care and caution; and if there is no man at a level crossing, surely they are bound to take all the more care and caution then that they do not interfere with people who may be crossing there. I see no misdirection in that. The third is this: "The railway company, being obliged to protect the gates as far as vehicles are concerned, are necessarily obliged as far as foot passengers are concerned to protect them also, if they keep persons there as they do. The man who has to protect the carriages will also protect the foot passengers." Is that a misdirection? I confess it seems to me to be absolutely accurate, and that there is no misdirection in it at all. Now, the fourth and last was this: After describing what Judges' duties were, as to which there was no conflict, the learned judge says: "Any neglect of duty on the part of Judges is, I tell you, a neglect of duty on the part of the railway company, for which the railway company is responsible." Can it possibly be said that where an official, like Judges, is placed at a level crossing like this, and neglects his duty, that neglect of duty is not attributable to the railway company? Is it possible to deny that?

The next point is: Was there any evidence to go to the jury of neglect of duty on the part of the railway company in this case? The duty of the railway company was acknowledged to be to have a man on the line with a light whenever a train passed. That they assumed to be their duty, and they had a man there whose duty it was to be always present when a train passed. The learned judge in his summing up does not accuse the engine-driver of any neglect of duty whatever. I am not sure that the jury would agree with him in that, because the engine-driver says in his evidence that he did observe that the man was not there when the train was passing. He missed the light which the man ought to have shown him, and which he might have seen a long distance before he came to the crossing, because the line, as is shown by the photograph, is perfectly straight for some distance on the side on which the train was approaching. Now, what was the duty or what might the jury fairly think was the duty of the engine-driver when he saw that the man was not there and there was no light shown? If the man had not a red signal to show, the danger signal would be the absence of the white light, and he did not show the white light, and yet the engine-driver drove this train at from thirty-five to forty miles an hour past the level crossing. Might not a jury say that that was some evidence of want of proper caution and care on the part of the engine-driver? I should think they might, at any rate it is a matter to be left to them.

Then the default of Judges was a thing which cannot be denied for a moment, and the only way in which Mr. Willis sought to meet it was this. He said that he had no duty whatever towards the foot passengers, his duty was only with regard to vehicles and horses. I utterly deny that. When a man is placed, as Judges was, with the duty of signalling when any train passed, night or day, to show, as Mr. Willis said again and again, that the line was clear, that is a duty as much for the safety of the foot passengers as for the safety of carriages and horses or the safety of the train, or at any rate the jury had a right to infer that. Therefore it seems to me that there was evidence upon which the jury might well infer a neglect of duty on the part of the railway company.

Then it was said that the facts are equally consistent with a want of due precaution on the part of the man himself, and that the law is that the judge should say: "These facts are equally consistent with either hypothesis, and therefore there is nothing for the jury to decide." I venture to say, with all possible respect to those who hold a different opinion, that as long as we have juries in these cases, and as long as they are to be the judges of fact, it must be a very remarkable case indeed in which a judge will take upon himself to say: "I will weigh these circumstances and draw inferences from them, and say that they weigh exactly the same on the one side as on the other, and therefore I will withdraw the case from the jury." There may be such a case, and the House of Lords seems to have considered in one case

which was before them, that it was such a case. I can only say that those cases must be very rare indeed, and it does not seem to me that this is that case, and I entirely agree with what has fallen from both the other members of the court. In this case it was a fair inference that Thomas Clark Smith, who was familiar with this crossing and with the lodge, and knew Judges, and would know what Judges' duties were, as he found that Judges gave him no warning, and did not go out upon the line—it was a fair inference that he was misled by that neglect of duty on the part of Judges, and did not take such precautions as he ought to have taken if Judges had gone upon the line and had done his duty by warning him that a train was coming.

It is said: "The engine-driver began to whistle ten seconds before he reached the crossing." Whether the man heard the whistle or not in the hurry of leaving the cottage—for it seems to have occurred just as he was leaving the cottage—was all for the jury to consider.

It seems to me that there was not that even balance of evidence which would justify any judge in withdrawing this case from the jury and saying that the circumstances were equally consistent with this accident having been caused by the negligence of the poor man himself as with having been caused by the negligence of the company, and that therefore there was no case for the jury. To my mind this was not such a case, and no judge would have been justified, in the present state of our legal proceedings, in withdrawing this case from the jury on that ground.

On the question whether the verdict was against the weight of evidence, I need say little. This is not a case to which it is possible to apply that principle, and it is applied very rarely in any case.

I wish to guard myself entirely against its being supposed that I agree to the view that it is any part of the plaintiff's duty, in a case of this kind, either by pleading or defence, to make out a *primâ facie* case that the plaintiff has not been guilty of contributory negligence. I reserve my opinion upon that point entirely, and I do so for this reason: I see that there is very considerable conflict of judicial opinion on the subject. In the cases in the House of Lords which have been cited very eminent judges indeed have expressed a contrary opinion. I myself rather incline to the opinion, as at present advised, of those learned judges who have expressed their opinion in the House of Lords; but I reserve my opinion on that subject until the question comes before us for decision.

Appeal dismissed.

Solicitor for the defendants, *A. Willis.*

Solicitor for the plaintiff, *Edward Clarke.*

High Court of Justice.

Chan. Div.
Chitty, J.

Feb. 14, 15.

THWAITES *v.* COULTHWAITE (*a.*)

Gaming — Partnership — Action for account—Illegal business — Bookmaker's business — Betting — Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *s.* 3—*Place used for betting.*

In an action by a turf commission agent or bookmaker against his partner, who was the active partner and transacted the business at race meetings, for an account of the profits of the business,

Held, that, inasmuch as the conduct of a bookmaker's business did not necessarily involve any violation of the provisions of the Betting Act, 1853, *and it appeared that the plaintiff contemplated that the business would be carried on in conformity with the rules of Tattersall's enclosure at meetings, and not in such a manner as to come within the prohibition of the statute, the plaintiff was entitled to relief at the hands of the court, and the order must go for an account, notwithstanding that the defendant might have acted illegally at meetings.*

Construction of the word "place" in the Betting Act, 1853, *considered.*

Action.

This was an action by a turf commission agent or bookmaker for an account of a bookmaking partnership entered into with the defendant, who was also a bookmaker and the active partner in the business. The partnership was an oral one, made on the 21st of August, 1894, by the terms of which the plaintiff contributed one-fourth part of a capital of £1,000, and was to receive a proportionate net share of the defendant's book. The defendant having attended some four or five race meetings, the plaintiff on the 12th of September, 1894, wrote a letter terminating the partnership, and asking for his £250 to be returned. The defendant wrote in reply, enclosing a cheque for £250. The plaintiff alleged large profits, and claimed a fourth share. The defendant offered the plaintiff about £20, and, this being declined, paid the sum into court.

The main defence to the action was that the partnership business was an illegal one.

The defendant adduced evidence to show that the plaintiff was well aware that the business of a cash bookmaker—which appeared to be the turf description of this business—could not be conducted in Tattersall's enclosures without contravening the Betting Act, 1853, and that, whereas it was the custom of the "large men" who booked principally credit commissions to conduct their business without display or ostentation, it would be the custom of men like the defendant, who sought cash bets, to attract as much of the attention of the public as they could by their get up and appliances, such as a large book with owner's name on it, a bag, and betting tickets, and, above all, a portable, collapsible box to be used in Tattersall's enclosures in contravention of rules, for the bookmaker to stand on. It appeared that the defendant confined his operations at race meetings to betting in the enclosure, and that he did not bet on the course.

Levett, Q.C., and *Moyses*, for the plaintiff.—The plaintiff is entitled to the usual order for an account of profits.

R. Younger, for the defendant.—First, the circumstances show accord and satisfaction. Secondly, the business is within the prohibition of the Betting Act, 1853, and the court will not aid the plaintiff. Any person using a place for the purposes of betting is within section 3, and the plaintiff must have known or be taken to have known that the business intended to be carried on by the defendant, the active partner, would bring him within the prohibition of that enactment.

Levett replied.

The following authorities were cited: Lindley on Partnership, 6th ed., p. 103, and *Doggett* v. *Catterns*, 13 W. R. 160, 390, 19 C. B. N. S. 765; *Shaw* v. *Morley*, 16 W. R. 763, L. R. 3 Ex. 137; *Bows* v. *Fenwick*, 22 W. R. 804, L. R. 9 C. P. 339; *Gallaway*

(*a.*) Reported by J. F. Waley, Esq., Barrister-at-Law.

v. *Maries*, 30 W. R. 151, 8 Q. B. D. 275; *Eastwood* v. *Miller*, 22 W. R. 799, L. R. 9 Q. B. 440; *Reg.* v. *Preedy*, 17 Cox C. C. 433; and *Liddell* v. *Lofthouse*, 40 SOLICITORS' JOURNAL, 278.

CHITTY, J.—The plaintiff and defendant entered into a partnership in a business, which was that of a bookmaker. The partnership was at will, and there was no writing. It began on the 21st of August, 1894, and was terminated by notice by the plaintiff on the 12th of September, 1894. The plaintiff received back from the defendant the £250 which he advanced as his share of capital in September, 1894. The plaintiff now asks for an account of profits. The first defence was accord and satisfaction. [His lordship held that that defence failed for reasons which do not call for a report.]

The second and most important defence was that the partnership was illegal, being for a purpose forbidden by the statute 16 & 17 Vict. c. 119. The first question that arises is: Is the business of a bookmaker necessarily illegal, must it be so carried on as to fall within the provisions of the statute? That question must, I think, be answered in the negative. The statute 8 & 9 Vict. c. 109, as is well known, does not make betting illegal. It merely avoids the wagering contract. A man may make one bet or many, or carry on a betting business, provided the business as carried on does not fall within the statute 16 & 17 Vict. c. 119. That a betting business may be carried on without coming within that statute is conclusively shown by *Doggett* v. *Catterns*, where the Court of Exchequer Chamber held that the habitual use of a particular spot in Hyde Park for the purpose of making bets with persons resorting thereto was not the using of a "place" for the purposes of betting within the meaning of the Act.

The next question is: Did the parties intend or contemplate that the business should be carried on in a prohibited manner? If they did, it was illegal, though nothing definite was said at the time that the partnership was entered into. It is plain that the case is not within section 1 of 16 & 17 Vict. c. 119. The partners were not the owners or occupiers of any "house, office, room, or other place" for the purpose of carrying on business. The point for the defendant turned on section 3, which is aimed not only at owners or occupiers but at persons using a place within the prohibition of the Act. The plaintiff's evidence was to the effect that he contemplated that the business would be carried on in the ordinary way in which the business was carried on by a bookmaker in Tattersall's enclosure at race meetings. With reference to the practice of bookmakers standing on what are called "boxes," the object of which was to elevate the bookmaker above the heads of other persons in the enclosure, the plaintiff's evidence was that he had frequented some races, and that the rules of Tattersall's enclosure were that such "boxes" were not permitted to be brought in, and there was no substantial controversy as to this. But the defendant said that there were bookmakers who, notwithstanding the rules, by "squaring" or bribing the gatekeepers managed to get their boxes through, or otherwise smuggled them in.

The plaintiff's evidence was that a "box" was not used by the defendant during the plaintiff's acquaintance with the defendant previous to the partnership or at the meetings which the plaintiff had attended. The result of the evidence is that though the defendant himself may have contrived to bring in and use a "box," he being the active partner, yet the plaintiff did not anticipate that mode of carrying on the business.

The gist of all this dispute as to the use of a "box" or like contrivance is that it brings up the question which has often been mooted, What is a place for the purposes of betting within the meaning of the statute of 16 & 17 Vict.? It is obvious that, betting or not betting, a man must be in some place. But in the construction put upon the Act it is plain that the word "place" there is not used in its most general sense. The court has frequently been asked to decide this question. The Act is part of the legislation against gaming houses. The question here turns on section 3. A place must in some sense be fixed and ascertained to be within section 3, but the courts have wisely refrained from defining a meaning, the Legislature having given no definition beyond such as is afforded by the context of the enactment. The court has to apply the Act to the circumstances of each particular case. A place may unquestionably be an uncovered place: *Eastwood* v. *Miller*, a case under section 1. It may be a little bay or hoarding supported by stays on a quay side, as was decided in *Liddell* v. *Lofthouse* by Lindley and Kay, L.JJ., in the Divisional Court. It may be a temporary wooden structure erected on a strip of ground bounded by an iron railing with a line of desks fronting both ways: *Shaw* v. *Morley*. The court held the structure, although open to the air, to be both an office and place within section 3. Again, in the well-known umbrella case—*Bows* v. *Fenwick*—where the bookmaker fixed an umbrella in the ground, capable of sheltering seven or eight persons, and kept it up all the day, the day being only a showery one, the court had no difficulty in saying that the umbrella was a place within the Act.

To come back to the question here, Was it the intention of the parties that the betting business should be carried on at a place within the meaning of the Act, and did the plaintiff contemplate that it should be carried on by means contravening the rules as to Tattersall's enclosures? I am satisfied that the business of bookmaking as carried on by the "large men," as they were called in the defendant's evidence, in Tattersall's enclosures can be carried on without violating the Act. Did the plaintiff intend that the business should be carried on illegally? No doubt some cunning bookmakers carry on business in the way described by the defendant. I, however, am not satisfied on the evidence that the plaintiff intended the business to be so carried on. There is another alternative—namely, that the plaintiff might have become aware that the business was in fact being carried on illegally. But no case of that kind is made. The result, therefore, is that the plaintiff is entitled to an account, with costs up to and including judgment. Further costs reserved.

Judgment for the plaintiff.

Solicitors, *T. H. Philpots*, for *Thos. Platts*, Blackburn; *Radford & Frankland*, for *Bowden & Widdowson*, Manchester.

Chan. Div. | Stirling, J. | Nov. 6, 7; Jan. 15.

In re CAREW.
CAREW *v.* CAREW. (*a.*)

Will—Reversionary interest — Forfeiture clause—Gift over in case of legatee being under any legal disability on death of life tenant—Meaning of "legal disability."

Testator gave property to B. for life, with remainder

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

to C., but in case of C.'s being at the time of B.'s death under any legal disability in consequence whereof he could be prevented from taking the same for his own personal and exclusive benefit, then over to others.

During B.'s life C. mortgaged his reversionary interest, and also executed a voluntary settlement of his equity of redemption in the premises. In B.'s lifetime also, an order was made on the further consideration of an action for the administration of the testator's estate, that C. (who was also one of the executors) should pay to the trustees of the testator's will a large sum of money representing assets of the testator received by C. as executor, and that C.'s reversionary interest was liable to make good the money so found due by him as executor.

Afterwards B., the life tenant, died, and on the day of B.'s death, but previous to the death, C. was, on his own application, adjudicated bankrupt; but the order of adjudication was afterwards annulled, on the ground that it ought never to have been made.

Held, that the words "legal disability" as used in the will indicated a disability imposed by act of law, rather than a disability arising simply from the voluntary act of C.; that upon the above facts C. was not at the time of B.'s death under any disability imposed by act of law, and consequently that the event upon which the gift over was to take effect had not occurred.

The testator, George Carew, by his will, after giving his wife a specific and a pecuniary legacy, made the following residuary bequest: "And as to all other my worldly estate and property of every description, I give the income arising therefrom to my said wife for her life, and subject thereto I give one equal moiety thereof to my son Henry George Carew; but if he should predecease either my said wife or me, or in case of his being at the time of the death of the survivor of my said wife and me under any legal disability in consequence whereof he could be hindered in or prevented from taking the same for his own personal and exclusive benefit, I give the same, subject as aforesaid, unto his widow or wife and children (other than his daughter Jessie Carew) living at the death of the survivor of my said wife and me, to be made over to them respectively on their respectively attaining twenty-one, the income arising from the shares of such children to be in the meantime applied for their benefit, and I appoint my said wife and son executors."

On the 11th of January, 1886, the testator died, leaving a widow, and she and the son Henry George Carew proved the will. On the 8th of August, 1892, the usual judgment for the administration of the testator's estate was given in this action.

By deeds dated the 24th of March and the 2nd of June, 1893, H. G. Carew mortgaged his interest under the will to Francis Dashwood to secure two sums of £600 and £300 respectively. By a deed dated the 15th of March, 1894, H. G. Carew and Emma, his wife, mortgaged their respective interests under the will to the Legal Reversionary Society to secure £100. By a deed dated the 7th of July, 1894 (which recited the claims made against H. G. Carew in the administration action), he assigned to a trustee all his interest under the will upon trust to raise a sum of £2,500 for the benefit of his wife and children, and subject thereto upon trust for himself.

On the 29th of July, 1894, the chief clerk's certificate was made, finding a sum of £5,188 16s. 10d. due from Henry George Carew. On the 30th of January, 1895, an order was made on further consideration whereby H. G. Carew was ordered to pay the said sum of £5,188 16s. 10d. to the plaintiffs as the present trustees of the testator's will, and it was declared, without prejudice to any claims of the wife and children of H. G. Carew to or in respect of the share or interest (if any) given to Henry George Carew by the will of the testator, that the interest (if any) coming to H. G. Carew under the testator's will was liable to make good to the testator's estate the said £5,188 16s. 10d.

On the 16th of March, 1895, Mrs. Carew, the widow of the testator, died. On the same day, and before the death of Mrs. Carew, a receiving order and an order of adjudication in bankruptcy were, upon his own application, made against H. G. Carew. On the 26th of March, 1895, an order was made staying proceedings in the bankruptcy until after the 4th of April following; and on the 4th of April a further order was made, whereby the receiving order and order of adjudication of the 16th of March, and all subsequent proceedings, were annulled on the ground that the said orders ought not to have been made.

Under these circumstances a summons was taken out by the surviving trustees of the testator's will, asking that it might be declared who, according to the true construction of the will and in the events which had happened, were entitled to the moiety of the testator's estate given to H. G. Carew, subject to the life interest thereby created in favour of the testator's widow.

C. E. Bovill, for the trustees.

Graham Hastings, *Q.C.*, and *W. D. Rawlins*, for Mrs. Weston, *née* Carew, a residuary legatee.

Henry Fellows, *T. Ribton*, *Elgood*, and *W. C. Fooks*, for various incumbrancers.

Grosvenor Woods, *Q.C.*, and *Philpotts*, for Mrs. H. G. Carew and her children.

STIRLING, J., having stated the facts as above set out, continued:—It was suggested in the first place that the gift in favour of the wife and children of H. G. Carew was one which took effect by defeating an absolute interest in the first instance given to him, and was consequently bad for repugnance. I am unable to take this view of the gifts, which appear to me to be alternative, that is to say, I read the will as if it had been expressed thus: "In case the said H. G. Carew shall survive both my said wife and myself, and shall not at the time of the death of the survivor of my said wife and myself be under any legal disability; but if he should predecease either my said wife or me, or in case of his being at the time of the death of the survivor of my said wife and me under any legal disability . . . then I give, &c. . . ."

The question then arises, which of the two alternatives has occurred; and the answer depends on the true meaning of the words "being . . . under any legal disability in consequence whereof he could be hindered in or prevented from taking the same for his personal and exclusive benefit." "Of disabilities," says Lord Coke (Inst. 2,206), speaking of disability on the part of a feoffee to perform a condition annexed to the feoffment, "some be by act of the party, some by act in law." The distinction has been repeatedly recognized. Thus, in cases somewhat similar to the present, it has been held that a limitation for life determinable on alienation by the tenant for life is not determined by alienation by act of the law: see *Lear* v. *Leggett*, 1 Russ. & M. 690; *Pym* v. *Lockyer*, 12 Sim. 394; and *Rochford* v. *Hackman*, 9 Ha. 484; and I apprehend that a limitation for life which on its true construction was made determinable by act of the law would not be determined by a voluntary alienation. What I have to decide, therefore, appears to be whether the language of the testator, fairly construed, extends to both classes of disability, or is to be confined to disability arising by act of law.

The event on which the limitation in favour of Mrs. H. G. Carew and her children arises is that of Mr. Carew "being at a particular time" under a legal disability involving certain consequences. Now, a man is more appropriately said to be under a disability when that disability is imposed *in invitum* than when it arises from a voluntary act by which he has disabled himself.

Again, the words are under a *legal* disability. Some force ought to be given to the word "legal," and it seems to me to indicate a disability imposed by law rather than one simply arising out of a voluntary act. A person who has assigned away a particular property is, no doubt, thenceforth prevented from taking the same for his personal and exclusive benefit; but I do not think that he would, according to the ordinary use of language, be described as under a legal disability in consequence whereof he is so prevented, though he might well be described as having so disabled himself. In my judgment, therefore, the disability contemplated by the testator was not one arising simply from the voluntary act of H. G. Carew, but one imposed by act of law.

I have, then, to consider whether H. G. Carew was at the death of the testator's widow under such a disability. At that time he was bankrupt, and bankruptcy certainly appears to me to be a disability imposed by law. The adjudication, however, was obtained on H. G. Carew's own application when his mother was *in extremis*; it was annulled within three weeks afterwards, and that on the ground that it never ought to have been made. I am unable to treat this as a valid and effectual bankruptcy. The order of the 4th of April, 1895, expressly states the ground assigned by the court itself for the annulment.

In conclusion, however, apart from this, I should be of opinion that the facts show it to be a mere contrivance on the part of the bankrupt probably resorted to in order to procure a benefit for his wife and children. I think, therefore, that at the death of his mother H. G. Carew was not under any real disability arising out of bankruptcy.

It is further said that the large sum of £5,188 16s. 10d. has been found due from the defendant H. G. Carew, and has by the order on further consideration been charged on the interest of H. G. Carew under his father's will. If an ordinary creditor of H. G. Carew had recovered judgment against him, and then obtained an order for payment out of his beneficial interest under his father's will, I should have thought that there was much force in the contention that H. G. Carew had come under a legal disability in consequence of which he would be hindered in or prevented from taking such interest for his own personal and exclusive benefit. In the present case the defendant H. G. Carew was an executor of the will, and he has received assets of the testator to the amount mentioned, for which he is unable to account. Under these circumstances the court treats him as having taken the sum which came to his hands in respect of his beneficial interest, and the true meaning and effect of the order on further consideration is simply to preclude him from receiving any further part of the trust property for his own benefit until the other *cestui que trust* has received as much as himself. This view of the position appears to me to be laid down by Lord Romilly, M.R., in *Irby* v. *Irby* (No. 3), 6 W. R. 853, 25 Beav. 632, see pp. 637 and 638, and by Sir George Jessel, M.R., in *Jacubs* v. *Rylance*, L. R. 17 Eq. 341, 22 W. R. Dig. 251. The disability which has thus arisen on the part of H. G. Carew is therefore, in my opinion, one which has arisen from his own voluntary act, and is not one imposed by the act of law.

In my judgment, therefore, the event on which the limitation arises in favour of Mrs. H. G. Carew and her children has not occurred. But unless all parties are agreed as to the priorities of the persons claiming under H. G. Carew I cannot now decide who are entitled to so much of the fund as may be coming to him.

Solicitors, *Routh, Stacey, & Castle; Bush & Mellor; E. Vernor Miles; Mear & Fowler; Rye & Eyre; Elgood & Moyle; E. H. Goddard.*

Chan. Div. }
Romer, J. } Feb. 17.

In re WASSELL.
WASSELL *v.* LEGGATT. (*a*.)

Married woman — Separate use — Trustee — Husband taking possession before the Married Women's Property Act, 1882, *of property settled to separate use of married woman — Notice of trust — Constructive notice — Statute of Limitations — Acquiescence — Trustee Act*, 1888 (51 & 52 *Vict. c.* 59).

A husband taking possession before the Married Woman's Property Act, 1882, *of property coming to his wife under circumstances that should put him on his inquiry as to whether it is settled to her separate use, becomes a trustee of such property for her; and if the husband has retained such property for his own use, neither he nor his executors can rely on section* 8 *of the Trustee Act*, 1888, *as a defence.*

Trial of action.

This was an action in which the plaintiff, Susannah Wassell, widow of Mr. Charles F. Wassell (who died on the 12th of December, 1894), claimed as against the defendants, the executors and trustees of the said C. F. Wassell, a declaration that the said C. F. Wassell was a trustee for her of the sum of £291, and payment of that sum with interest thereon at 4 per cent. from the 1st of October, 1894. The facts of the case were as follow.

The plaintiff was married to the testator on the 9th of January, 1854, and lived with him up to a month or so of his death. The plaintiff and her husband had several disputes over money matters, and there was evidence that he had taken possession of several sums of money bequeathed to his wife not to her separate use, and to which, therefore, under the existing law he was entitled. On the 29th of November, 1875, Sarah Willats, an aunt of the plaintiff, died, and left her under a will a sum of £300 for her separate use, according to a promise previously made to her. One of the executors of this will, to whom probate was granted, wrote to the plaintiff asking her to call on him at his office for the money, which she did, and without informing her husband. This executor placed in her hands coins and notes for the value of £291 (being the legacy of £300 minus the duty), and told her that it was hers. On reaching her home after this interview, the plaintiff placed the money and notes in a wardrobe in her bedroom. Her husband then came in from his adjoining dressing-room and demanded the money from her, saying, according to her statement in the witness-box, "You have been for that money, and I'll take it; it is mine." She took the money from the wardrobe and refused to give it him, saying that it was hers; whereupon he violently seized her and took it from her by force. No one was present at the

(*a*.) Reported by J ARTHUR PRICE, Esq., Barrister-at-Law.

time; but the plaintiff subsequently told one of her daughters of the facts, and wrote to the executor to ask if the money was really hers. He replied that it was. She several times asked her husband for the money, but he always refused to give it her. The last time that she asked him was six months before his death, when he again refused it her. The plaintiff abstained from taking any action in her husband's life, partly on the ground that she was persuaded by some of her friends that he would repay her the money by his will. By his will, dated the 17th of November, 1894, the husband bequeathed to the plaintiff an annuity of £350, and furniture to the value of £200.

The defendants in their statement of defence generally denied the liability of the husband's estate to make good the sum claimed. They further submitted that if the testator received the sum it was as a voluntary gift from the plaintiff; and, further, that the claim was barred by lapse of time by the Statute of Limitations and the Trustee Act, 1888, s. 8.

The plaintiff's cross-examination showed that on some points her memory was defective; but his lordship held that she had established the main facts of her case, and her evidence was to some extent corroborated by other witnesses. It was also elicited in cross-examination that the husband maintained the plaintiff liberally out of his own money.

Oswald, Q.C., and *Stallard*, for the plaintiff.—When money is given to a married woman for her separate use, it is given in trust for her. If her husband or any other person takes it into his possession, he constitutes himself a trustee of it for her, and is practically in the same position as if he had been a trustee for her under the will. [ROMER, J.—*Primâ facie* it ought to be shown that he did take it as a trustee.] A person who meddles with trust property become a trustee of it: *Rich* v. *Cockell*, *Rich* v. *Hull*, 9 Ves. 369; *Green* v. *Carlill*, 4 Ch. D. 882, 25 W. R. Dig. 124; *In re Flamank*, *Wood* v. *Cock*, 37 W. R. 502, 40 Ch. D. 461.

Robson, Q.C., and *Sims Williams*, for the defendants.—It cannot be shown that the husband was a trustee of the wife, nor can it be shown that he knew that the legacy was given to her for her separate use. The husband must be a trustee or not, he cannot be partly a trustee and partly not. Further, the Statute of Limitations can now be pleaded in favour of a trustee: Trustee Act, 1888, s. 8. [ROMER, J.—I do not see how you can get out of this claim, under the Trustee Act, 1888. The only question is whether you were a trustee.] Suppose a stranger took the money, he might be a trustee if he knew that the money was given to the wife to her separate use; but to make a man a trustee he must have some sort of notice, that he may know what his duty is, and so may perform the trust. A man cannot be made a trustee against his will. If he is not told his duty, he cannot perform it. [ROMER, J.—In this case was not the husband put on his inquiry?] The wrong done, at the outside, was a mere civil wrong, and the remedy, which was one at common law, is now barred by time. It cannot, however, be said that the husband in any sense converted the money to his own use. The money was handed to him by the wife, and spent for the mutual benefit of both of them, an arrangement in which the plaintiff acquiesced, *Thorne* v. *Heard*, *ante*, p. 155, [1895] A. C. 495.

Oswald, Q.C., in reply.—The separate use was a creation of equity, and has always been protected by courts of equity, which, if there was no other trustee, before the Married Woman's Property Act made the husband a trustee for the wife. It is clear from the evidence that the husband was, at least, a constructive trustee for the wife. He knew that she had taken the legacy under a will, and that is sufficient to fix him with constructive notice of the contents of the will. The plaintiff distinctly told him that the money was hers, and, considering that he knew that she said this, it is not open for his executors now to assert he did not know that it belonged to her for her separate use. If such a thing were permitted, the separate use could easily be got rid of. The rights of the plaintiff are in no way touched by the provisions of section 8 of the Trustee Act, nor by the Statute of Limitations, nor by lapse of time, nor by acquiescence. He referred to *Hartford* v. *Power*, 16 W. R. 822, Ir. Rep. 2 Eq. 204; *In re Flamank*, *Wood* v. *Cock*. At the time the money was taken the plaintiff had no right to an action at law. Her right was solely to a suit in equity against her husband as a trustee.

ROMER, J.—Although the plaintiff's memory was not on all points reliable, she has established the material facts of her case, and her evidence was in some respects corroborated. In my opinion, the husband knew when he took the £291 that it belonged to the wife for her separate use. At any rate, he knew that there was a will, that there was a legacy, and that his wife had obtained payment on her separate receipt and claimed that the money was her own. If he did not know that it was her separate estate, he was put upon inquiry if he wished to rely on his marital right, as to the circumstances under which she took it. He must therefore be taken to have acquired the money with notice that it belonged to her for her separate use. The occurrence happened before the Married Woman's Property Act, 1882, and he became a trustee of the money for her. She was entitled to recover it; but how could she do so? She had no right to it at common law, but in equity he was a trustee for her, and I do not know how it would be possible to put her rights otherwise. The Statute of Limitations never ran against the wife, the husband never ceased to be a trustee for her; and his executors cannot now avail themselves of the Trustee Act of 1888, because the husband retained the money and never accounted for it or gave up possession of it. The Statute of Limitations cannot, therefore, be relied on as a defence.

But then it was said that there had been such an acquiescence by the plaintiff as deprived her of her right to sue. As a matter of fact, however, she never gave up her claims to the money. There were quarrels between the husband and wife on that subject down to a short time before the husband's death. He appears to have thought that he was entitled to the money; but he was not the less a trustee because he had strong notions as to a husband's rights, and the plaintiff never lost her right to hold him or his estate liable to replace the money. It is not necessary for me to go into the question of the graciousness of such a claim. As the executors admit assets, all I have to do is to declare the plaintiff entitled to be repaid the £291, with interest at 4 per cent. from the date of her husband's death, and to be paid the taxed costs of the action.

Solicitors, *Wellborne & Son*; *Robert Carter*.

Q. B. Div.
(Wright and Bruce, JJ.) Feb. 12.

BIRCHALL AND OTHERS v. BULLOUGH. (a.)

Stamp—Practice — Evidence — Unstamped promissory note—Document used for purpose of refreshing memory —Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 38 (1).

In an action for money lent an unstamped promissory note may be put in the hands of the defendant for the purpose of challenging his memory as to whether he had signed the note and had received the money, although such note could not be used as evidence, and notwithstanding that by section 38 *of the Stamp Act*, 1891, *it is provided that a promissory note not duly stamped shall not be "available for any purpose whatever."*

This was an appeal by the defendant from the judgment of the Lancashire County Court Judge, sitting at Bolton.

The action was originally brought in the High Court, and was remitted to the county court.

The plaintiffs in the action were the executors of one Peter Brindle, deceased, and they sought to recover from the defendant a sum of money which they alleged the deceased had lent to the defendant. The plaintiffs administered interrogatories to the defendant, one of which was in relation to a promissory note for the sum of £30 15s., signed by the defendant. This note was insufficiently stamped, having only a penny stamp on it. The defendant objected to answer this interrogatory, on the ground that the promissory note being insufficiently stamped was not admissible in evidence. At the trial of the action a daughter of the deceased stated in her evidence that there had been money transactions between her father and the defendant, and the defendant was thereupon cross-examined as to his interrogatories, and the promissory note was put into his hands and he was asked to look at it. This document was in writing on paper, and only stamped as aforesaid. It ran as follows:—

"Westhoughton, June 3, 1889.

"I, Peter Bullough, of Church-street, Westhoughton, joiner and builder, promise to pay to Peter Brindle, of 505, Chorley-road, Westhoughton, the sum of £30 15s. in one month from this date, for money lent on this date, June 3rd, 1889.

"(Signed) PETER BULLOUGH.

"(Witness) J. BULLOUGH."

Objection was taken by the defendant's counsel that the promissory note could not be looked at by the defendant in order to ascertain whether he signed it, nor be used in any way. The judge overruled the objection, and allowed the defendant to look at it. The defendant then said: "It is my signature to the document of the 3rd of June, 1889. I have no recollection of paying the £30 15s. back. I have no recollection of borrowing that sum, but will not swear anything about it. Refreshing my memory on reading the document of the 3rd of June, 1889, I do not believe I should have signed that document if I had not received the money. I cannot give a case of signing a document for money which I had not received."

The judge found that the defendant had received the £30 15s., and entered judgment for the plaintiffs for that amount.

The defendant appealed, on the ground that the judge was wrong in allowing the insufficiently stamped document to be used on behalf of the plaintiffs, and that there was no evidence to support the finding.

Section 38 of the Stamp Act, 1891, provides that any person who takes or receives a promissory note, not being duly stamped, "either in payment or as security or by purchase or otherwise, shall not be entitled to recover thereon or to make the same available for any purpose whatever."

R. V. Bankes, for the defendant.—A promissory note not duly stamped cannot, under section 38, be used in any way whatever: *Ashling* v. *Boon*, 39 W. R. 298, [1891] 1 Ch. 568; *Jacker* v. *International Cable Co.*, 5 Times L. R. 13.

H. W. Loehnis, for the respondents, was not called upon.

WRIGHT, J.—We are both of opinion that in substance and in effect the judge's note means to say that the promissory note was put into the defendant's hands in order to challenge his recollection, and that no use was made of the note by the learned judge himself as evidence. The judge then had before him the admissions made by the defendant himself after looking at the note, and I am of opinion that there was sufficient evidence in such admissions to support the plaintiffs' claim.

BRUCE, J.—I am of the same opinion. I think the promissory note was only handed to the defendant to look at. It could not, of course, be used in any way in evidence. But the defendant, having looked at it, said: "I do not believe I should have signed that document if I had not received the money."

Appeal dismissed.

Solicitors, *Woodcock, Ryland, & Parker*, for *Balshaws & Challinor*, Bolton; *Rowcliffes, Rawle, & Co.*, for *Hope & Garstang*, Wigan.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Q. B. Div.
(Wright and Kennedy, JJ.) Jan. 15, 16.

HUNTINGTON v. COMMISSIONERS OF INLAND REVENUE. (a.)

Inland revenue — Stamp — Equitable mortgage—Foreclosure—Conveyance by order of court—"Conveyance on sale"—Stamp Act, 1891 (54 & 55 *Vict.* c. 39), *ss.* 54, 57.

A conveyance executed by order of the court by a mortgagor, the equitable mortgagee having obtained a foreclosure decree, is a "conveyance on sale" within the meaning of section 54 *of the Stamp Act*, 1891, *and as such is chargeable with an* ad valorem *duty, vide "Conveyance or Transfer on Sale" in the schedule to the Act; and by section* 57 *the debt is the consideration in respect whereof the conveyance is chargeable.*

This was an appeal on a case stated from the decision of the Commissioners of Inland Revenue, who held that a deed of conveyance by a mortgagor, executed by him in pursuance of an order of the court, the equitable mortgagee having obtained a foreclosure decree, was a "conveyance on sale" within the meaning of section 54 of the Stamp Act, 1891.

The facts as set out in the stated case were as follows.

On the 4th of April, 1895, an instrument was presented on behalf of Mr. Joseph Huntington to the Commissioners of Inland Revenue under the provisions of the 12th section of the Stamp Act, 1891 (54 & 55 Vict. c. 39), for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The instrument was dated the 26th of March, 1895, and was made between Alexander Fletcher Knox and William Ernest Taylor of the first part, James Thompson of the second part, and the said Joseph Huntington of the third part; and was a conveyance to the said Joseph Huntington of certain property in Liverpool, of which he was a mortgagee, freed and discharged from all right or equity of redemption. The instrument contained recitals with respect to dealings with the said property, to the effect that the property had by an instrument dated the 30th of September, 1899, been mortgaged by the said James Thompson to the said Alexander Fletcher Knox and William Ernest Taylor to secure the sum of £1,000 with interest thereon at the rate of £4 10s. per cent., that the said sum and all interest thereon had long since been paid off, and the title deeds relating to the property had been returned; but that no reconveyance of the property had been executed, and that on the 26th of June, 1893, the said title deeds were deposited by the said James Thompson with the said Joseph Huntington by way of equitable mortgage to secure the sum of £1,680, with interest thereon at the rate of £5 per cent. The instrument contained also recitals (*a*) of a judgment of the Chancery Division of the High Court of Justice, dated the 14th of June, 1894, whereby it was declared that the said Joseph Huntington was a mortgagee of the said property, and it was ordered that an account should be taken of the amount due to him for principal and interest and costs; and it was declared that if default were made by the said James Thompson in payment of all sums certified to be due to the said Joseph Huntington within six calendar months after the date of the district registrar's certificate, the said Joseph Huntington would be entitled to the property free from all equity of redemption, and to have an absolute conveyance thereof accordingly; (*b*) that by a certificate dated the 29th of June, 1894, the district registrar certified that there was due to the said Joseph Huntington for principal, interest, and costs the sum of £1,784 13s. 11d., which sum would be increased on the 29th of December then next to £1,825 9s. 5d.; (*c*) that default had been made in payment of the said sum of £1,825 9s. 5d., and that by an order of the said division dated the 16th of February, 1895, it was ordered that James Thompson should stand absolutely debarred and foreclosed from all equity of redemption in the property, and should execute an absolute conveyance of all his estate and interest therein to the said J. Huntington; and (*d*) that it had been agreed that the said Alexander Fletcher Knox and William Ernest Taylor should concur in the conveyance.

Neither of the two orders of court above mentioned had been stamped with any *ad valorem* or other stamp duty payable under the Stamp Act, 1891. The commissioners were of opinion that, inasmuch as the property referred to in the instrument, and by the said orders directed to be conveyed, was so ordered to be conveyed by reason of the non-payment of the said debt of £1,825 9s. 5d. by the said James Thompson to the said Joseph Huntington (which debt was, in conformity with the order of the 14th day of June, 1894, to be considered as a charge upon the said property), the property was conveyed to the said Joseph Huntington in consideration of the debt of £1,825 9s. 5d. due by the said James Thompson to the said Joseph Huntington within the meaning of section 57 of the Stamp Act, 1891, and that by reason of such section the instrument was a conveyance on sale within the meaning of section 54 of the said Act chargeable with *ad valorem* duty under the head "Conveyance or Transfer on Sale" in the first schedule to the said Act; and that, inasmuch as the property was at the date of the said order subject to and charged with the payment of the said sum of £1,825 9s. 5d., that sum must by virtue of the said section 57 be deemed to be the consideration in respect whereof the *ad valorem* duty was chargeable. The commissioners accordingly assessed upon the instrument the duty of £9 5s., being the *ad valorem* duty of 5s. for every £50 of the said sum of £1,825 9s. 5d., and the instrument was stamped in conformity with the assessment.

The questions for the opinion of the court were (1) whether the instrument was chargeable with the duty of £9 5s., in accordance with the assessment of the commissioners; (2) if not, with what duty the instrument was chargeable.

J. E. Bankes, for the appellant.—There was not a sale here at all, and therefore there was not a sale on conveyance within section 54; and even if there was a sale, it was not made in consideration of the original debt. But there was no sale, for there was neither a vendor nor purchaser, nor was any price mentioned. There was no instrument here whereby any property on the sale thereof was transferred to or vested in a purchaser: *Denn* v. *Diamond*, 4 B. & C. 243; *Anderson* v. *Commissioners of Inland Revenue*, 6 Court Sess. Cas., 4th series, 56. If any sale did take place, it did so by the order of the court itself, and not by virtue of the conveyance, which followed the order of the court and was a separate transaction, therefore this could not be a "conveyance on sale." Section 57 is relied upon by the commissioners as supporting the contention that the sum of £1,825 due to Huntington was the consideration for the transaction; but that cannot be so, for the instrument was not made in consideration of the money advanced on the equitable mortgage. Therefore there had been no sale; and if there had been, it was not a sale on conveyance, nor was there any consideration for it.

Counsel also referred to the following cases: *Marshall* v. *Shrewsbury*, 23 W. R. 803, L. R. 10 Ch. App. 250; *Lockhart* v. *Hardy*, 9 Beav. 349; *Foster* v. *Commissioners of Inland Revenue*, 42 W. R. 259, [1894] 1 Q. B. 516.

Sir R. Webster, *A.G.* (*Danckwerts* with him), for the respondents.—There was a conveyance here of property in such a manner and under such circumstances as to amount to a sale, and the consideration for such conveyance must be taken to be the old debt of £1,825 due from Thompson to Huntington, and therefore, there being a transfer of property for a valuable consideration, there was a "conveyance on sale" within the meaning of section 54: *Heath* v. *Pugh*, 29 W. R. 904, 6 Q. B. D. 345, see judgment of Lord Selborne at p. 357.

Counsel also referred to *Foster* v. *Commissioners of Inland Revenue*, *Great Western Railway Co.* v. *Commissioners of Inland Revenue*, 42 W. R. 211, [1894] 1 Q. B. 507; *Commissioners of Inland Revenue* v. *Liquidators of City of Glasgow Bank*, 8 Court of Sess. Cas., 4th series, 389.

WRIGHT, J.—This is a case which seems to us to be one of some difficulty; but on the whole I think that the Crown ought to succeed.

The question depends upon sections 54 and 57 of the Stamp Act of 1891, and the question is whether this document amounts to a conveyance on sale within the meaning of section 54, and what the amount is on which the duty ought to be paid, as to which we do not think that the Crown is altogether entitled to succeed.

On the first question the section says: "The ex-

pression 'conveyance on sale' includes every instrument . . . whereby any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser." This document is clearly an instrument whereby "property" or an "estate or interest in" property is transferred to the purchaser, unless anything turns on the word "purchaser." I do not think that it does; and the only question is whether the transfer was a transfer "upon the sale thereof."

Now, it seems to me that the transaction here, taken as a whole, does amount to a sale within the meaning of the section. The root of the whole matter is in a contract of equitable mortgage that is worked out by the court, and therefore I think there is a succession here resulting from the contract and made for monetary consideration; and when that is the case there is a sale, and it is not the less a sale because the contract as applied to the events which have occurred is worked out by or under the order of the court.

Then was this an instrument "upon the sale"? It was argued that the sale, if any, took place by order of the court, and was a separate transaction. I do not think that is so. The words "upon the sale" do not appear to me to be limited to any particular part of the transaction of sale. Conveyance is a necessary part of the action of the court in giving effect to a mortgage, and I think that a conveyance executed under the order of the court may properly be held to be "upon the sale," and the two together turn what was in equity, and also in the present case in law, a mere security into an absolute title; and if there was consideration for that, then section 54 applies. What was the consideration? There are two answers to that; one is that if you look at the transaction as a whole following from the original contract, then the money which was advanced on the equitable mortgage may be regarded as the consideration for which the ultimate sale, following from that contract, was effected. But if not, I think section 57 applies to the consideration. That section says: "When any property is conveyed to any person in consideration, wholly or in part, of any debt due to him," the debt "is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable." I think that section makes the debt a consideration in a sufficient sense to enable us to regard the transaction, as a whole, as a sale.

Then comes the question whether the right amount of duty has been claimed. I do not think that the whole amount of the debt can be right measure of what the duty ought to be charged upon. What the amount ought to be may be a very difficult matter to settle, but I should think that it ought not to exceed the value of the property.

KENNEDY, J.—I have come to the same conclusion, though, I confess, with considerable hesitation.

The question here is whether the document should be stamped as a conveyance on sale. There are various heads given with regard to conveyances in the Stamp Act of 1891: a conveyance on sale, a conveyance in the case of mortgage, and conveyance on other occasions. Now, the position of things is this. There had been an equitable mortgage by deposit of deeds given by Thompson to Huntington. Then, in 1894, proceedings were taken in the Chancery Division by the equitable mortgagee, and he obtained a foreclosure declaration or order to Thompson to stand absolutely debarred and foreclosed from all equitable redemption of the property, and to execute an absolute conveyance of all his estate and interest in the mortgage. Where there is a legal mortgage, all that is needed is a foreclosure order to make the title of the mortgagee perfect; where there is only an equitable mortgage, there has not only to be a foreclosure order, but an order for the execution of the conveyance. To make that title perfect there is required, in the case of an equitable mortgage, there being no mortgage deed, that there should be not merely an order of the court declaring the right of the mortgagee, but an order of the court directing a conveyance to give that right its perfection. The question, therefore, is, there being a conveyance executed by order of the court giving a real value to Huntington, whether that is a conveyance on sale. He gets that which is described by Lord Selborne in *Heath* v. *Pugh*, quoting the language of Lord Hardwicke, Sir William Grant, and Sir Lancelot Shadwell in earlier cases (at p. 360), as being, in effect, a vesting of "the ownership of and the beneficial title to the land for the first time in the person who previously was a mere incumbrancer." A conveyance is needed for the purpose of giving to Huntington what is so described in that case. It is a conveyance by order of the court. Is it less a conveyance on sale within the meaning of the statute? It seems to me that it is a conveyance of a valuable interest to Huntington. Then, is there a consideration for that? By reason of that conveyance the person conveying gets the satisfaction, at any rate, of an equivalent portion of the old debt, which, under section 57, may be a consideration in such a case as this; it is referred to as one of the forms of consideration "where any property is conveyed to any person in consideration wholly or in part of any debt due to him." The effect of this conveyance under the foreclosure order is that if there is any further right as regards the debt secured by the deposit of deeds, it is a right confined to the excess, or the claim, if any, of Huntington for the amount of his loan beyond the value of the mortgaged property. The case of *Lockhart* v. *Hardy*, 9 Beav. 349, 15 L. J. Ch. 347, seems to me to treat the matter as settled by the then Master of the Rolls; that is to say, that Huntington, having got this conveyance, could not make a further claim upon the estate against the person who had conveyed it to him except for the balance. It seems to me *pro tanto* that there has been a satisfaction practically of an equivalent portion of the debt which is gained by the person who conveys. If that is so, then there was a debt which, at any rate in part, may be said to be the consideration for this conveyance; and if that is so, there is a transfer of title by it—a transfer for consideration which, looking at the other provisions of the Stamp Act, ought to bring it within section 57.

Therefore I think that judgment should be for the Crown.

Judgment for the Crown, with costs.

Solicitors, *Norris, Allens, & Chapman; Solicitor of Inland Revenue.*

Q. B. Div.
(Wright and Kennedy, JJ.) Jan. 13.

STERN v. REG. (*a*.)

Inland revenue—Probate duty—Certificate of shares held in foreign companies—Realizable asset of estate—Customs and Inland Revenue Act, 1881 (*44 & 45 Vict. c.* 12), *s.* 27—*Probate Court Act*, 1857 (*20 & 21 Vict. c.* 77, *s.* 92.

An English testator was possessed of share certificates

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

of a foreign company, being documents necessary to establish the legal title to the shares; the holder of the certificates having an equitable title which would enable him to obtain registration of the shares in his own name in the foreign company. Delivery of the certificates was sufficient to transfer this equitable title, and the certificates were marketable on the London Stock Exchange.

Held, that probate duty was payable in respect of the certificates.

Special case.

The suppliants, the executors under the will of the late Baron Herman de Stern, duly proved the same and paid probate duty on the personal estate.

After probate, but during the administration of the estate, they were advised that probate was not properly payable on certain stocks and shares in foreign companies which belonged to the baron at the time of his death.

The suppliants, in the form of a petition of right, claimed a return of £8,187, paid as probate duty in respect of these shares.

The special case set out that Baron de Stern died in England on the 20th of October, 1889, leaving a will dated the 17th of August, 1881, and three codicils.

At the time of his death Baron de Stern was an English subject, and was domiciled and resident in England.

In due course probate was granted to the executors on the personal estate of the testator situated in the United Kingdom, which was sworn by the executors at the net value of £3,541,366 19s. 11d., and paid duty to the amount of £106,242.

Subsequently the suppliants alleged that there had been erroneously included in the affidavit required by the Customs and Inland Revenue Act, 1881, from persons applying for probate, a portion of the personal estate of the deceased which should not have been included therein, and which was not liable to probate duty. They thereupon lodged a corrected affidavit as to the true value of the estate on which duty was payable, in which they stated that certain American railway shares specified in the schedule thereto were at the date of the original affidavit thought to be property in England; but it had since been discovered that they were not so, because they were transferable only in the books of the several companies in New York, and were therefore not liable to probate duty.

The commissioners declining to return the duty alleged to have been overpaid, the suppliants lodged a petition of right claiming the return of the sum of £8,187, the amount of the alleged overpayment.

On issue joined, the Attorney-General pleaded a demurrer, which was subsequently waived, and the application came before the court in the form of a special case.

The portion of the estate alleged to have been included in error consisted of shares in various railway companies constituted under the law of, and domiciled in, the United States. The certificates, however, in respect of the shares certified that the person named was entitled to the number of shares specified in the capital stock of the company, and certified as to the manner in which the shares were transferable. Upon every certificate there was indorsed a form of transfer and power of attorney in blank.

It was agreed that the American law stated in evidence in *The Colonial Bank* v. *Cady and Williams*, 39 W. R. 17, 15 App. Cas. 267, should be applied to this case. A statement giving the effect of that evidence, taken from the judgments of Lord Watson and Lord Herschell (who said there was no difference between the English and American law on this point), formed part of the case, and was to the effect that where the indorsed transfer had been duly executed by the registered owner of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him or by his authority with intent to transfer transmitted his title to the shares both legal and equitable; the person to whom it was delivered could effectually transfer his interest by handing the certificate to another, and the document might thus pass from hand to hand until it came into the possession of the holder who thought fit to insert his own name as transferee and obtain a new certificate in his own name from the company. Delivery did not invest him with the ownership of the shares in the sense that no further act was required in order to perfect his right; but the holder had an equitable title which enabled him to have the shares vested in himself by registration in the books of the company. The company, upon the request of the holder for the time being of the certificate and on its production, was bound to register the name of such holder or of his nominee, and to issue a new certificate in such name in exchange for the old certificate. As between the parties to the transaction the transfer was entirely completed by the delivery of the certificates.

The securities in question were negotiable in this country, and were commonly dealt with on the London Stock Exchange.

At the date of the death of Baron de Stern the certificates for these shares were in England, either in his possession or that of his agent or trustee, and the whole beneficial interest in and title to these securities belonged to him and passed under his will. None of them, however, were registered in his name in the books of the companies, but stood in the names of certain persons all of whom were not resident in England.

The suppliants had dealt with the shares by sales effected in England, with the exception of two sets of railway shares the sales of which were effected in New York.

Arthur Cohen, Q.C., Fletcher Moulton, Q.C., and *A. T. Lawrence*, for the suppliants.—The question here is whether or not these shares form part of the English estate of the testator, and as such would properly be administered by his executors in this country. These certificates are not negotiable instruments, for the transferee's title is not completed until the transfer has been registered in America in the books of the several companies. Probate duty is only chargeable on shares in foreign companies (*a*) where the certificate is itself a negotiable instrument, and (*b*) of such a character that the property passes by mere delivery. Shares held in a foreign company by a testator dying in England are not property situated in this country for the purposes of probate duty, although administered by the executors in this country: *Attorney-General* v. *Dimond*, 1 Cr. & Jer. 356, and *Attorney-General* v. *Hope*, 1 Cr. M. & R. 530. Simple contract debts due from persons are not in the eye of the law property situated here. The case of *Attorney-General* v. *Bouwens*, 4 M. & W. 171, does not apply to the present case, because the bonds in that case were completely negotiable. The following cases were also referred to: *Commissioners of Stamps* v. *Hope*, [1891] A. C. 476, 40 W. R. Dig. 162; *Yeoman* v. *Bradshaw*, 3 Salk. 70; *In the Goods of Ewing*, 29 W. R. 474, 6 P. D. 19; *Laidlay* v. *Lord Advocate*, 15 App. Cas. 468, 39 W. R. Dig. 196; *In re Commercial Bank Corporation of India and the East Fernandes Executors' case*, 18 W. R. 202, 411, L. R. 5 Ch. App. 314. On these authorities the suppliants are entitled to the relief sought.

Sir R. Webster, A.G. (with him *Sir R. B. Finlay*,

S.G., *Vaughan Hawkins*, and *Danckwerts*), for the Crown.—I submit that the case is governed by the reasoning in *Attorney-General* v. *Bouwens*. That was decided in 1838, and has been frequently recognized as good law to the present time. The certificates of these shares can be dealt with on the London Stock Exchange. They are therefore a realizable asset, and must be included in the value of the estate in the same way as any other chattel. [He was stopped.]

Cohen, *Q.C.*, replied.

WRIGHT, J., after stating the facts as set out in the special case, said:—I think that the true inference to be drawn from these facts is that the duty which the suppliants contend was paid in error was properly claimed and paid in respect of all the certificates of the American railway shares that were in this country in the possession of the baron at the time of his death. These certificates were documents the existence of which vouched and were necessary for vouching the title of the holder to the shares they represented. Indeed, without them no one could establish his right to the shares at all. It is found in the case as a fact that the delivery of the certificates was sufficient to pass all the interest of the holder to his transferee. It follows, therefore, that the certificates have of themselves an operative power up to a certain point, and, although the mere delivery did not invest the transferee with the ownership of the shares in the sense that no further act was required to perfect his title in law, still the delivery gave the transferee an equitable title which enabled him to have the shares vested in him at any time by registration in the books of the company. It was found in the case also that these shares were marketable on the London Stock Exchange. That seems to me conclusive evidence that these certificates are documents of value in the hands of the executors, and as such formed a realizable asset of the estate, liable to the payment of duty in the same way as any other asset. For these reasons I am of opinion that the petition of the suppliants fails.

KENNEDY, J., concurred.

Judgment for the Crown, with costs.

Solicitors for the suppliants, *Hollams, Son, Coward, & Hawkesley.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Prob. Div. & Adm. Div. } June 17;
Probate. } July 1, 17, 1895.

IN THE GOODS OF MCAULIFFE. (*a.*)

Administration—Residuary legacy for benefit of convent—Death of legatee and executor—Grant to head of convent—Charity—No scheme required.

Where a residuary legacy was given by a will to C. H. "to be disposed of as she shall think fit at her discretion for the benefit of" a certain convent, and the only executor of the will and C. H. both died during the testatrix's lifetime, the court granted letters of administration with the will annexed to the Reverend Mother the head of the convent, on being satisfied of the permanence of the institution and the fitness of the Reverend Mother, having regard to her powers, to receive and apply the legacy in question, the court being satisfied that it was not necessary to require a scheme to be propounded on the authority of Walsh v. Gladstone, 1 *Ph.* 290.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Motion for a grant of letters of administration with the will annexed of the personal estate of Hannah McAuliffe to Maria Blount, the Rev. Mother and Head of St. Edward's Convent, Blandford-square, as residuary legatee.

Younger, in support of the motion.—The bequest is good, the only question is in what capacity the applicant shall take. If under the 73rd section of the Court of Probate Act, 1857, that would necessitate applying to the Chancery Division for a scheme. The amount of the property is small, about £450; and there is no necessity for a scheme: *Present* v. *Goodwin*, 1 Sw. & Tr. 544, 8 W. R. Prob. Dig. 4; *Cole* v. *Wade*, 16 Ves. 27, at p. 47; *Burrough* v. *Philcox*, 5 Myl. & Cr. 72. In Chancery, if the court can find someone to give a receipt, it will pay over the money; otherwise it is paid into court to a separate fund. In *Walsh* v. *Gladstone*, 1 Ph. 290, no scheme was required.

He also referred to Tyssen on Charitable Trusts.

Cur. adv. vult.

July 17.—JEUNE, P.—The question in this case relates to the form of the grant of administration which it is proper to make.

By her will, dated the 17th of December, 1885, the deceased Hannah McAuliffe appointed the Rev. Philip Cavanagh executor, and, after giving a legacy of £11 5s. to Catherine Headon, bequeathed the residue of her property to the said Catherine Headon, "to be disposed of as she shall think fit at her discretion, for the benefit of the Convent of St. Edward, Blandford-square." The Rev. Philip Cavanagh and Catherine Headon died in the lifetime of the testatrix.

A grant of administration is asked for in favour of Maria Blount, who holds the office of Reverend Mother of the Convent of St. Edward.

The convent in question is a community of Roman Catholic sisters. There is no instrument prescribing the objects of the society, and no formal allocation of funds to specific purposes. But, in fact, the society devotes itself to four charitable works—the teaching of the children of the poor, the visiting of the poor in their homes, the visiting of the sick and infirm at hospitals and workhouses, and the sheltering and training of young women for domestic service. The property of the community is vested in a council consisting of the Reverend Mother and three sisters, and is subject to their absolute discretion in the disposal thereof for the purposes of the community. The bank account stands in the name of the Reverend Mother and two of the said three sisters. The other members of the council concur in the application for a grant of administration to Maria Blount.

There can, I think, be no doubt that this would be a proper case for a grant under section 73 of the Probate Act, 1857. But what is asked is a grant to Maria Blount as residuary legatee, the object being that she shall not take the grant in a capacity which would imply the necessity of an application to the Chancery Division. I had considerable doubt whether this could be done. As confidence was obviously placed by the testatrix in the personal discretion of Catherine Headon, no doubt a trustee cannot be appointed in her place; and, as several objects of the convent are not so well defined as to admit equal distribution amongst them, it would seem to be doubtful whether a scheme is not necessary. But I have been referred to a case of *Walsh* v. *Gladstone*, where the circumstances closely resemble those in the

present instance, which appears to me to show that no scheme is required. There a legacy was given to a certain person to be applied to the use of a Roman Catholic college; and, the legatee having died in the lifetime of the testator, it was argued on behalf of the Attorney-General that a scheme was necessary. But the Lord Chancellor, affirming the decision of the Vice-Chancellor, held that, though the legatee might have had a discretion if he had been living as to the application of the fund, yet it would have been a fair exercise of that discretion to have paid it over to the president of the college, and that if the court was of opinion that the funds would be safe in his hands it would be justified in doing the same.

I am satisfied in this case as to the permanence of the institution, and the fitness of the Reverend Mother, having regard to her powers, to receive and apply the legacy in question. I think, therefore, that a grant may be made to her as residuary legatee.

Motion allowed.

Solicitor, *P. Thornton.*

Court of Appeal.

From Prob. Div. & Adm. Div. (Lindley, Lopes, and Kay, L.JJ.) Feb. 19.

WILKINS *v.* WILKINS. (*a.*)

Practice—Trial—Motion for new trial—Enlargement of time—Imposition of terms—Supreme Court of Judicature Act, 1890 (53 & 54 *Vict. c.* 44), *s.* 1—*R. S. C.*, 1883, *ord.* 64, *r.* 7.

A motion for a new trial or to set aside the verdict of a jury is, since the passing of the Supreme Court of Judicature Act, 1890, *to be made to the Court of Appeal, and not to a Divisional Court. Consequently, on the hearing of any such motion the Court of Appeal has power, by virtue of ord.* 64, *r.* 7, *to enlarge the time within which to move for a new trial, and to impose such terms as the justice of the case may require.*

Original motion.

This was an application to the Court of Appeal in a divorce action by the husband for an extension of the time for appealing, or for moving for a new trial to set aside the verdict of the jury at the trial on the 18th of January, 1895.

In February, 1854, George Rickard and Emma Hand were married at Plymouth. Rickard was at that time a ship's carpenter in the Royal Navy, serving on board the *Magicienne*. A few days after the marriage the Crimean War broke out, and the *Magicienne* was ordered out to the Baltic. Rickard remained on the *Magicienne* until the conclusion of the war in 1856. He then returned home and lived with his wife.

In 1857 he joined the *Indus*, and was sent out to the West Indies. He soon deserted, and returned to England in 1858, living for one day with his wife at Plymouth. In order to avoid observation, he then went to the United States, and was never seen or heard of again, by his wife until quite recently.

On the 13th of May, 1865, Emma Rickard married John Wilkins (the petitioner), the period of seven years since she had last seen her first husband not having quite elapsed. Wilkins was aware that his wife had been previously married, but was informed and believed that the first husband was dead. There were no children by the first marriage, but there were eight by the second. Wilkins and his wife separated by mutual consent in January, 1883.

On the 16th of December, 1892, the wife presented a petition for judicial separation, on the ground of her husband's adultery.

On the 15th of April, 1893, the husband filed his answer, denying the adultery and pleading unreasonable delay, and that the marriage was invalid, the wife being already married and her first husband being still alive.

In May, 1893, the wife traversed these pleas.

In July, 1893, the husband filed a cross-petition for nullity of marriage.

The two suits were consolidated, and came on for trial before the President and a special jury in January, 1895.

The cross-petition was by leave withdrawn.

The jury found that Wilkins had committed adultery, and that the first husband was not alive at the date of the second marriage. A decree for judicial separation was accordingly made.

In September, 1895, Wilkins received a letter from Rickard's brother saying that Rickard had arrived in this country, and was staying at his house. Wilkins having satisfied himself of the identity of Rickard, on the 20th of October, 1895, presented a petition for nullity of marriage.

On the 4th of December, 1895, the wife filed her answer, denying that George Rickard was alive, and pleading the previous suit as a bar.

On the 14th of January, 1896, the trial came on before Barnes, J., without a jury. George Rickard was called and gave evidence, and his identity was established.

Barnes, J., adjourned the further consideration until an application had been made to the Court of Appeal either for a new trial or to set aside the verdict of the jury in the first action.

Inderwick, Q.C., and *Bargrave Deane*, for the motion.

Bayford, Q.C., *H. A. Forman*, and *F. O. Robinson*, *contra.*

LINDLEY, L.J.—We have come to the conclusion that in point of law this case is governed by the Supreme Court of Judicature Act, 1890, and that we have power to enlarge the time for a motion for a new trial by virtue of ord. 64, r. 7. Obviously this is a case in which, if there is to be further litigation, we ought not to refuse leave. There must be some method of getting rid of the difficulty created by the verdict in the first suit, and the proper way is by a new trial. We are all impressed with the extreme hardship of granting leave without imposing terms on the husband. It would be nothing short of inhuman that, after the wife has lived with her second husband for eighteen years, she should now be left with her eight children without means of support. The husband says he is willing to give an undertaking to continue the allowance of 12s. a week which he covenanted to pay under the separation deed of 1883. But circumstances have altered since then, and we think that 12s. a week is not enough now, seeing that the wife is now sixty-four years of age. We shall not give leave unless the husband undertakes to secure to his wife £1 a week during their joint lives.

LOPES, L.J.—I am of the same opinion. I have not the slightest doubt that the court has power to enlarge the time for moving for a new trial; and leave ought to be given in this case in order that the verdict of the jury may be set aside. I am also clearly

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

of opinion that leave should only be given on terms: the question is, on what terms? I quite agree the proper amount to be secured is £1 per week. On those terms the application should be granted.

KAY, L.J.—This point of practice arises on the Supreme Court of Judicature Act, 1890. The questions whether a new trial ought to be granted and whether leave should be given to move for one are clearly questions of practice. This is a case in which we are all agreed leave should be given on terms; for there seems to have been no negligence on anybody's part. . . . I think there is jurisdiction to enlarge the time, and that this is a case in which it should be enlarged. . . . £1 per week is a proper provision for the appellant to make for his wife, and he ought not to have leave except he properly secures that sum to her.

Application allowed. The order was to the effect that the petitioner and respondent being satisfied that the first husband was still alive, the verdict and decree in the first suit should be set aside by consent.

Solicitors for the husband, *Lewis & Lewis.*

Solicitor for the wife, *Edwin Hughes.*

From Prob. Div. & Adm. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) Nov. 14.

THE "RED SEA." (a.)

Insurance—Marine—Constructive total loss—Chartered freight—Bill of lading freight—Advanced freight—Delivery of cargo at port of destination—Rights of underwriters.

A ship, which was chartered for a particular voyage, was insured by the owners. The cargo was shipped under bills of lading, which provided that the cargo was to be delivered at the port of destination to the order of the shippers or their assigns, they paying freight as per charter-party. Part of the charter-party freight was prepaid before the commencement of the voyage. During the voyage the ship became a constructive total loss, and notice of abandonment was given to, and accepted by, the underwriters. The ship and cargo were subsequently brought to the port of destination and the cargo was delivered, and the shipowners received the amount of the freight, less the prepaid freight, from the consignees of the cargo.

Held, that the underwriters were only entitled to the freight earned by the delivery of the cargo after the ship became their property; that the freight so earned was the difference between the total freight and the prepaid freight; and that therefore they were not entitled to recover the balance.

Appeal from the judgment of Bruce, J. ([1895] P. 293).

The action was brought by the underwriters on the hull and machinery of the steamship *Red Sea* against the Sea Steamship Co., the owners of the *Red Sea*, to recover a balance of freight, under the following circumstances:—

The *Red Sea* was chartered to carry a cargo from Pensacola to a port in the United Kingdom as ordered on signing bills of lading.

The charter-party provided that "sufficient cash for the ship's ordinary disbursements at port of loading should be advanced the master by charterers or their agents, ship paying 2½ per cent. commission, including insurance. Master to give his draft on owners or consignees as required and customary to cover same, which shall be paid out of the first freight collected."

The freight was to be paid one-third on arrival of the ship, and the rest on delivery of the cargo.

The cargo was shipped by the charterers under a bill of lading which provided that the cargo was to be delivered at West Hartlepool to the order of the shippers or their assigns, they paying freight and all other conditions as per charter-party.

The bill of lading was indorsed to Wade, Sons, & Co., of West Hartlepool, to whom the property in the cargo passed.

The charterers made disbursements for the ship at Pensacola amounting to £1,677 19s. 10d., and in respect of this sum the master signed and gave to the charterers a note promising to pay it in a bill on London five days after the arrival of the ship at the port of destination, for the payment of which he pledged the ship and freight. This note was subsequently indorsed for value to Wade, Sons, & Co., the consignees of the cargo.

The ship took the ground when endeavouring to cross the bar at West Hartlepool, and became a constructive total loss, notice of abandonment being given to and accepted by the plaintiffs, the ship, however, being lightened and towed into port and her cargo delivered by the captain.

The defendants received from Wade, Sons, & Co. the amount of the gross freight due under the bill of lading (which was the same as the chartered freight) less the above-mentioned sum of £1,677 19s. 10d.

The question of law raised was whether, as the plaintiffs contended, the defendants were bound to account to them for the gross bill of lading freight, or whether, as the defendants contended, the plaintiffs were only entitled to the balance of the freight after deducting the £1,677 19s. 10d.

Bruce, J., held that the defendants' contention was right.

The plaintiffs appealed.

J. A. Hamilton, for the plaintiffs.—Assuming, first, that the £1,677 19s. 10d. was advanced freight, the underwriters are entitled to the bill of lading freight on delivery of the cargo. The master was bound to collect the bill of lading freight payable by the consignees for the carriage of their cargo, and to hand it over to the underwriters; and the fact that the consignees had previously purchased the master's note cannot affect the rights of the underwriters, who were no parties to any contract between the shipowners and charterers. He referred on this point to *Case* v. *Davidson*, 5 M. & S. 79: *Sea Insurance Co.* v. *Hadden*, 32 W. R. 841, 13 Q. B. D. 706. Secondly, the £1,677 19s. 10d. was not advanced freight, but merely a personal loan by the charterers to the shipowners.

Joseph Walton, Q.C. (*T. G. Carver* with him), for the defendants.—The judgment of Lord Ellenborough in *Case* v. *Davidson* shows that the underwriters, on a constructive total loss happening, are entitled to what the shipowners are entitled to receive. They cannot have a higher right than the shipowners. The captain collects the bill of lading freight, and hands over the amount of the chartered freight to the shipowners, less any prepaid freight, and holds the balance, if any, as trustee for the charterers. The underwriters, who step into the shoes of the shipowners, are therefore only entitled to the chartered freight less the prepaid freight.

(He was stopped.)

J. A. Hamilton replied.

Lord ESHER, M.R.—In *Case* v. *Davidson* Lord Ellenborough, it seems to me, has pointed out what

(a.) Reported by W. F. BAREY, Esq., Barrister-at-Law.

are the rights of the underwriters and shipowners when there is a constructive total loss of the ship, and notice of abandonment is given and accepted. The ship is considered as having passed to the underwriters as from the time when the damage, which entitled the owners to abandon her, occurred. The underwriters are entitled to whatever is earned by the use of the ship from that time. They are not entitled to anything earned by the use of the ship before it became their ship. In the ordinary case of freight payable on the arrival of the ship and delivery of the cargo, the ship has earned no freight, according to the law of England, unless it has been prepaid, before the ship's arrival and delivery of the goods. Therefore in that case the ship would have earned no freight up to the time of a constructive total loss occurring, but he who is the owner of the ship when she arrives with her cargo is entitled to the freight for the whole voyage. In the present case the underwriters were entitled to receive all the freight earned by the ship by delivery of the cargo at the port of destination. Prepaid freight cannot be recovered from the shipowners, and therefore that is not freight which the ship earns by delivery of the cargo. The shipowners would be entitled, on delivery of the cargo at the port of destination, to the difference between the whole charterparty freight and the prepaid freight, for I cannot doubt that the sum of money in this case was advanced in respect of freight. The whole ship was chartered, and the master was bound to sign bills of lading for the cargo. The master would collect that bill of lading freight from the consignees of the cargo, and he would pay over the amount of the charterparty freight to the shipowners, and hold the surplus, if any, as trustee for the charterers. In this case the charterparty freight and the bill of lading freight were the same, and so there was no surplus. Therefore, when the ship arrived the sum to be received was the difference between the total charterparty freight and the prepaid freight. The shipowners had ceased to be the owners when that difference was earned; the underwriters owned the ship at that time, and they became entitled to that sum, and to that sum only. I may add that the note signed by the master when the freight was advanced does not affect the case in any way. For these reasons I think that the judgment of Bruce, J., should be affirmed.

LOPES and KAY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickenson, & Co.*, Liverpool.

Solicitors for the defendants, *Batesons, Warr, & Wimshurst*, Liverpool.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) Feb. 10.

REG. *v.* INCORPORATED LAW SOCIETY. (*a*.)

Solicitor — Misconduct—Application to Law Society— Primâ facie *case—Jurisdiction of committee—Solicitors Act*, 1888 (51 *&* 52 *Vict. c.* 65), *s.* 13.

Where the Committee of the Incorporated Law Society, upon an application under section 13 *of the Solicitors Act*, 1888, *alleging professional misconduct against a solicitor, are of opinion that the affidavits disclose no* primâ facie *case of misconduct, they need not hear any further evidence or take any further proceedings in the matter, or make any report.*

Application for leave to appeal from an order of the Queen's Bench Division (reported, 43 W. R. 687) discharging a rule *nisi* for a *mandamus* to the committee of the Incorporated Law Society appointed under the Solicitors Act, 1888, to hear and determine a complaint against certain solicitors.

An application was made to the Incorporated Law Society that two solicitors might be required to answer allegations of professional misconduct contained in an affidavit of the applicant. The committee of the Law Society, having considered the allegations contained in the affidavit, and without calling on the solicitors charged to appear and answer the allegations, were of opinion that the applicant had not made out a *primâ facie* of professional misconduct against the solicitors, and declined to hold further inquiry in the case.

The court discharged the rule *nisi* for a *mandamus* obtained by the applicant as above.

The applicant applied for leave to appeal, notwithstanding that the time for appealing had expired.*

Willis, Q.C. (*Rose Innes* with him), for the applicant argued as in the court below.

F. W. Hollams (*Sir E. Clarke, Q.C.*, with him) for the Committee of the Incorporated Law Society, and

Levett, Q.C., and *A. T. Lawrence*, for the solicitors, were not called upon.

LORD ESHER, M.R.—Under section 13 of the Solicitors Act, 1888, and the rules made under the Act, an applicant has to put his charge on affidavit, and to state in the affidavit the facts in support of the charge. He must then send the affidavit to the Law Society. The Committee of the Law Society appointed under the Act of 1888 read and consider the affidavit. If upon so doing they come to the conclusion, assuming the facts stated therein to be true, that a *primâ facie* case of professional misconduct has not been disclosed, they are to stop there and to proceed no further. It is contended that they must call the applicant before them and hear his evidence before deciding whether a *primâ facie* has been made out, and that they must make a report in all cases, though they need not send it to the court if they think that a *primâ facie* case is not made out. In my opinion, if the committee, upon reading the affidavit, honestly come to the conclusion that it discloses no *primâ facie* case of misconduct, they have heard the case, and they can then stop and take no further steps. The applicant is not precluded from taking other proceedings. By the proviso in section 13 he may, upon his own responsibility, apply to the court. The committee of the Law Society are the sole judges whether a *primâ facie* case of misconduct has been disclosed, and there is no appeal from their decision upon that point.

Therefore the application for leave to appeal must be dismissed, there being no ground shown for giving leave.

LOPES and RIGBY, L.JJ., concurred.

Solicitors, *R. Chapman; E. W. Williamson; Trower, Freeling, & Parkin.*

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

* The court, upon this application, went into the merits of the appeal.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) Dec. 4.

BADISCHE ANILIN UND SODA FABRIK *v.* HENRY JOHNSON & CO. AND THE BASLE CHEMICAL WORKS. (*a.*)

Practice—Writ—Service out of the jurisdiction—Action for infringement of patent—Injunction—R. S. C., 1883, *ord.* 11, *r.* 1 (f).

Foreign manufacturers supplied goods to an English firm of retail dealers. The plaintiffs, alleging that such goods were an infringement of their patent, commenced an action against the English dealers, and applied ex parte *to North, J., in chambers for leave to issue a concurrent writ and serve notice of it on the foreign manufacturers out of the jurisdiction.*

Held (*reversing the decision of* North, J.), *that the plaintiffs had made out a* primâ facie *case within R. S. C.*, 1883, *ord.* 11, *r.* 1 (f); *and the leave asked for was granted.*

Appeal *ex parte* from a decision of North, J., in chambers.

The plaintiffs were the owners of an English patent for dyes, and applied for leave to issue a concurrent writ in the action, and to serve notice of it on the second defendants at their place of business, Basle, out of the jurisdiction of the court.

By their writ in the action they claimed an injunction restraining the defendants, their servants and agents, from importing into England and from manufacturing, selling, supplying, and using in England dyes manufactured according to the patent, or in any manner only colourably differing from the same, and generally from infringing the plaintiffs' rights under the patent. The plaintiffs also claimed damages and other consequential relief.

The evidence was to the effect that the Basle company manufactured at Basle a dye which was an infringement of the plaintiffs' patent, and imported it into this country, the defendants, Henry Johnson & Co., having so bought some. The first defendants, when served with the writ, stated that they did not intend to enter an appearance, and would submit to a perpetnal injunction.

R.S.C., ord. 11., r. 1, provides: "Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever (*inter alia*) (*f*) any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof."

North, J., refused the application to allow notice of such writ to be served, and the plaintiffs appealed *ex parte* to the Court of Appeal.

Moulton, Q.C., and *W. N. Lawson*, for the appellants.—The second defendants are proper and necessary parties to the action, and the plaintiffs seek an injunction to restrain acts done within the jurisdiction, so that the case is exactly within the rule. The importation and sale in England of articles manufactured abroad according to the specification of an English patent, being an infringement, can be restrained by injunction: *Elmslie* v. *Boursier*, 18 W. R. 665, L. R. 9 Eq. 217. See also *Von Heyden* v. *Neustadt*, 28 W. R. 496, 14 Ch. D. 230; and *Marshall* v. *Marshall*, 38 Ch. D. 330, 36 W. R. Dig. 161.

LINDLEY, L.J.—In my opinion the plaintiffs have made out a *primâ facie* case within rule 1 (*f*) of order 11 for giving leave to issue a concurrent writ, and to serve notice of it on the Basle company abroad. It is clear that the plaintiffs are *bonâ fide* seeking an injunction to prevent the sale in England of an article infringing their patent. The invoice contains a clause which *primâ facie* the Basle company were not authorized to insert in it. This is merely a colourable proceeding to conceal the fact that the Basle company sent their goods and sold them in this country. This, however, is an *ex parte* application, and, of course, if after the Basle company have been served they should come here and ask the court to discharge the order for service, they will not be prejudiced by anything we have said to-day.

I think the leave which the plaintiffs ask for should be granted.

A. L. SMITH and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitors, *J. H. & J. Y. Johnson.*

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div. Chitty, J. Feb. 19.

SANGUINETTI *v.* STUCKEY'S BANK (*a.*)

Mortgage — Practice — Foreclosure—Judgment—Account —Special circumstances.

Any special matter affecting the state of the account as between mortgagor and mortgagee in a foreclosure action should be brought forward at the trial, and the judgment should direct the chief clerk to have regard to any such matter specifically.

Where the common account was directed in a foreclosure judgment, and there was no special direction to the chief clerk,

Held, that it was not open to the mortgagor on the taking of the ordinary account to bring forward for the first time a claim to redeem on payment of the amount at which the mortgagee had valued his security in the mortgagor's bankruptcy, and that a summons to vary the certificate by the addition of a finding of the claim to redeem must be dismissed.

Summons.

This was a summons by one Denman, a defendant in the above action (which was a foreclosure action), to set aside or vary the chief clerk's certificate.

A receiving order against the mortgagor had been made in February, 1885; and the above action was instituted in January, 1888, and a foreclosure judgment was made in December, 1894. The present applicant was the trustee in bankruptcy of the mortgagor, and his object was to be allowed to redeem on payment of £2,400, being the amount at which the plaintiff in the above action had valued his security in the bankruptcy proceedings against the mortgagor.

In June, 1888, a settlement made by the mortgagor was set aside in the bankruptcy, and the present applicant had thereupon maintained that the benefit of the order setting aside the settlement was confined to the unsecured creditors, but the contrary was decided at the hearing of the above action, reported on this point 43 W. R.

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

154, [1895] 1 Ch. 176. In consequence of this decision the value of the plaintiff's security was greatly increased, and funds in court which formed part of the security amounted, in December, 1894, to £4,800. The foreclosure judgment directed the usual account to be taken of what was due to the plaintiff for principal and interest, after giving credit for the sum the plaintiff had received out of court under the payment schedule; and under the payment schedule it appeared that the plaintiff had actually received out of the £4,800 the sum of £3,528.

Farwell, Q.C., *Herbert Reed, Q.C.*, and *Fossett Lock*, for the applicant.—The chief clerk's certificate should be varied by adding a finding that the present applicant claims to redeem for £2,400. The foreclosure judgment ought to have shown that he was entitled to do so: see *Knowles* v. *Dibbs*, 37 W. R. 378. This judgment as it stands is for an account to be taken of what is due—*i.e.*, of what is due having regard to all the circumstances. [CHITTY, J.—The matter should have been brought forward at the trial.] There is no authority as to what matters are open and what are not at the taking of the account. The applicant could bring in a settled account, and that is really what he wants to do. The Bankruptcy Act, 1883, schedule 2, rule 12 (A), favours the applicant's claim to redeem.

Levett, Q.C., and *George Henderson*, for the plaintiff.—The applicant cannot be allowed to set up now a case which he did not set up at the trial. It is too late for him to avail himself of rule 12 (A) after judgment has gone for foreclosure, *Ex parte Norris*, *In re Sadler*, 35 W. R. 19, 17 Q. B. D. 728. Moreover, the plaintiff's security has increased in value, and rule 13 gives a creditor power to amend his valuation in such a case. But the application is altogether out of time, and ought to be dismissed on that ground.

Farwell, replied.

CHITTY, J., after stating the facts, continued:—The question that has been raised by this summons clearly might have been raised, and ought to have been raised, at the trial. The account directed by the judgment is in the common form for principal and interest; and if there were any special matter affecting the account there should have been a declaration directing the chief clerk, who was only taking an ordinary account as it appears, to have regard to some particular circumstances and facts. Mr. Farwell put several illustrations in support of his argument that he was entitled to redeem now for £2,400. That argument is wholly inconsistent, as I have already shown, with the judgment itself, on the face of which the plaintiff got £3,528. The point was not raised on behalf of the defendant, and I am entitled to consider what Mr. Levett says is correct, namely, that the defendant deliberately abstained from raising it, but perhaps that point is not very material. I take it that he did not raise this point at the trial, and, if he had, there would have been then a declaration limiting the account in this way—an account of what is due under and by virtue of the charges, regard being had to the plaintiff having valued his security in bankruptcy at the sum of £2,400. It seems to me that so far from the rejection of the present application involving any injustice, as was contended for by the defendant, upon mortgagors generally, I should be inflicting on mortgagees a great injury by acceding to such a contention as this. Here the mortgagee gets the benefit of an order of the court that an account is to be taken of what is due on the charges; and there is nothing on the face of the order to cut it down. I quite agree that the object of the account is to find out what is justly owing and what is justly due, and in taking the account the mortgagor can always show what he has paid on account of either principal or interest. I agree that settled accounts are not disturbed; but I do not agree, and there is no precedent for it, that a defence of this kind, which was not brought forward at the right time can be brought forward during what I may term the mechanical operation of taking an ordinary account. Therefore, on the substance of the question, there being no authority to the contrary or one which touches the point, except merely the direction I gave in the undefended case of *Knowles* v. *Dibbs* that some words should be put in to the effect I mentioned in the judgment (see 37 W. R. 378), I hold that it is too late, after the judgment has gone, for the defendant, the trustee in bankruptcy, to raise this defence. I therefore decide the question upon the merits.

[There was a controversy as to whether the question of redemption was raised at all before the chief clerk while the certificate was still pending, and it appeared to his lordship that the question was really not raised till after the certificate had gone, and that on that ground also the applicant was too late to raise the point, but the decision on this part of the case does not call for a detailed report.]

Summons dismissed.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *John Trevor Davies*, Sherborne, Dorset; *Richard Furber*.

Chan. Div. / North, J. — Jan. 30.

In re SANDERS' SETTLEMENT. (*a*.)

Solicitor — Remuneration — Easement — Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *General Order, Schedule I., Part I.*

An easement is not freehold property within the meaning of Schedule I., Part I., to the order made in pursuance of the Solicitors' Remuneration Act, 1881, *and on a purchase and sale of an easement the scale charge does not apply.*

In re Stewart, 37 *W. R.* 484, 41 *Ch. D.* 494, *followed.*

Summons to review taxation.

Certain property had been taken compulsorily by the London County Council, and upon petition, the reinvestment of the purchase money in the purchase of an easement consisting of a right of way for £516, was authorized.

The costs were ordered to be paid by the London County Council.

The taxing master held that the scale did not apply to the sale of a right of way, and the London County Council now applied to review his decision.

Baker, for the applicants.—The taxing master thought that *In re Stewart*, 37 W. R. 484, 41 Ch. D. 494, decided the point. But in that case the vendors only granted a licence to lay down pipes. Here the surface of the road will vest in the public authority. *In re Earnshaw Wall*, 42 W. R. 567, [1894] 3 Ch. 156, shows that *In re Stewart* turned upon the particular circumstances of the case. I submit that the scale fee is payable.

Gent, for the respondent, was not called upon.

NORTH, J.—In my opinion the taxing master had

(*a*.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

no choice, but was bound to follow the decision of Kay, J., in *In re Stewart*, which I also follow.

Solicitors, *W. A. Blaxland*; *Withall, Trotter, & Patteson.*

Chan. Div. } Jan. 16.
North, J. }

In re WISE.
JACKSON *v.* PARROTT. (*a.*)

Trustee—Discretion of trustees—Maintenance—Accumulations—Order.

A trustee who has, under the instrument of trust, a discretionary power of accumulating and investing as capital any portion of income unapplied for maintenance, does not exercise his discretion if he obeys an order of the court to accumulate the whole of the income of the fund until further order.

Whether a trustee who has exercised his discretion in accumulating income as capital can afterwards apply the capitalized accumulations for maintenance, quære.

Adjourned summons.

William Wise, by his will dated the 19th of October, 1887, appointed W. S. Parrott and James Mortimer executors and trustees, and after giving certain legacies, devised his real estate to his trustees upon trust to receive the rents, and pay his brother George Wise the annual sum of £41 12s. during his life, and his sister Margaret Hine Jackson the annual sum of £208 during her life; and to dispose of any surplus as part of his residuary personal estate. And on the death of the survivor of George Wise and Margaret Hine Jackson upon trust for the child, if only one, or all the children, if more than one, of Margaret Hine Jackson, who, either before or after her decease, should attain twenty-three years (such children, if more than one, to take in equal shares as tenants in common), and the issue of such of the children of his said sister as might then be dead, such issue taking only as tenants in common the share which their respective parents would have taken if living. And the testator bequeathed all the residue of his personal estate unto his trustees upon trust for sale and conversion, and to invest the net proceeds and stand possessed of the income arising therefrom upon trust to apply the whole, or such part thereof, as his trustees or trustee for the time being in their or his absolute discretion should think fit in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of the child or children of Margaret Hine Jackson, until they should respectively attain the age of twenty-three years, and to accumulate any unapplied portion.

The ultimate trusts were for the child, if only one, or all the children, if more than one, of his sister, who, either before or after her decease, should live to attain the age of twenty-three, and the issue of such of the children of his said sister as might then be dead, such issue taking only as tenants in common the share which their respective parents would have taken if living.

There was a gift over if all his sisters' children died without issue in her lifetime.

The testator died on the 25th of February, 1888.

North, J., on the 30th of January, 1889, upon the application of the trustees by originating summons said that the effect of the devise of real estate could not be determined till the death of the annuitants. The bequest of the residuary personalty was void for remoteness, but the persons to take could not be determined until the death of Margaret Hine Jackson. And it was ordered that the trustees should accumulate the surplus income of the real and residuary personal estate until further order.

No part of the income was applied in maintenance, but the whole was accumulated.

Two children of Margaret Hine Jackson now applied for maintenance—viz., Florence Mary, who attained twenty-three on the 10th of March, 1892, and Frederick William, born the 28th of May, 1874.

Swinfen Eady, Q.C., and *Dickinson*, for the applicants.—The trust for maintenance can be separated from the void gift of capital, and is valid for twenty-one years from the death: *Gooding* v. *Read*, 4 De. G. M. & G. 510; *In re Watson*, W. N., [1892] p. 192. The trustees have never exercised their discretion, and they can use the accumulations of past years: *Edwards* v. *Grove*, 2 De G. F. & J. 210, 9 W. R. Ch. Dig. 99.

Stallard, for one of the next of kin.—The trustees have no discretion as to past, but only as to future income: *Wilson* v. *Turner*, 31 W. R. 438, 22 Ch. D. 521.

Macnaghten, for another of the next of kin.

Chaster, for the trustees.

NORTH, J.—I thought on reading the will that it was reasonably clear that the trust for the maintenance out of the income of a fund up to the age of twenty-three of persons who are described, was an entirely different and separate trust from the trust of the capital of the fund for the same persons on their attaining the age of twenty-three. Two cases have been cited showing that my opinion arrived at independently on this will, is identical with the view taken by the court in similar cases: *Gooding* v. *Read* was very like the present case, and *In re Watson* was even stronger.

In my opinion, therefore, the trust for maintenance is good. Nearly eight years have elapsed since the testator died, and during the whole of that time the income has been accumulated. I at first thought the trustees had deliberately chosen to capitalize the income, and had exercised their discretion to the effect that it was not required for maintenance, and ought to be accumulated. I had not then given due weight to the clause in my former order. The positive direction to accumulate the income until further order bound the trustees until it was varied, and they had no longer any discretion as to applying any part of the income for maintenance without some further order of the court. Under these circumstances, the trustees, in capitalizing the income, have not exercised any discretion, and it is now open to them to exercise the discretion given to them by the trust in question, and I can see no difficulty in their applying income accrued in past years for maintenance after these years have expired. The question whether, if the trustees had exercised their discretion and capitalized the income they could afterwards resort to the capitalized accumulations does not now arise, for the trustees have not in fact exercised their discretion.

The fact that the daughter attained twenty-three four years ago does not deprive the trustees of the power of exercising their discretion regard to the income which accrued up to the date of her attaining twenty-three. The fact that she was maintained and educated until then is a point to which, however, they would, no doubt, give due consideration.

Solicitors, *Hichin, Smith, & Capel-Cure*; *R. E. Bartley*; *Collyer, Bristowe, & Co.*; *Ingle Holme & Sons.*

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div.
Kekewich, J. } Feb. 21.

COLLINSON v. JEFFERY. (a.)

Practice — Time — Enlargement — Redemption action— Order to pay into court—Default—Mistake—Payment in after time specified—Jurisdiction—R. S. C., 1883, *ord.* 64, *r.* 7.

In a redemption action an order was made giving leave to the plaintiff to lodge a sum of money in court to cover the amount due to the mortgagee, and directing that in default of payment being made within two months of the date of the order that "the action be dismissed, with costs."

Owing to a bonâ fide *mistake on the part of the plaintiff's solicitor, the money was not paid in until after two months from the date of the order, though within two months of the date of the order being entered and passed. No application had been made to dismiss the action.*

Held, that the action was still alive, and that the court had jurisdiction to extend the time for payment in.

Motion.

This was a motion in a redemption action asking for an extension of time with respect to an order for payment into court, under the following circumstances.

By an order of the Court of Appeal, dated the 6th of November, 1895, it was ordered that "the plaintiffs be at liberty to make the lodgment into court of £420," and it was also ordered "that in default of such lodgment within two months from the date of this order, the action be dismissed, with costs to be paid to the defendant by the plaintiffs."

Owing to a mistake of the plaintiffs' solicitor, who thought that time began to run from the 17th of December, 1895 (the date on which the order was passed and entered), and not from the 6th of November, 1895 (the date of the order), the money was not paid into court until the beginning of February, 1896.

On the 8th of February, 1896, the defendant's solicitor wrote to the plaintiffs' solicitor, saying that as the plaintiffs had made default in not paying the £420 into court, the action stood dismissed, with costs. The plaintiffs' solicitor replied that the £420 had been paid into court (as was the fact) on the 6th of February, 1896, and, after further correspondence, gave notice of motion for an extension of time for the purpose of putting right the omission to pay in the £420 within the time prescribed by the order of the Court of Appeal.

No application had been made on behalf of the defendant to dismiss the action.

Warrington, Q.C., and *C. Johnston Edwards*, for the plaintiffs.—This is a case for relief, the mistake being a *bonâ fide* one, and the defendant having obtained the security he bargained for. No application has been made to dismiss the action: Daniel's Ch. Practice, 6th ed., p. 789.

W. G. Lemon, for the defendant.—The action is dead, and the court has no jurisdiction to relieve by granting an extension of time: *Whistler* v. *Hancock*, 26 W. R. 211, 3 Q. B. D. 83; *King* v. *Davenport*, 27 W. R. 798, 4 Q. B. D. 402; *Script Phonography Co.* v. *Grey*, 59 L. J. Ch. 406, 38 W. R. Dig. 160. And on the merits of the case the court will not extend time in a redemption action unless there is very distinctive reason: *Novosielski* v. *Wakefield*, 17 Ves., at p. 418; *Faulkner* v. *Bolton*, 7 Sim. 319.

KEKEWICH, J.—I remember a phrase of which Knight Bruce, L.J., was very fond, "a slip in the office"; and he always, where such a slip had occurred, if it was an honest one, attempted to assist the applicant for relief therefrom. In this case I am convinced that there was a "slip in the office," and that it was an honest one. A mistake—a very stupid mistake—has been made, as from the form of the order it was quite clear that the money was to be paid in within two months of the date of the order. However, a blunder was made and the money was not paid into court until too late, but it is now in court and the defendant has the security for which he bargained, and I think it is a case in which the court ought to grant relief. Mr. Lemon says that I cannot grant relief because the action is dead, and if the action is dead it is true that I cannot relieve the applicant. But the action is not dead, it is only comatose or moribund. A final stroke in the shape of an application to dismiss the action is requisite to effect death, and, consequently, if an application for relief is made to me before the final stroke I have the power to grant it. Cases from the Queen's Bench Division have been cited to show that I have no such power, but in all those cases it was ordered that the applicant should take certain steps within a certain time, and in default of his doing so that the action should be dismissed for want of prosecution. That, in my opinion, is a final and peremptory order fixing the time that was to put an end to litigation, the only question being whether the applicant shall have more time in which to contest his opponent's right. That practice has never been applied in such an action as the present, where the question is one of paying money into court as security in a redemption action; and though, no doubt, there is some difficulty in dealing with the question after the time has expired, it has never been the practice to treat the action as dead until an application has been made to dismiss the action. It is true that there is a special form sometimes made use of in these cases that on failure to do certain acts within a specified time the action shall be dismissed "without further order," but these words have not been introduced here.

I therefore grant the application for extension of time in the terms of the notice of motion; but of course it is an indulgence, and therefore the applicants must pay the costs of this application.

Solicitors, *E. F. M. Ryan; Hepburn, Son, & Cutcliffe.*

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Chan. Div.
Kekewich, J. } Dec. 17.

In re CHAPMAN.
COCKS v. CHAPMAN. (a.)

Trustee — Breach of trust—Investment—Unauthorized investment—Liability—Trustee Act (1893) *Amendment Act*, 1894 (57 *Vict. c.* 10).

Section 4 *of the Trustee Act* (1893) *Amendment Act*, 1894, *is not retrospective so as to relieve trustees from an obligation* (e.g., *a breach of trust in retaining investments not authorized by law or by the instrument creating the trust*) *existing at the date of the passing of the Act.*

Summons.

James Chapman, by his will dated the 15th of June, 1871, gave to his executors and trustees all his

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

real and personal estate upon trust for Martha Ann Chapman (one of the trustees) for life with remainder over, and directed them to invest the same upon "good, real, or Government security," with full power to alter and vary and to reinvest upon like securities without being "answerable or accountable" for any loss occasioned thereby. And he gave to his executors all hereditaments vested in him "upon any trust or by way of mortgage to the intent that they might be better enabled to get in and discharge all such trust estates and moneys secured by way of mortgage."

The testator died on the 5th of April, 1879, leaving property which largely consisted of mortgage securities, which the trustees allowed to remain outstanding.

Subsequently, owing to depreciation in property, the securities became unrealizable except at a loss.

On the 21st of December, 1892, the trustees received a notice from one of the persons interested in remainder, to the effect that the trustees had been guilty of a breach of trust in not having forthwith on the death of the testator invested the trust funds in good and proper securities as directed by the will, and that they would be "held responsible for all losses, costs, and expenses arising to the trust estate by or by reason or on account of such breach of trust," followed by a requisition to invest the trust funds in a proper manner, and to make good any deficiency.

This was a summons taken out by the trustees to determine whether the estate of a deceased trustee and the surviving trustee, or either of them, ought to make good any deficiencies arising on any of the said mortgages.

Warrington, Q.C., and *Gatey*, for the plaintiffs.—The trustees are not liable. Section 4 of the Trustee Act (1893) Amendment Act, 1894, applies—viz., that "a trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law." The Act is retrospective, and sections 8 and 9 of the Trustee Act, 1893, apply. In the next place, this claim against the trustees is barred by the Statute of Limitations: the Trustee Act, 1888, s. 8, sub-sections (*a*) and (*b*). Sub-section (*a*) applies to this case: Wolstenholme, 7th edition, p. 188.

Marten, Q.C., and *Wilkinson*, for the tenant for life and the legal personal representatives of the testator.—The Act of 1894 was an amending Act, and was intended to be retrospective. Sections 30, 41, and 44 of the Act of 1893 are amended by sections 1, 2, and 3 of the Act of 1894. The general principles as to the retrospective effect of an Act are laid down in *Attorney-General* v. *Theobald*, 38 W. R. 527, 24 Q. B. D. 557; Ellis on the Trustee Act; *Rex.* v. *Dursley*, 3 B. & Ad. 465; *Freeman* v. *Moyes*, 1 Ad. & E. 338; *Pardo* v. *Bingham*, 17 W. R. 419, L. R. 4 Ch. App. 735; *Towler* v. *Chatterton*, 6 Bing. 258. The Act of 1894, section 4, says "a trustee shall not be liable"—*i.e.*, after the passing of the Act, and consequently the trustees are not liable here.

Warmington, Q.C., and *Micklem*, for the remainderman who had called on the trustees to make good the breach of trust.

KEKEWICH, J.—The question I have to decide is whether section 4 of the Trustee Act (1893) Amendment Act, 1894, is retrospective. In this case, according to the chief clerk's certificate, the trustees ought to have called in these mortgages not later than the end of July, 1881. They did not do so, and have not yet done so; and consequently on the passing of the Act of 1894 had been for thirteen years guilty of a breach of trust, and were liable to make good the deficiency arising from that breach of trust. Then comes the Act of 1894, which says: "A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law." We have in this case a "breach of trust by reason only of his continuing." The question, therefore, is whether when the Act passed it relieved the trustees from an obligation under which they lay up to that time, an obligation not enforced, but enforceable. There are many cases on the general doctrine whether an Act of Parliament is retrospective or not, and many cases on particular statutes; but I have the general doctrine concisely stated by Lord Hatherley in *Pardo* v. *Bingham*, where he says, at p. 739 of L. R. 4 Ch. App.: "The general rule of law being that, except there be a clear indication either from the subject matter or from the wording of a statute, the statute is not to have a retrospective construction." In other words, you assume that it is not retrospective, but that assumption might be rebutted. On the next page Lord Hatherley gives a guide for deciding what is the intention of the Legislature. He says: "In fact we must look to the general scope and purview of the statute and at the remedy sought to be applied, and consider what was the former state of the law and what it was that the Legislature contemplated." The first thing I have to do is to construe the meaning of the words before me, which is not so easy as at first sight it appears to be. What is the meaning of the word "liable"? The etymological meaning is not of much service. Regarded by jurists as modern English, the word has not a distinct meaning in ancient law. It is a single word for expressing "under an obligation" or "obliged." A trustee is not under an obligation or obliged. That does not help us; it only explains the word, and does not show whether the word "shall" must be construed prospectively or retrospectively. I must therefore take Lord Hatherley's words as a guide. The statute is remedial. Lord Hatherley says I must look at the remedy sought to be applied. I must see whether the Legislature in passing the Act was minded to relieve trustees of liability to which up to that time they had been subject. I will not fall back upon maxims or rules to construe remedial statutes otherwise than other statutes. I am not entitled to give to the statute an interpretation more favourable to trustees than if it were not remedial. I must give the statute the best meaning I can. I look at the general scope and purview of the statute and at the remedy sought to be applied, and consider what was the former state of the law, and what alterations in the law the Legislature contemplated. The general scope is of no assistance. It is an amending statute for the purpose of amending two or three clauses of the Trustee Act of 1893. This 4th section is the only one which refers to general law; the other three sections are merely amending sections to the Act of 1893. Now, the scope and purview of section 4 is, no doubt, to relieve trustees from liability for breach of trust. The Legislature has for many years turned its attention to that point. The Trustee Act of 1888 was of remedial character, and the Act of 1893, which repealed it (with the exception of sections 1 and 8), re-enacted the other remedial sections. The amending Act of 1894 does not mention the Act of 1888; but the Acts of 1888 and 1893 constitute a code, and of that code the Act of 1894 must be considered as an amendment. Consequently one must look at the Act of 1888, as well as the Act of 1893, in order to find the scope and purview of the Act of 1894, which must be considered as affording relief to trustees beyond that granted by the Act of 1888. Until the Act of

1888 no Statute of Limitations ran in favour of trustees, but by section 8 of that Act trustees may plead the statute. Now sub-section 3 of section 8 of the Act of 1888 says: "This section shall apply only to actions or other proceedings commenced after the 1st day of January, 1890, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations." The rights of *cestuis que trustent* were reserved until after the 1st of January, 1890. Turning to the Act of 1893, sub-section 4 of section 8 says: "This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the 24th day of December, 1888"; and sub-section 2 of section 9 says: "This section applies to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the 24th day of December, 1886," the section being thus expressly made retrospective. I find, therefore, in the provisions of the Trustee Act, 1893, which this Act of 1894 sought to amend, special provision for the commencement of the relief, as regards the relief, and the time at which it shall commence. I have nothing of the kind here, and the language is different. In the Act of 1893, s. 8, the words are: "A trustee shall not be chargeable with breach of trust"—*i.e.*, shall not be made to pay. In the Act of 1894, s. 4, the words are: "A trustee shall not be liable for breach of trust." The words do not give me much assistance; it is curious that "liable" should be used instead of "chargeable," and that no directions should be added as to when liability is to cease. With regard to the general scope and purview of the Act I see nothing retrospective in its operation. Trustees were in the former state of the law liable. It is said that the remedy of the *cestui que trust* shall be taken away. I cannot assume that the Legislature by one line of the statute intended to do so.

I am therefore unable to hold that section 4 of the Trustee Act (1893) Amendment Act, 1894, is retrospective so as to relieve trustees from an obligation which existed at the date of the Act.

Solicitors, *H. A. Maude*, for *Francis & Back*, Norwich; *Waterhouse, Winterbotham, & Co.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright and Kennedy, JJ.) Jan. 18.

In re GALWEY. (*a.*)

Extradition—Delivery up of British subject—Treaty with Belgium—Extradition Act, 1870 (33 & 34 *Vict.* c. 52), *ss.* 2, 6.

In 1876 *a Treaty was signed between England and Belgium for the mutual surrender of fugitive criminals, and by an Order in Council the Extradition Act*, 1870, *was made to apply to this Treaty. In* 1887, *by a declaration between the two countries, it was provided that "in no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects."*

Held, that while the contracting parties are not bound, they may under this Treaty surrender their own subjects; and that therefore the British Government had a discretion to surrender a fugitive criminal in this country, notwithstanding the fact that he was a British subject.

Rule *nisi* for *habeas corpus* to bring up F. Galwey and discharge him from custody, on the ground that he was a British subject and not liable to extradition to Belgium under the Treaty.

In this case a rule *nisi* had been obtained calling on the governor of her Majesty's prison at Holloway to show cause why a writ of *habeas corpus* should not issue, directed to him, commanding him to have the body of one Frederick Galwey before the court.

The following are the facts of the case:—

On the 11th of December, 1895, Galwey was brought up before the magistrate at Bow-street for extradition to the Belgian Government, on a charge of fraudulently receiving stolen securities within the jurisdiction of the Belgian Government.

The prisoner was the son of R. Galwey, who was born in Ireland in 1812, and who in 1838 went to Belgium, where in 1845 he was married, having previously declared himself a British subject.

The prisoner was born at Bruges in 1846, and resided there until nearly twenty-one years of age.

In 1870 he came to reside in England, and continued to reside there except for a short period in the years 1888 and 1893, when he was respectively in Brussels and Paris.

The magistrate, being of opinion that a *primâ facie* case had been established, made, on the 1st of January, 1896, a committal order for extradition.

Thereupon a rule *nisi* was obtained for the discharge of the prisoner under a *habeas corpus*, on the ground that he was a British subject and therefore ought not to be delivered up. There was no question about the offence.

By the Extradition Act, 1870 (33 & 34 Vict. c. 52), it is provided as follows:—

Section 2: "Where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, her Majesty may by Order in Council direct that this Act shall apply in the case of such foreign State."

Section 6: "Where this Act applies in the case of any foreign State, every fugitive criminal of that State who is in or suspected of being in any part of her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of her Majesty's dominions over that crime."

In 1876 a Treaty, signed the 20th of May, was made between her Majesty and the King of the Belgians for the mutual surrender of fugitive criminals.

Article 1 provides: "It is agreed that her Britannic Majesty and his Majesty the King of the Belgians shall, on requisition made in their names by their respective diplomatic agents, deliver up to each other reciprocally any persons, except as regards Great Britain native-born and naturalized subjects of her Britannic Majesty, and except as regards Belgium those who are by birth or who may have become citizens of Belgium, who, being accused or convicted as principals or accessories of any of the crimes hereinafter specified committed within the territories of the requiring party, shall be found within the territories of the other party."

On the 21st of April, 1887, a declaration was made between the British and Belgian Governments for

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

amending the above article as follows: Article 1.—"The words 'except as regards Great Britain native-born or naturalized subjects of her Britannic Majesty, and except as regards Belgium those who are by birth or who may have become citizens of Belgium,' which occur in article 1 of the Extradition Treaty of the 20th of May, 1876, are suppressed."

Article 2.—The following paragraph is added to article 1 of the said Treaty: "In no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalization."

Sir R. Webster, *A.G.* (*Sir R. Finlay*, *S.G.*, and *Sutton*, with him), showed cause against the rule.—The rule in this case was obtained on the ground that by the terms of the Treaty there is no power to deliver up a British subject; but, although it cannot now be contended that Galwey is not a British subject, yet it is clear that by the said Treaty he can be given up notwithstanding that he is a British subject. In *Reg.* v. *Wilson*, 26 W. R. 44, 3 Q. B. D. 42, it was held that British subjects could not be delivered up. That case was decided under a Treaty between the British and Swiss Governments made in 1874, and contained a clause similar to that in the Treaty of 1876 in this case. Owing to that decision the words in the Treaty of 1876 prohibiting the delivery up of British subjects were suppressed, and the clause in the declaration of 1887 substituted. The words substituted are that in no case shall the parties be bound to surrender their own subjects. These are not prohibitive words, but leave a discretion in the Secretary of State. Such a discretion should be exercised in this case. In the interests of justice the prisoner should be handed over when there is clear proof of his crime, although the court is not bound to do so.

F. M. Abrahams, for the Belgian Government.—The Belgian Government desire to have the prisoner handed over to them.

Bower (*Farrant* with him), in support of the rule.—When it is proved that the prisoner is a British subject the Crown must establish the fact that they are bound to hand him over, before this court will make the order. [LORD RUSSELL OF KILLOWEN, C.J.—The Treaty only says that the Government shall not be bound to hand over, and therefore it is left to the discretion of the Government.] Galwey is not confined owing to the exercise of the Government's discretion, but on the committal of the magistrate on the assumption that he is liable to be surrendered under section 6 of the Extradition Act, 1870. There is neither obligation nor right to hand him over. He owes allegiance to the Queen, and he is entitled to her protection.

LORD RUSSELL OF KILLOWEN, C.J.—In my judgment the rule in this case must be discharged. For the purpose of considering the question before us, we assume (for it has not been questioned) that the offence in respect of which the prisoner is detained under an order of committal is one within the Treaty and the statute. We must also assume that he is a British subject; and in my judgment we must further assume that the demand for extradition by the Belgian Goverment is assented to and supported by the executive Government of this country.

The question turns upon the construction of the Extradition Act, 1870, into which, and in connection with which, is to be read the terms of the Treaty. Now, the Treaty originally made in 1872 was modified in 1876, and as modified in 1876 it contained, as it originally stood, this stipulation: that her Britannic Majesty shall, on requisition made in her name by the respective agent of the other Power, deliver to each other reciprocally any persons, "except as regards Great Britain native-born and naturalized subjects of her Britannic Majesty." Now, as the Treaty then was, assuming *Reg.* v. *Wilson*, which was decided in 1877, to have been properly decided—and I am far from saying that it was not properly decided—assuming the Treaty to have stood in that position, the Extradition Act would not have authorized the extradition of the criminal, because from extraditions were excepted native-born and naturalized subjects of Great Britain. That *Reg.* v. *Wilson* decides, and I think rightly decides. I do not stop at all to consider whether, even if the Treaty did not apply, there might not have been some other steps taken with the view to extradition. *Reg.* v. *Wilson* decides that extradition could not be made under the Treaty, and the Extradition Act which applied to the Treaty. That being the original form of the Treaty it was subsequently altered; and, as the learned Attorney-General has suggested, it is quite probable that it was altered because of the case of *Reg.* v. *Wilson*, or probably other cases in the same sense, because in that case Cockburn, C.J., expresses regret that this country should not be enabled, under the extradition law then existing, to deliver, in proper cases even, British subjects who have offended against the laws of another country, as to which offences against the laws of another country, even although they might be crimes, and probably would be crimes common to both countries, yet could not be adequately dealt with or punished under the criminal law in this country. Accordingly, in 1887 the Treaty is designedly altered; the excepted words—that is to say, the exception which excluded native-born and naturalized subjects of Great Britain altogether from extradition under the statute and the then existing Treaty are excluded, and these words are substituted: "In no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalization." Now, what does that mean? It means surely that, while they are not bound, they may, under the Treaty and any legal enactment which relates to the Treaty, make such extradition.

Then we turn to the statute in connection with which the Treaty has to be construed. Section 6, a section to which the learned counsel for the prisoner has principally addressed himself, provides that where this Act applies in the case of any foreign State, and it applies in the case of Belgium, every fugitive criminal of that State who is in or suspected of being in any part of her Majesty's dominions, or that part which is specified in the order applying this Act as the case may be, shall be liable to be apprehended and surrendered in manner provided by this Act. The learned counsel says that in the present case the prisoner was not liable to be surrendered. It seems to me he clearly was. One may conceive the case of an application to the Secretary of State—and no particular Secretary of State is referred to in the Act—and that in that application in any given case the facts of which might be notorious, amongst others that the person against whom the application was made is a British subject, and that the circumstances under which he was charged with having committed a crime were such that in the clear opinion of the Secretary of State the executive Government ought not to assent to his extradition and ought not to exercise that power which the Treaty and the Act conjointly give, it clearly would be within his competence to say: "I shall not assist the extradition of this particular alleged criminal." In this case, however, as the learned counsel has pointed out, what he

did was to sign a warrant in conformity with the terms of the first form in the second schedule to the Act. This warrant runs in these terms. It is addressed to the chief magistrate of the Metropolitan Police Court, it recites the Treaty arrangement and the Order in Council of the Queen applying the Act, it states that a requisition has been made to one of the principal Secretaries of State by diplomatic representatives for the surrender of a particular person; then it proceeds: "Now I hereby by this my order under my hand and seal signify to you"—that is the chief magistrate—"that such requisition has been made, and require you to issue your warrant for the apprehension of such fugitive, provided that the conditions of the Extradition Act, 1870, relating to the issue of such warrant are in your judgment complied with." It seems to me that that is as clear and distinct an assent on the part of the representative of the executive Government to the demand for extradition as can possibly be; and I decline entirely to give any effect to the argument of the learned counsel, which, as I understand it, may be stated compendiously thus. It is not denied that there might be such a requisition made by the diplomatic representatives of the demanding Power to the executive Government here; but the suggestion is that there must be shown to have been a formal demand, and that the assent must have been given by the Secretary of State in some other way than by his signing the form of order which I have just cited to the stipendiary magistrate. I do not for one moment mean to convey that the Secretary of State having given that order to the chief magistrate of the Metropolitan Police Court may not, when at a later stage he becomes more fully aware of the facts than he previously was, withdraw that assent even at a later stage, and say this is not a case in which the executive Government of this country think that extradition ought to be granted. Nay, more, I am far from saying that even at this moment, or at a later moment, before the accused is handed over to the foreign Government, that, if there be grounds for urging it, it is not perfectly open to those representing the person now in custody to make representations to the Crown, if reasons exist why extradition should not be made. But all those considerations are matters of a political complexion, they are not matters which enter into the duty of the judiciary at all to determine. The man having been taken into custody is brought before the metropolitan police magistrate, and we would, after the order of committal by such magistrate, be entitled to review his decision, not in the sense of entertaining an appeal from his decision, but in the sense of determining whether there was evidence enough to give the magistrate jurisdiction to make the order of committal. I mean evidence of the offence and of other necessary conditions for the application of the Act itself.

The prisoner is now in custody under the magistrate's order. It seems to me that the only ground on which this *habeas corpus* can be successfully maintained is that the committal order was made without jurisdiction and was illegal. I see no grounds or pretence whatever for maintaining any such contention, and I think this application is not in any sense well founded.

Lastly, upon argument before us, the executive Government of the country appear in the only way in which they can be represented in our courts, by the recognized law officers of the Government of the day. They are here expressing the wish of the Government of the day that this extradition shall take place; and it seems to me it is impossible for us to go beyond that, and to entertain any considerations which may or may not, if they exist, be properly addressed in another quarter. It is quite obvious, without pointing it out in detail, that the whole tenor of the argument of the learned counsel for the accused is in contravention of the argument and of the judgment in the case of *Reg.* v. *Wilson*; and, indeed, Field, J., in one passage of his judgment contemplates this very case. He pointed out that in that particular case, as the Treaty with Switzerland then stood—it has since been altered, in 1890—extradition of British subjects was excluded; and he also points out how different would the result of the decision of the court have been, if it had not been an exclusion, but had been a case in which an option, so to speak, was left to the Government, because he says: "Is there not in this very Treaty an exception? It is not that one country shall not be bound to deliver up, but that no subject shall be delivered up to the other country."

On these grounds I think that this rule must be discharged.

WRIGHT and KENNEDY, JJ., concurred.

Rule discharged.

Solicitor against the rule, *Solicitor to the Treasury.*

Solicitors for the Belgian Government, *Michael Abrahams, Sons, & Co.*

Solicitor in support of the rule, *Joseph Davis.*

Q. B. Div.
(Grantham and Charles, JJ.) May 23; July 12, 1895.

SOUTHWELL *v.* GOVERNORS OF ROYAL HOLLOWAY COLLEGE. (*a.*)

Inland revenue — Inhabited house duty—Exemption—"Charity school"—48 Geo. 3, c. 55, schedule B, case 4—14 & 15 Vict. c. 36, s. 2.

By 48 Geo. 3, c. 55, schedule B (repealed by 4 & 5 Will. 4, c. 19, but re-enacted by 14 & 15 Vict. c. 36), "any hospital, charity school, or house provided for the reception or relief of poor persons" is exempted from inhabited house duty.

An institution is a charity school within the schedule if its primary object is the education of those who cannot afford to educate themselves.

A college was founded with the object of enabling women to continue their education after leaving school with all the advantages of a collegiate life. The college was maintained partly by endowment and partly by students' fees, but the fees alone would not have been sufficient to carry on the college in the manner directed by the deed of trust.

Held, that the college was not a charity school, and the exemption from inhabited house duty contained in 48 Geo. 3, c. 55, schedule B, did not apply to it.

Special case stated under 43 and 44 Vict. c. 19, s. 59, by the Commissioners for the General Purposes of the Income Tax Acts and for executing the Acts relating to the inhabited house duties.

The respondents had appealed to the commissioners against an assessment to inhabited house duty made upon the buildings used for the purposes of Holloway College. The college was established to enable young women to carry on their studies after they have left school, and provides the instruction necessary for London degrees and for pass and honour examinations at Oxford. The building, which stands in its own grounds and gardens, includes chapel, dining-hall,

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

gymnasium, library, reading-room, museum, lecture theatre and rooms, laboratories, common room, and a picture gallery. Each student has a bedroom and sitting-room to herself, fitted with all necessary furniture, and there are certain rooms such as dining-hall, music-hall, &c., common to the use of all students.

The declaration of trust as to the endowment of the college, the college prospectus, the report of the governors, and statements of accounts formed part of the special case. The material facts appearing from these documents are set out in the judgments.

It was contended for the respondents in support of their claim for exemption from inhabited house duty that the college was a charity school within the meaning of 48 Geo. 3, c. 55, schedule B, case 4.

The commissioners held that the college was exempt from the duty. The question for the court was whether the decision of the commissioners was right. 48 Geo. 3, c. 55, schedule B, case 4 (repealed by 4 & 5 Will. 4, c. 19, and re-enacted by 14 & 15 Vict. c. 36, s. 2), contains an exemption from inhabited house duty in the case of "any hospital, charity school, or house provided for the reception or relief of poor persons."

Sir R. T. Reid, A.G., Sir F. Lockwood, S.G., and *Danckwerts*, for the appellant.

Channell, Q.C., and *Gregson Ellis*, for the respondents.

The following cases were cited in the course of the arguments:—*Governors of Charterhouse School* v. *Lamarque*, 38 W. R. 776, 25 Q. B. D. 121; *Blake* v. *Mayor of London*, 35 W. R. 212, 791, 18 Q. B. D. 437, 19 *Ibid.* 79; *Cawse* v. *Committee of Nottingham Lunatic Asylum*, 39 W. R. 461, [1891] 1 Q. B. 585; *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 531, 40 W. R. Dig. 217; *In re The Duty upon Bootham Ward Strays, York, Commissioners of Inland Revenue* v. *Scott*, 40 W. R. 632, [1892] 2 Q. B. 152; *Reg.* v. *Commissioners of Income Tax*, 37 W. R. 294, 22 Q. B. D. 296.

Cur. adv. vult.

July 12, 1895.—GRANTHAM, J., read the following judgment:—In this case, which is stated by the Commissioners for the General Purposes of the Income Tax Acts, and for executing the Acts relating to the inhabited house duties, we are asked to say whether the buildings belonging to and used by the Royal Holloway College for the education of women come within the exemption from inhabited house duty allowed to charity schools under schedule B of the 45 Geo. 3, c. 55. In other words, we have to determine whether or not Holloway College is a "charity school" within the meaning of that exemption; and whether or not the young ladies enjoying the benefit, and with all the luxuries of a collegiate education, are "charity scholars." The commissioners have held that they are — *i.e.*, that the buildings are exempt as a "charity school."

The first point, a preliminary one, we have to determine is whether or not the question is one of fact or of law. If of fact, we have no power to alter the decision of the commissioners. If of law, we have. If it is one of fact, it is only necessary to read the prospectus and report of the governors to see that the commissioners have decided wrongly, though we could not correct their decision; for it is impossible to contend as a fact of everyday life that a school or college where every scholar or student pays £90 a year can be a charity school, and it can only be so treated by a fiction of law; while, as it is admitted that the Commissioners arrived at their decision in consequence of their application to this case of certain legal decisions on the interpretation of the word "charity," as applied to trust estates, I have no doubt that this is a question of law, and one in which our decision is properly sought. Before attempting to apply the law as laid down in other cases, let us see clearly what the facts are, because if the facts are different in this case, the application of the same law must be wrong. The college was built "to enable young women to carry on their studies after they have left school under specially healthy conditions, and with all the advantages of a collegiate life." And provision is accordingly made for instruction in all the higher branches of education. Now, it may be that, under modern ideas of the higher education of the masses, all these advantages may some day or other be provided for those who are the objects of charity. But can it be said in this case that they are provided for those who are the objects of charity, when we find that the recipients of those advantages have to pay, and therefore can afford to pay, for them £30 a term (*i.e.*, £90 a year), payable in advance, besides extras for doctors, fees for examination, and all the inevitable extras to be found in high-class ladies' schools, the charges for which come to from three guineas to five guineas a term (or nine guineas to fifteen guineas a year), making for the combined advantages the large sum of £146 16s. per annum, and that, too, without the laundress charges, which are also another extra? Surely, the bare statement of these facts answers the question, and no man can be so illogical as to say that legally this is a charity school. I have not forgotten that large sums are given by way of scholarships which reduce the cost of the education to those who obtain them; but they are not given on account of poverty, but on account of intellectual merit, and those least requiring pecuniary aid may, and often do, obtain them, so that the existence of these scholarships does not really affect the question. Why is it, then, that it is suggested that this is a charity school? Because it is said that so large a part of the expenses of the college are met by the endowment fund provided by a generous donor, and that the existence of that fund brings it within the principle of previous decisions on this question, and that we are bound by those decisions. True it is that at present a large proportion is so provided, but that is only temporarily so, and year by year as the college increases in numbers that proportion will diminish. The endowment fund may be taken to be a fixed fund of £7,500 a year, while the fund derived from fees for the year 1893 was also the same—viz., £7,500—and as the gross annual expenditure was about £15,000 in 1892-93 fees provided about one-half. But that was the proportion when the college only had ninety students, whereas with a complement of 200 students, for which the college was created and endowed, the proportion will be—endowment £7,500 and fees £18,000; or, in other words, about a quarter only will be derived from endowment funds, while the annual application of the funds makes the endowment proportion still less important, for I find that even now the fees received are far more than sufficient to pay the whole cost of tuition and household expenses—fees, £7,564; tuition and household expenses, £5,876. Notwithstanding this anomalous state of things, we may, however, be bound by precedent or by decisions of judges in other cases. I can find, however, no case which is applicable to such facts as these. The nearest case to them is the *Charterhouse case—The Governors of Charterhouse* v. *Lamarque*—where it was held that the school was not a charity school. I admit that the proportion the income from endowment funds bore to the amount paid by the

boys was apparently less than in this case; but the principle was the same. Originally that school was founded for the purpose of providing a gratuitous education entirely. Now its main object is not to provide a gratuitous education, but to provide for those who can pay the necessary fees a high-class public school. And it must not be forgotten that Charterhouse School buildings at Godalming were, as I understand it, originally built out of endowment money in the same way that the buildings were erected at Holloway College, so that free buildings do not make a charity school; and, as the primary object of this college is not free education, but the highest class education combined with the luxuries of college life, it would require a very strong authority to make me conclude that this was a charity school.

I do not forget that I was pressed very fairly during the course of the argument with my own judgment in the case of *Commissioners of Income Tax* v. *Pemsell*, which was afterwards upheld in the Court of Appeal and the House of Lords—a judgment given by me with a good deal of hesitation, as I was differing alone from the unanimous judgment of three Scotch judges of great eminence, and from the judgment of the then Lord Chief Justice of England, Lord Coleridge; but not only were the circumstances there entirely different, but the section of the Customs Act which we had to interpret and apply was an entirely different section from this. There we had to determine what was a "charitable trust," and the moment you get into trusts you come within the range of innumerable decisions of the Court of Chancery; and the fact that the Income Tax Act had specially relieved property applied to charitable trusts from paying income tax is a long way from showing that buildings in which charitable trust funds are applied in the maintenance of the buildings and partial provision and education of the inmates are not profitably used when the inmates themselves pay annually so large a sum for the advantages they derive as is paid by them in this college. I quite agree with the decision of my brother Charles in the case of *Cawse* v. *Nottingham Lunatic Asylum* that the word "poor" in the exemption of a house provided for the reception or relief of poor persons "only applies to the house" so provided; but we must not forget that the other words in the schedule, "hospital or charity school," indicate the buildings for the use of which no pecuniary advantage is obtained, and in interpreting the word "charity" you cannot therefore divorce it from the word school. So that we have not to determine what is a "charity" or what is a charitable purpose, which has been the question in so many of the cases cited during the argument; but what is a "charity school." I have not alluded to the other cases cited during the course of the arguments, because I can find nothing in the judgments there delivered helping us to a decision in this case; but for the reasons above given, in my judgment, this college and buildings are not exempt from inhabited house duty as coming within the exemption of the Act 48 Geo. 3, c. 55, schedule B.

CHARLES, J., read the following judgment:—The question in this case is whether the Royal Holloway College, Egham, is exempt from inhabited house duty. The commissioners to whom the governors of the college appealed against the assessment which had been made upon them were of opinion that the college was exempt, upon the ground that it was a "charity school" within the meaning of 48 Geo. 3, c. 55, schedule B. By that statute, which was repealed by 4 & 5 Will. 4, c. 19, but re-enacted by 14 & 15 Vict. c. 36, "any hospital, charity school, or house provided for the reception or relief of poor persons" is exempted from inhabited house duty.

The cases which have been decided upon the schedule have reference to three classes of institutions—first, institutions wholly self-supporting; second, institutions dependent upon endowments; and, third, institutions partly supported by endowments and otherwise self-supporting. With regard to the first class there is no doubt that they do not fall within the exemption, which it has been held must be restricted to institutions maintained wholly or in part by charity. Thus, in *Needham* v. *Bowers*, 37 W. R. 125, 21 Q. B. D. 436, an unendowed hospital for the reception of insane persons founded by charitable donations, but supported entirely out of payments made by the patients, was held not to be exempt. With regard to the second class there is equally no doubt that they do fall within the exemption, whether they be "hospitals, charity schools," or "houses provided for the reception or relief of poor persons." It is in the third class of cases, the class to which Holloway College admittedly belongs, that we meet with points of difficulty. It has, however, been decided that the exemption does apply to an institution possessed of a substantial charitable endowment, notwithstanding the fact that it also derived income from the payments made by inmates sufficient, in some years, to cover the whole expenditure: *Cawse* v. *Nottingham Lunatic Asylum*. But the applicability of the exemption can hardly depend upon the exact proportion in any particular year between the income from endowments and that from other sources. It must depend, I think (as was pointed out in *Cawse* v. *Nottingham Lunatic Asylum*), not upon consideration of any particular year, but upon the character of the institution. This, moreover, was the test applied in *The Governors of Charterhouse School* v. *Lamarque*, where the court held that the modern School of Charterhouse was not a "charity school," although considerable benefit was derived from the funds of the original foundation, especially with regard to scholarships and exhibitions. The question is there treated as one of degree, to be determined upon the facts of each particular case, and this seems to me to be the only satisfactory way of dealing with the matter. The facts of the case must first be ascertained, and then the question of law arises whether these facts bring the particular hospital or school whose liability is under consideration within the exemption clause.

The question, then, to be determined is, What is the character of Holloway College? Can it be said to be, taken as a whole, a charity school? Now, I do not propose to attempt any definition of the word "charity" as used in schedule B, but I think there can be no doubt that the language of the schedule contemplates institutions whose primary object is the maintenance or education of those who cannot in the one case afford to maintain themselves, or in the other to pay for their own education—institutions, in other words, eleemosynary in character. A "hospital" certainly is primarily intended to receive patients who do not pay for their treatment. A "house provided for the reception or relief of poor persons" is a poorhouse, and nothing else. And the words "charity school" must, in my opinion, be interpreted, having regard to the preceding and succeeding words, as "school primarily intended for the supply of gratuitous education." If that condition is fulfilled, then the exemption will be available, even although the pupils who are educated contribute towards the expense of education; just as a hospital remains a hospital entitled to exemption, although in a particular year it may receive fees to a large amount from paying patients. But in the case of Holloway College there does not appear to have ever been an intention to supply gratuitous instruction to

any pupil, rich or poor. I say "rich or poor," for I respectfully agree with the observations of Lord Herschell and Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel*, to the effect that many charities may exist which are not for the relief of mere pecuniary necessity. The object of the founder of the college was to enable young women "to carry on their sudies after they have left school under specially healthy conditions, and with all the advantages of a collegiate life." Instruction is provided for the degrees of the London University and for the pass and honours examinations at Oxford. The college was opened for work in October, 1887, in buildings erected by Thomas Holloway at his own cost upon land provided by him between the years 1876 and 1883. In the latter year he endowed the college with a sum of £300,000, and directed that sum to be applied for the benefit of the college, in paying off the building debt (if any), in furnishing and equipping the college, in establishing scholarships, exhibitions, and prizes, in paying the salaries of professors and teachers, and otherwise in discharging the domestic and other expenses incurred. The average income from the endowment under that trust and from other benefactions for the last four years has been £7,800 per annum, and is at present largely in excess of the income received from the fees of students, who, however, are rapidly increasing in number. The students pay £90 each a year, which covers all expenses except laundress, medical attendance, fees for university examinations, and individual lessons in special subjects. For this sum each student, no doubt, receives in consequence of the mode in which the endowment fund is used more educational advantages and greater material comforts than could be supplied to her in return for the fees she pays. Does this circumstance make the college a "charity school"? I think not; and I base this opinion, not upon any comparison between the receipts in any particular year from fees and those from endowment, but upon the view which I take of the character of the institution itself. It was not in its origin and never has been of an eleemosynary character, and the mere fact that in a boarding school in which a considerable fee is charged the inmates obtain various advantages and comforts from the endowment is not sufficient, in my opinion, to constitute the school a "charity school." For these reasons I think our judgment in this case must be for the appellant.

Appeal allowed.

Solicitor for the appellant, *Solicitor to the Inland Revenue.*

Solicitors for the respondents, *Ewart, Jukes, & Gore.*

C. C. R.
(Lord Russell of Killowen, C.J., Hawkins, Mathew, Wills, and Vaughan Williams, JJ.) Dec. 7; Feb. 3.

REG. *v.* RILEY. (*a.*)

Criminal law—Obtaining money by forged instrument—Forged telegram—Forgery Act, 1861 (24 & 25 *Vict. c.* 98), *s.* 38.

The prisoner was indicted under section 38 *of the Forgery Act*, 1861, *for obtaining money by means "of a certain forged instrument—to wit, a forged telegram."*

It appeared that the prisoner, who was a clerk in a post office, sent to a bookmaker a telegram, by which he offered to bet a sum of money that a certain horse would win a certain race. The telegram purported to have been handed in for transmission before the race was run, and the bookmaker accepted the bet on that footing, and ultimately paid the money. The telegram was in fact sent by the prisoner after the race had been run, and after he had learnt that the horse in question had won.

Held (*by* Hawkins, Mathew, *and* Wills, JJ.; Lord Russell of Killowen, C.J., *and* Vaughan Williams, J., *doubting*), *that the telegram was a forged instrument within the meaning of section* 38 *of the Forgery Act*, 1861, *and that the indictment was good.*

Case stated by Kennedy, J.

The prisoner Henry Riley was indicted under section 38 of the Forgery Act, 1861, for that he "feloniously did cause and procure to be delivered and paid to one Henry Dorber certain money—to wit, the sum of nine pounds, the property and moneys of George Crompton and Samuel Radcliffe, under, upon, and by virtue of a certain forged instrument—to wit, a forged telegram, that is to say, a forged message and communication purporting to have been delivered at a certain post office—to wit, at Royal Exchange, Manchester, for transmission by telegraph, and to have been transmitted by telegraph to a certain other post office—to wit, the head post office at Manchester, with intent thereby to defraud; the said Henry Riley then well knowing the same forged instrument to be forged against the form, &c."

The prisoner pleaded guilty.

It appeared that the prisoner was a clerk in the telegraph department of the head post office at Manchester. He had obtained from Dorber permission to make bets in his name with Messrs. Crompton & Radcliffe, who were bookmakers with whom Dorber kept an account.

On the 27th of June, 1895, a race known as the Newcastle Handicap was fixed for 2.45 p.m., and a horse named "Lord of Dale" was entered to run in it. On that day the prisoner sent to Crompton & Radcliffe a telegram in the name of Dorber, and in the words "Three pounds Lord of Dale." The telegram was stated on the face of it to have been handed in at the Royal Exchange office at 2.40 p.m., and to have been received at the head office at 2.51 p.m., from which office it was transmitted to Messrs. Crompton & Radcliffe. In fact, the telegram was not handed in at the Royal Exchange office at all, but was sent by the prisoner from the head office after he had received the news that Lord of Dale had won the race.

Crompton & Radcliffe believing that the telegram was sent before the race was run accepted the bet at the current odds of three to one against Lord of Dale, and on hearing that that horse had won credited Dorber with the sum of £9, which would afterwards be paid over by Dorber to the prisoner. No suggestion of fraud was made against Dorber.

Kennedy, J., desired the opinion of the court on the questions: (1) whether the forged telegram was a forged instrument within the meaning of section 38 of the Forgery Act, 1861, and whether the prisoner could be convicted on the indictment above set out? and (2) whether the prisoner by pleading guilty must be taken as admitting the facts appearing on the depositions?

F. H. Mellor, for the prisoner.

Sir R. B. Finlay, S.G., McCall, Q.C., and *Casserley*, for the Crown.—The arguments sufficiently appear from the judgments.

Cur. adv. vult.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Feb. 3.—HAWKINS, J.—The main question for us to decide is whether the telegram upon which this indictment was preferred is a "forged instrument" according to the true interpretation of section 38 of 24 & 25 Vict. c. 98.

Messrs. Crompton & Radcliffe are bookmakers at Manchester. Their practice is to accept bets on horse races offered them by telegram by persons desirous of backing horses provided that on the face of the telegram it appears to have been handed in by the sender at a time earlier than that fixed for the running of the race upon which the bet is offered.

On the 27th of June last a horse named "Lord of Dale" was about to run in the Newcastle Handicap, and the time fixed for the running of that race was 2.45 p.m. The prisoner, on the afternoon of that day sent to Crompton & Radcliffe in the name of a person named Dorber, a customer of theirs who had authorized the prisoner to use his name, a telegram which on the face of it purported to have been handed in at the Royal Exchange branch post office in Manchester at 2.40 p.m. and to have been received at the head office at Manchester at 2.51 p.m., whence it was sent out to Crompton & Radcliffe. The body of it was in these words "Three pounds Lord of Dale." The starting-price odds against Lord of Dale at the time when the telegram is purported to have been handed in were three to one. This telegram was received by Crompton & Radcliffe at 3.15 p.m. and the bet was accepted by them in the ordinary course. Lord of Dale won the race, and upon the faith that the telegram had been handed in as it purported to have been, Crompton & Radcliffe in due course paid Dorber or allowed him in account the amount won by him—namely, the sum of £9. The telegram was, in fact, not handed in at or sent from the Royal Exchange office at all, but was dispatched by the prisoner from the head office in the form in which it reached Crompton & Radcliffe after the race had been run and won.

It is fair to Dorber to say that it was not suggested that he was a party to that fraud.

By the 24 & 25 Vict. c. 98, s. 38, "Whosoever with intent to defraud shall demand, receive, or obtain, or cause, or procure to be delivered or paid to any person, or endeavour to receive or obtain or to cause or procure to be delivered or paid to any person any chattel, money, security for money or other property whatever under, upon, or by virtue of any forged or altered instrument whatever, knowing the same to be forged or altered," shall be guilty of felony.

[His lordship then read the indictment, and continued:—] To this indictment the prisoner pleaded guilty, but the learned judge (Kennedy, J.) before whom the case came on to be tried, entertaining a doubt whether the telegram was an instrument within the meaning of section 38, reserved that question for the consideration of the Court for Crown Cases Reserved, and also desired the opinion of the court as to the sufficiency of the indictment.

As to the indictment. Assuming the telegram to be an instrument within the meaning of the 38th section, I think the indictment sufficiently describes it; I consider it would, after a plea of guilty, have been sufficient under section 42 of the Act even had the indictment been for forging the instrument. *A fortiori* it is so upon this indictment, which is not for forgery but for procuring money to be paid by virtue of a forged instrument. I think it amply sufficient. See *Taylor* v. *The Queen*, 43 W. R. 24, [1895] 1 Q. B. 25.

I proceed to discuss the question reserved for our consideration, whether the telegram described in the case constitutes a forged instrument in law, and whether it is such an instrument as is contemplated by section 38?

My answer to both these questions is in the affirmative.

In 4 Blackstone's Commentaries, 8th ed., p. 247, forgery at common law is defined as "the fraudulent making or alteration of a *writing* to the prejudice of another man's right." I seek for no other definition for the purposes of the present discussion.

That a postal telegram is a writing is to my mind clear. It originates in a written message addressed and signed by the sender and delivered by him into the post office of dispatch for the express purpose that it shall in the very words in which it is penned be transmitted by means of an electric wire to another post office, which I will call the arrival office, and that it shall there, on its arrival, be committed to writing *verbatim et literatim*, and that such last-mentioned writing shall be handed to the person to whom it is addressed. The writing delivered in at the office of dispatch is the authority of the postmaster to transmit the message, and of the postmaster at the arrival office to commit it to writing and to deliver it to the addressee as the sender's written message to him. This message sent out from the arrival office is, in my opinion, as binding upon the sender as though he had written it with his own hand.

If I am right in this, it follows that an offer by telegram accepted by telegram might well create a contract sufficient to satisfy the Statute of Frauds between the sender and the addressee, and a verbal offer accepted by telegram might create an ordinary contract. For this there is the authority of the Common Pleas so long ago as 1870. See *Godwin* v. *Francis*, L. R. 5 C. P. 295, 18 W. R. C. L. Dig. 89.

Assuming the telegram to be such a writing as I have stated, a bare reading of the contents of it, coupled with the admission of its falsity and of the purpose for which it was made, are overwhelming to establish that it was fraudulently made to the prejudice of another man's right—and thus a forgery at common law—for this I need only cite the judgment of Blackburn, J., in *Reg.* v. *Ritson*, 18 W. R. 73, L. R. 1 C. C. R. 200: "When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent it is a forgery at common law."

In this case, unless the telegram was dated and dispatched before the race was run, it would have been inoperative, the time of dispatch was therefore material; falsely to write the telegram so as to make it appear that it was sent in for dispatch before the race was run when it was not sent in till afterwards, was to make it appear on the face of it to be that which it was not.

The more vexed questions, however, are whether the writing can be treated as an "instrument," and if so, whether it is such an instrument as is contemplated by the 38th section—the contention for the prisoner being that it cannot properly be treated as an instrument at all and that even if it can, the 38th section has reference only to such forged legal or commercial instruments as are mentioned and made felonies in the earlier sections of the statute. After much consideration I have formed an opinion adverse to the prisoner on both these points.

Now, can this telegram properly be called an instrument? I am not aware of any authority for saying that in law the term instrument has ever been confined to any definite class of legal documents. In the absence of such authority I cannot but think the

term ought to be interpreted according to its generally understood and ordinary meaning as stated in the dictionaries of Dr. Johnson and of Webster. Both these give definitions first how the word is to be treated when applied to a chattel—viz., as "A tool used for any work or purpose." When applied to a writing Dr. Johnson defines it as "A writing—a writing containing any contract or order." Webster's definition is "A writing expressive of some act, contract, process, or proceeding." When used generally Dr. Johnson speaks of it as "That by means whereof something is done." Webster as "One who or that which is made the means, or caused to serve a purpose." These definitions cover an infinite variety of writings, whether penned for the purpose of creating binding obligations or as records of business or other transactions. Every one of the documents mentioned in the statute is unquestionably an instrument, and intended to be so treated. Throughout the statute it is evident that the Legislature attached no rigid definite meaning to the word, for it is used in a variety of senses all falling within one or other of the definitions of Dr. Johnson and Webster to which I have referred.

Thus in section 1 of the Act, the word is used to signify a document having thereon affixed a counterfeit of the Great Seal. In sections 9-14 the word is used to denote the tool or implement to be used for making a peculiar kind of paper. In sections 16, 17, 18, the word is used to indicate tools for the manufacture of paper plates or implements to be used for carrying out forgeries. In section 21 the expression is "testamentary instrument." In section 29 the word is applied to written or printed documents made evidence by Act of Parliament. In section 33 it is applied to writings purporting to be made by the Accountant-General of the Court of Chancery, &c. In section 34 it refers to recognizances.

To most of the forged documents mentioned in the sections before section 38, and declared to be felonies, the term "instrument" is not applied at all although no doubt it could be suggested that they are intended to be treated as instruments within the meaning of the Act.

It will not of course be denied that there are very many instruments of an important character, commercial and otherwise, the forgery of which is an offence only at common law. I do not, for instance, find that the forgery of an ordinary written contract (not under seal or specially named in the statute) is a felony. So also a certificate of ordination, though the forgery of it is a mere common law offence, was nevertheless spoken of as an instrument by Blackburn, J., in *The Queen* v. *Morton*, 21 W. R. 629, L. R. 2 C. C. R. 22.

I call attention to these undeniable facts for the purpose of showing that there are many written documents of an important character beyond those mentioned in section 38, to which the words "any instrument whatsoever" used in that section, apply in addition to those documents mentioned in the statute.

In my view of the case the telegram in question is an instrument of contract—it is the instrument which completed the wager offered by Crompton & Radcliffe to those who were able and disposed to accept it—see *Carlil* v. *The Carbolic Smoke Ball Co.*, 41 W. R. 210, [1892] 2 Q. B. 484, [1893] 1 Q. B. 256, and the cases there cited; and thenceforth an obligation was imposed upon each party in honour to fulfil it according to the result of the race. I say in honour, because though it was clearly not an illegal contract it could not be enforced by any legal process.

In virtue of it, and upon the assumption that the telegram was what it purported to be, Messrs. Crompton & Radcliffe paid the £9.

Assuming the document to be an "instrument," I come to the only remaining question, Whether it is such within the meaning of section 38 of the statute. Why should it not be so? It is contended that the section has reference only to such instruments as are mentioned in the earlier sections of the statute, and that section 38 applies only to those forged instruments which are punishable as felonies. Such a construction is, I think, erroneous. There is no definition of the word "instrument" in the statute to fetter us in giving to it the ordinary and general interpretation. It was clearly the intention of the Legislature by section 38 to create a new offence.

If it had been the intention of the Legislature to limit the operation of the section to felonious forgeries, how easy it would have been to use appropriate language for that purpose. So far from doing this the Legislature, having used the term instrument in a variety of senses all falling within one or other of the definitions I have above referred to, proceeds in section 38 to use language which read in its ordinary sense comprises every description of written instrument. What simpler, stronger, or more comprehensive words could they have employed than "any forged or altered instrument whatsoever" to convey an intention that every forged instrument should be covered by it whether the forgery was a felony by statute or a misdemeanour at common law. I think the Legislature intended exactly what it has said, and I feel strengthened in this view by the declaration of Mr. Greaves, Q.C., (who had much to do in the framing of the Criminal Consolidation Acts of which this is one) in that chapter of his work relating to these statutes which treats of the construction of them, wherein he says, "It may be well to add that the word 'whomsoever' is used throughout these Acts in the widest sense so as to include every person capable of becoming a criminal." There is no reason why the word "whatsoever" should not be interpretated in a similar spirit. As to the word "any," he says, "It is also to be used in like manner so as to include every person or thing, or at least every person or thing other than the person or thing previously mentioned." Speaking of the expression "any other" he illustrates its intended interpretation by saying that the words "gunpowder," or any other "explosive substance" in section 19 of the Offences Against the Person Act are intended to include every explosive substance. He points out also in the latter part of that chapter that (for reasons he has given) any argument as to a difference in the intention of the Legislature which may drawn from a difference in the terms of one clause from those in another will be of no weight in the construction of such clauses. Moreover, in a note to the section now under consideration, he says, "This clause is intended to embrace every case of demanding, &c., any property whatsoever upon forged instruments."

I think no argument against the interpretation I have put upon section 38 can be derived from the section immediately following, for it expressly limits the operation of that section to statutory forgeries by enacting that whether such forgeries are created by that or any other Act the person charged with them may be indicted as offenders against that Act. Again, in section 40, the operation of which is confined to statutory forgeries, it is expressly and unmistakably so limited. Section 41 deals with the question of venue in all cases of forgery, expressly stating that it shall apply to all forgeries whether by statute or common law. Section 42 deals with what shall be a sufficient description in an indictment of "any instrument" charged as a forgery, while section 44 which makes it unnecessary to allege an

intent to defraud any particular person, admittedly covers forgeries of every description without any exception, and expresses that intention by the very same words used in section 38 "any instrument whatsoever." Is it possible that the Legislature, who were clearly alive to the difference between common law and statutory felonies, can have intended that a different construction should be put on these same words when used in section 38?

The result is that, in my opinion, the conviction ought to be affirmed.

In regard to a question suggested in the case whether a person by pleading guilty to an indictment thereby admits the truth of the fact stated in the depositions, I think it right to express my opinion that he does not. He admits simply that he is guilty of the offence as charged in the instrument, and nothing more.

WILLS, J. — The only question in this case is whether a post-office telegram is an "instrument" within the meaning of the 24 & 25 Vict. c. 98, s. 38.

After a careful study of the Act I am of opinion that it is so. The Act is not very artistically drawn, and the words "instrument," "document," and "writing" are used in a manner which makes it sometimes difficult at first sight to say whether a real distinction is intended by the use of different words. Sections 1-26, 28, 30, 32, 35, 36, 37, and 40 all relate to instruments or documents of various kinds known by definite designations, and so described. They therefore throw no light upon the present question.

Section 27 relates to the forgery of "documents" or "writings" intended to be used in evidence. Any writing so used would, in ordinary legal phraseology, be called part of the documentary evidence in the case, and probably this section would have been construed as including every description of writing so used if the words "or writing" had been omitted.

Section 29 relates to forgery of "instruments" made evidence by Act of Parliament; this could only apply to writings of a more or less formal character, but this limitation follows from the subject matter of the clause rather than from the use of the word "instrument."

Section 31 relates to the forgery of "documents" or "writings" made or issued under the provision of any Act of Parliament. The same remark applies; such "documents or writings" must necessarily be of a more or less formal character, and the phrase "document or writing" in this section would appear to mean exactly the same thing as "instrument" in section 29.

The same remark applies to section 33, where the corresponding phrase is "instrument or writing." In section 34 the word "instrument" must, from the nature of the enactment, refer to writings of a formal character.

In section 39, which relates to the forgery of "instruments or writings" designated in Acts of Parliament by any particular name or description, it is obvious that the meaning of the clause would have been exactly the same if the words "or writings" had been omitted.

Sections 40-45 are a group of enactments for facilitating procedure and obviating mere technical difficulties. There is no reason why they should not have the widestc onstruction and be applied to every kind of offence, which either by statute or at the common law constitutes a forgery. On the contrary, there is every reason why sections inserted for the purpose of advancing justice by getting rid of mere useless technicalities should be applied to forgeries of every description. Some of these sections are older than the Act of 1861. In all that is material to the present discussion, section 42, which makes it unnecessary in the indictment to do more than describe the forged writing by any designation by which it may be generally known, is a repetition of 14 & 15 Vict. c. 100, s. 5; and section 44, which makes it unnecessary to specify more than an intent to defraud generally, is a repetition of section 8 of the same Act. In section 42 the expression used is "any instrument," and in section 44 "any instrument whatever." My own experience in drawing indictments goes back to 1851, and, in my experience, since that time it has been the practice to treat sections 42 and 44 as applying to forgeries at common law as well as to statutory forgeries. Inquiry has satisfied me that the experience of others widely conversant with the subject agrees with my own. The phrase used in section 38, under which the present question arises, is "any instrument whatsoever." There can be no difference in meaning between this phrase and either of those used in sections 42 and 44. It would be most unwise to throw a doubt upon the correctness of the interpretation put ever since 14 & 15 Vict. upon the words used in sections 42 and 44, nor is there the slightest ground for doing so; and the only question is whether there is any more reason for restricting the meaning of "instrument" in section 38 than there is in those sections. I can see none. It seems to me obvious that the words "instrument," "document," and "writing" have not been selected for any particular logical reason to be used in any particular section, and that whether they are to have a restricted or a general sense must be gathered from the nature of the particular enactment. I have pointed out some sections where the context does necessarily restrict the application, but there it is rather the application than the meaning that is so narrowed.

Section 38 provides that "whosoever with intent to defraud shall demand, receive, or obtain, or procure to be delivered or paid to any person, or endeavour to receive or obtain, or to cause or procure to be delivered or paid to any person any chattel, money, security for money, or other property whatsoever under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, shall be guilty of felony and liable to penal servitude for any term not exceeding fourteen years, or to be imprisoned for any term not exceeding two years."

The essence of this section appears to be that where property has been obtained not merely by false pretences, but by false pretences into which forgery or its equivalent enters, the offence shall be constituted a felony, and may involve much severer punishment than either the mere obtaining of money by false pretences or a mere forgery at common law.

I cannot see anything in the nature of such a section which should make it necessary or desirable to restrict the application of the word "instrument" to writings of a formal character, and I think it is meant to include writings of every description if false and known to be false by the person who makes use of them for the purpose indicated.

The severity of the possible punishment has been appealed to as a reason for restricting the application of the section to documents of a mere formal character or documents having in themselves some

legal operation. The argument appears to me to have no weight. The section embraces cases involving forgeries which may be of a very heinous nature, such as forgeries of wills or letters of administration. There is no minimum of punishment, and the limits of discretion are not unreasonable. Theoretically a boy may be sent to penal servitude for five years for stealing an apple, and that though it be his first offence, and the limits of discretion in cases of many offences, whether triable at quarter sessions or at assizes only, are equally large. No violence is done by this construction to the use of the word "instrument." In *Coogan's case*, reported at length in 2 East. P. C. 949, Buller, J., defined forgery at common law as the "making of a false *instrument* with intent to deceive." Blackstone, J., defines forgery as "the fraudulent making or alteration of a *writing* to the prejudice of another's right" (4 Com. 246). It is plain that in these definitions "instrument" and writing are synonymous. East, himself a writer of considerable authority, defines forgery in one passage as "a false making, a making *malo animo*, of any written instrument for the purpose of fraud and deceit" (2 P. C. 852), and in another passage as "the counterfeiting of any *writing* with a fraudulent intent whereby another may be prejudiced" (*ibid.* 861). It is obvious that the writer in these passages treats "instruments" and "writings" as for the present purpose synonymous.

For these reasons I am clear that the conviction must be affirmed.

I think, further, that even if the true construction of the word "instrument" required a more restricted meaning, the telegram in the present case would fall within it. It was a writing which, if accepted and acted upon, would establish a business relation, and lead directly to business dealings with another person. It is true that the dealings were of such a nature that they led to no legal rights, and could not be made the foundation of an action. But they were not forbidden by law, and in that sense and to that extent were legitimate. A post-office telegram is issued by a public department in the course of business, and in the present case the telegram appears to me to have sufficient formality, both in its origin and in the use to which it was put, to deserve the name of an "instrument." The only hesitation I have in saying so is lest it should appear to imply any lingering doubt in my own mind as to the correctness of the wide meaning I have given in the principal part of my judgment to the word "instrument." I have no doubt or hesitation about the matter, and I notice the second point only because it was argued before us.

Lord RUSSELL OF KILLOWEN, C.J.—I have only one observation to make on the two judgments which have been read. It is obvious that the case is not of general importance, though it is of importance to this particular prisoner, because it is clear that the prisoner committed an act of forgery at common law. It is also clear that he committed a serious misdemeanour within the Telegraph Act, and, probably, also clear that he committed the offence of obtaining money by false pretences. I do not dissent from the judgments which have been read, but I share the doubts which are expressed in the judgment of my brother Vaughan Williams.

MATHEW, J., concurred in the judgment of the majority of the court.

VAUGHAN WILLIAMS, J.—I concur in the opinion that the defendant on the facts of this case was guilty of counterfeiting a writing with intent to defraud, and, therefore, of forgery by the common law, but I do not think he was guilty of any statutory forgery or that the telegram sent falls within the description of any of the written instruments, the forgery of which is made felony by 24 & 25 Vict. c. 98, but I propose to make some observations on the question whether the defendant was guilty of an offence within section 38 of that statute.

This question turns on the meaning in section 38 of 24 & 25 Vict. c. 98 of the words "any instrument whatever." Do these words mean any writing whatever or ought these words to be read subject to some, and what, limitations? Two possible limitations occur to me. (*a*) That "instrument" must be read, not as including all writings, but only such writings as contain a contract, order, or legal act of the writer; (*b*) that "instrument" in section 38 means a writing, the forgery of which is made a felonious forgery in the preceding sections.

The statute is a consolidating and amending Act relating to indictable offences by forgery, *i.e.*, consolidating and amending the statute law relating to offences which are made forgery by statute. The greater part of the sections are culled from older statutes and put as it were on a statutory file. In construing such sections I do not think one ought to let the meaning of a word in one section affect the construction in another section unless the sections are plainly connected.

As to limiting the word "instrument" to contracts, orders, and legal acts, I do not think that the meaning to be attached to the word in the various sections of the Act affords any guide to the meaning of the word in section 38. The meaning is sometimes the limited meaning, sometimes the wide meaning. The meaning, however, in each case is to be derived from the collocation of the word with the provisions of the particular section. The use of the word "instrument" in this Act as a whole does not in any case seem to afford any assistance. I mention this because undue stress seems to me attached to the use of the word instrument in section 42.

I think one must construe the words "any instrument whatever" in section 38 in reference to their collocation in section 38, and not in reference to the uses of the word "instrument" in other sections of the Act; but applying this guide of construction I find nothing to lead me to the conclusion that "instrument" in that section is limited to writings containing a contract or legal act.

Secondly, as to limiting "any instrument whatever" to writings the forgery of which is made felony by the preceding sections, it will be observed that the first thirty-eight sections deal with the forgery of specific instruments, writings, or matters, or with matters connected with each such offence—each group of sections is introduced with a heading—*e.g.*, "as to forging deeds, wills, and bills of exchange." Section 38 itself is headed: "As to demanding property upon forged instruments." The sections following section 38 are headed "as to other matters." Do the words "by virtue of any forged instrument whatever" in section 38 mean "by virtue of any of the forged instruments dealt with in the preceding sections"? Do they refer exclusively to the offences created by the Act? I am inclined to think that this is the true construction, remembering that we are construing a penal statute. The subject of the Act up to section 38 has been statutory—forgery—*i.e.*, felonious forgery. "This section creates an offence with reference to forged instruments," does it not mean any instrument whatever of those the forgery of which is made felony by this Act? One reason for attributing this meaning is that the offence of demanding property upon forged instruments is made felony; this is quite

reasonable if the forgery of the instrument itself with intent to defraud is made felony, but it seems unreasonable in a case where the forgery with intent to defraud of the writing itself is not felony, to make the demanding property upon it felony. It seems unreasonable to make what may be the lesser offence felony when what may be the graver offence is not felony. On the whole I think that section 38 is the supplement of the preceding sections, and that "instrument" must be limited to instrument (using the word in its widest sense) the subject of the preceding sections. But although this is the inclination of my mind I am not prepared to differ if the majority of the judges think otherwise.

Conviction affirmed.

Solicitor for the prisoner, *R. Riley*, Blackburn.

Solicitor for the Crown, *The Solicitor to the Treasury.*

Court of Appeal.

From Q. B. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) Jan. 17; Feb. 17.

HARDAKER AND OTHERS *v.* IDLE DISTRICT COUNCIL AND ANOTHER. (*a.*)

Negligence—Principal and agent—District council—Contractor—Damage—Remoteness.

A district council employed a contractor to construct a sewer in a public thoroughfare. The contractor in constructing the sewer, negligently left a gaspipe in use unsupported, so that the pipe broke, and gas escaped therefrom into the plaintiffs' house, and an explosion occurred, whereby the plaintiffs suffered damage.

Held, that there was a duty on the district council to so construct the sewer as not to cause damage to the public; that the district council might delegate that duty to a contractor, but if the contractor failed to perform the duty, the district council were liable for the damage resulting from such failure.

Held, also, that the damages claimed were not too remote.

Application by the plaintiffs for judgment or for a new trial.

The action was brought by a husband and wife against the Idle District Council and Abraham Thornton, a contractor, for having in the construction of a sewer been guilty of negligence by omitting to keep a gaspipe supported, so that it became fractured and the gas escaped into the plaintiffs' house and exploded, whereby the male plaintiff's furniture in his house was wrecked and the female plaintiff was injured.

The facts were as follows:—"On the 10th of October, 1894, the district council gave notice, under the provisions of the Public Health Act, 1875, s. 150, to the male plaintiff to make a sewer in Moorfield-place, he being the occupier of a house abutting thereon; and, as the notice was not complied with, the council, as they lawfully might do under the provisions of the section, proceeded to execute the works mentioned in the notice.

The district council employed the defendant Thornton to execute the work.

By the contract made between Thornton and the district council it was agreed that the contractor should execute the works in the most workmanlike and substantial manner, particular attention being paid to any directions or instructions which the inspector appointed by the council to superintend the work might from time to time give as the works proceeded. Power was given to the inspector, in the event of the contractor's foreman or his workmen disobeying his orders, to forthwith discharge them, and also to stop the works at any stage, and to enlarge, diminish, modify, or vary the works, or any part thereof, which, however, was not to annul the contract. It was further agreed that the care of the entire works, until completed, should remain with the contractor, who should be responsible for all accidents and damage to persons or property arising from the works, and that the contractor should protect all gaspipes which might be laid bare or otherwise interfered with.

It was proved that the contractor had been guilty of negligence by insecurely packing the soil around a gaspipe in use after the excavation had been made for the sewer, whereby the gaspipe was broken and the gas escaped.

Wright, J., gave judgment for the plaintiffs against the contractor for £45, but held that there was no case against the district council.

The plaintiffs in their present application contended that the district council were also liable.

Tindal Atkinson, Q.C., and *Longstaffe*, for the plaintiffs.

Kershaw, Q.C., and *Waugh*, for the defendants the district council.

The arguments of counsel and the authorities referred to are fully stated in the judgments.

Cur. adv. vult.

Feb. 17.—LINDLEY, L.J., read the following judgment, in which, after stating the facts and reading the material clauses of the contract, and sections 150 and 160 of the Public Health Act, 1875, and sections 22 and 79 of the Towns Improvement Clauses Act, 1874, he proceeded as follows:—

The powers conferred by the Public Health Act, 1875, on the local board can only be exercised by some person or person acting under their authority. Those persons may be servants of the local board or they may not. The local board are not bound in point of law to do the work themselves—*i.e.*, by servants of their own. There is nothing to prevent the local board from employing a contractor to do their work for them. But the local board cannot, by employing a contractor, get rid of their own duty to other people, whatever such duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed and they are responsible accordingly.

This principle lies at the root of the modern decisions on the subject, and the distinction between the two classes of cases is well illustrated by comparing *Reedie* v. *London and North Western Railway Co.*, L. R. 4 Ex. 244, with *Hole* v. *Sittingbourne and Sheerness Railway Co.*, 9 W. R. 274, 6 H. & N. 488. In the first of these cases the defendants employed a contractor to build a bridge. One of his men carelessly let a stone fall on the plaintiff, and the defen-

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

dants were held not liable. In the second of these cases the defendants' duty was to build a bridge which would open and let vessels pass. They employed a contractor, who built a bridge which would not open; the plaintiff was injured thereby, and the defendants were held liable for the consequences. The principle to which I am referring is further illustrated by *Pickard* v. *Smith*, 10 C. B. N. S. 470, 9 W. R. C. L. Dig. 59, the coal-cellar case; *Gray* v. *Pullen*, 13 W. R. 257, 5 B. & S. 970, where the Court of Exchequer Chamber, reversing the Court of Queen's Bench, held the employer of a contractor liable for injury caused to the plaintiff by the contractor's failure to make good a pavement under which he had constructed a drain. Blackburn, J., at the trial, and the Court of Queen's Bench, held the defendant not liable, on the ground that he was not responsible for the negligence of the contractor in doing the work. But on appeal it was held that it was the defendant's duty to fill up the drain or to see that it was filled up, and that he was liable for the non-performance of this duty. Lord Chelmsford in *Wilson* v. *Merry*, L. R. 1, H. L. Sc. App. 326, expressed doubt as to the correctness of decision, but I cannot find that it has ever been overruled or considered unsatisfactory by any other judge. The same principle was again applied in *Tarry* v. *Ashton*, 24 W. R. 581, 1 Q. B. D. 314, the case of the lamp on the defendant's property which fell on the plaintiff whilst passing under it.

So again in *Bower* v. *Peate*, 1 Q. B. D. 321, 24 W. R. Dig. 226; *Dalton* v. *Angus*, 30 W. R. 191, 6 App. Cas. 740; *Hughes* v. *Percival*, 31 W. R. 725, 8 App. Cas. 443, in all of which the defendant's contractor let down the plaintiff's wall. In each of these cases the defendant was held responsible, because it was his duty not to let the wall down, and to take whatever care was necessary to prevent injury from what he was doing.

Black v. *Christchurch Finance Co.* (*Limited*), [1894] A. C. 48, in the Privy Council, is the last case on the subject, and there a landowner who had employed a contractor to burn the bush on his land was held liable for his negligence in burning it so as to be unable to stop the spread of the fire on to the land of the plaintiffs.

It is not always easy to avoid mistakes in applying this, or, indeed, any other principle, to difficult cases, as is shown by *Gray* v. *Pullen* and *Butler* v. *Hunter*, 10 W. R. 214, 7 H. & N. 826, which is inconsistent with *Bower* v. *Peate*, but was distinctly disapproved in *Hughes* v. *Percival*. Neither is it easy to express the principle in terms which will apply to all cases, as is shown by Lord Blackburn's criticisms in *Hughes* v. *Percival*, when referring to *Bower* v. *Peate* and *Quarman* v. *Burnett*, 6 M. & W. 499, the well-known jobmaster's case. I will take the law, however, as laid down by Lord Blackburn in *Dalton* v. *Angus*. Lord Blackburn there said: "Ever since *Quarman* v. *Burnett* it has been considered settled law that one employing another is not liable for his collateral negligence unless the relations of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed; but he cannot thereby relieve himself from liability to those injured by the failure to perform it. *Hole* v. *Sittingbourne and Sheerness Railway Co.*, *Pickard* v. *Smith*, *Tarry* v. *Ashton*." Lord Blackburn in this passage contrasts a contractor's negligence, which he calls collateral, with failure on the part of a contractor to perform the duty of his employer. For the first the employer is not liable; for the second he is, whether the failure is attributable to negligence or not. Lord Blackburn's language in *Hughes* v. *Percival* shows that this is what he really meant, for he points out that the employer's duty was to see that his contractor did his work properly. Lord Watson said the same.

I pass now to consider the duty of the district council in the present case. Their duty in sewering the street was not performed by constructing a proper sewer. Their duty was not only to do that, but also to take care not to break any gaspipes which they cut under; this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to do so. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the district council's duty for them, but did so carelessly; the case is one in which the duty of the district council, so far as the gaspipes were concerned, was not performed at all. The case falls within the second of Lord Blackburn's propositions, and not within the first. It was contended for the district council that, although they might be liable to the owner of the gaspipes, they were not liable to the plaintiff as they were under no duty to him. But this is not consistent with *Gray* v. *Pullen* nor with *Tarry* v. *Ashton*, in neither of which was the defendant under any duty to the plaintiff, except as one of the public. On these grounds I am of opinion that the district council are liable to the plaintiffs.

Mr. Kershaw, on behalf of the district council, contended that the relation of the district council to Thornton was that of master and servant. Of course, if this were so, the liability of the district council would be clear enough. But I am of opinion that this contention cannot be supported. It is not proved that the surveyor gave orders which led to the mischief; and, large as his powers were, Thornton was not, in my opinion, the servant of the defendants. *Reedie* v. *London and North-Western Railway Co.*, and *Steel* v. *South-Eastern Railway Co.*, 16 C. B. 550, 3 W. R. C. L. Dig. 154, support this conclusion.

With respect to the remoteness of damage, little need be said. The nature of gas, its certainty to escape and to find its way where ever it can get, and to explode if it escapes in large quantities and comes into contact with fire, all render the breaking of a gas main very dangerous if houses are near. The fact, moreover, that free escape upwards through the surface was greatly hindered by the hardness of the surface after it was left by the contractor would force the gas laterally to some considerable distance, and very probably into some passage or place near a fire. Such an accident as that which eventually happened is only what was reasonably to be expected. *Sharp* v. *Powell*, 20 W. R. 584, L. R. 7 C. P. 253, does not, therefore, apply to the present case. The appeal, therefore, must be allowed, and judgment must be entered for the plaintiff for £45 and the costs of the action; and the district council must pay the costs of the appeal.

A. L. SMITH, L.J., read the following judgment, in which, after stating the facts as above set out, he proceeded as follows:—

The question now is whether the defendants, the district council, are liable to the plaintiffs for this negligent act of their contractor and its consequences. In order to render a person liable for an act of negli-

gence which he did not himself commit, it must be shown by the person injured either that the person sought to be made liable authorized the act of negligence complained of, or that it was committed by his servant in the course of his employment, or that he owed such a duty to the person injured that he could not, by delegating its performance to a contractor, rid himself of that duty. I pass by a liability which may be imposed upon an owner or occupier of land for injury to another occasioned by the use of his land, which will be found referred to by Parke, B., in his judgment in *Rapson* v. *Cubitt*, 9 M. & W. 710. It was not contended at the bar that this liability had any application to the case in hand; and, indeed, if it had, it would impose a very onerous obligation upon local authorities, which, so far as I know, has never before been attempted to be imposed upon them when executing works by their contractor in a public street.

In the present case, in my judgment, the relationship of master and servant did not exist between the council and Thornton, for the true relationship was that of principal and contractor. It is true that the district council by their inspector had the right of fully superintending and supervising the execution of the works and giving directions thereon, but the cases of *Steel* v. *South-Eastern Railway Co.* and *Reedie* v. *London and North-Western Railway Co.* show that these circumstances do not of themselves render a principal liable for the negligent act of his contractor unless brought about by the order of the inspector. If the fracture of the gaspipe in this case had been caused by reason of the orders of the district council's inspector, that would have rendered the district council liable; for, as between the district council and the inspector the relationship of master and servant existed, and for his acts within the scope of his employment the council would be liable; but no proof was given that the fracture was occasioned by anything the inspector either said or did. If the inspector was guilty of any negligent omission, that was a breach of duty he owed to his employers, not to the plaintiffs. The plaintiffs have not shown that the district council authorized the act of negligence complained of, nor that the contractor and the district council stood in the relation of servant and master.

But the important question still remains whether the plaintiffs have not shown that the district council owed such a duty towards them that the council could not, by delegating that duty to a contractor, thereby escape liability thereon should the contractor be guilty of negligence in the performance of the work he had contracted to execute. In the case of *Dalton* v. *Angus*, 6 App. Cas., at p. 829, Lord Blackburn states the law applicable to a case like the present thus—he said: "Ever since *Quarman* v. *Burnett* it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them; so that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing the duty performed, by delegating it to a contractor. He may bargain with a contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed; but he cannot thereby relieve himself from liability to those injured by the failure to perform it."

Lord Blackburn, it will be seen here, points to two distinct cases; the one where the cause of action is founded upon the negligence either of the servant acting within the scope of his employment, or of a contractor; and the other where it is founded upon a breach of duty which a person could not escape the performance of by delegation to another. As illustrations of this duty I refer to that class of cases of which *Hole* v. *Sittingbourne Railway Co.*, *Pickard* v. *Smith*, *Tarry* v. *Ashton*, and *Gray* v. *Pullen* (in error) are instances in which it was held that a duty was imposed by law upon the defendant towards the plaintiff as one of the public not to interfere with the right which the plaintiff possessed of using a public way so as to impede or injure him when passing; and also to that class of cases exemplified by *Bower* v. *Peate* and *Dalton* v. *Angus*, in which it was held that a legal duty was imposed upon the defendants towards the plaintiff not to interfere with the right he possessed of having his land supported by that of the defendant. In each of these cases it was held that the defendant was liable to the plaintiff for breach of the duty thus imposed upon him, although the act which caused the injury was the act and default of the defendant's contractor and not of the defendant. The *ratio decidendi* of these cases is that as the duty was imposed by law upon the defendant, he could not escape this liability by delegating its performance to a contractor, for the obligation imposed upon the defendant was to take the necessary precautions to see the duty was performed. If there were no other legal duty upon the defendant council than that which appears in the above-mentioned cases, inasmuch as the defendant council have invaded no right either of transit or of support to which the plaintiffs were antecedently entitled, I should have thought that the plaintiff would have had difficulty in bringing the defendant council within these authorities; but this I need not determine, for there is another duty imposed by law upon the defendant council in the circumstances of this case, which in my judgment settles the question. Lord Watson, in *Dalton* v. *Angus*, 6 App. Cas., at p. 831, states it thus: "When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house, which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable as well as the contractor to repair any damage which may be done." When the decision of the House of Lords in *Hughes* v. *Percival* is rightly understood, and the judgment in the Privy Council in *Black* v. *Christchurch Finance Co., Limited*, is considered, it appears to me clear that in the circumstances of this case a duty was imposed upon the defendant council which they could not evade by employing a contractor to do the work. What this duty is was thus formulated by the Queen's Bench Division in *Bower* v. *Peate* (Cockburn, L.C.J., Mellor and Field, JJ.) in the year 1876, in which the Lord Chief Justice, delivering the judgment of the Court, said: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground—namely, that a man who orders a work to be executed, from which in the natural course of things injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else, whether it be the contractor employed to do the work from which the danger arises, or some independent person

to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

It must be noted that in *Hughes* v. *Percival* Lord Blackburn, 8 App. Cas., at p. 447, doubted whether this duty was not too broadly stated, for he said: "If taken in the full sense of the words it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant but that of the innkeeper, uses the skill and care which is necessary when driving the coach to prevent mischief to the passengers." It is not for me to criticize this statement of Lord Blackburn, but with all respect I would point out that it seems to me not to be in the natural course of things to be expected, when a man hires post-horses and a coachman from an innkeeper, that injurious consequences would arise to his neighbour unless means are adopted to prevent them. In the ordinary course of events no injuries would occur to any one. The driver would drive and the hirer ride in the carriage, and in ordinary course the transit would come to an end without injury to any one. Now, the facts in *Hughes* v. *Percival* upon which judgment was given, as ascertained by the House of Lords, were these. The defendant had employed a contractor to take down his house, which stood between the plaintiff's house and the house of B., and to erect a new house for him upon the old site. In performing this work the contractor negligently cut into the party wall between the defendant's house and that of B., which caused the defendant's house to fall, which caused the injury complained of to the plaintiff's house. The question arose whether the defendant was liable to the plaintiff for the negligent act of his contractor. No question of the plaintiff having any right to support from the defendant's house arose in that case. It was held that the defendant was liable upon the ground that the work ordered by the defendant was necessarily attended with risk to the plaintiff's house, and that it was therefore the defendant's duty to see that proper precautions were taken to prevent injury to the plaintiff. Lord Blackburn (8 App. Cas., at p. 447) says: "The question is narrowed to this, Was the operation during which the defendant's duty required him to see that reasonable care and skill should be used, over at the time when those engaged in the work cut into the party wall between the defendant's house and B." Lord Watson, at p. 449, says: "The appellant (or defendant) does not deny that many of the operations which he contemplated, and which he had employed a contractor to execute, were such as would necessarily or possibly imperil the stability of the party wall if no precautions were used, nor does he dispute that it was incumbent upon him to see that these operations were safely carried out by the contractor. What he did (by his counsel) allege and offer to prove before the jury was that these hazardous operations had been brought to a safe termination months before the occurrence which resulted in damage to the plaintiff's house." Lord Fitzgerald, at p. 455, says: "What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works so as to protect his neighbours from injury, and that he cannot get rid of the responsibility cast upon him by transferring the duty to another." The learned lords finding as a fact, as indeed the majority of the Court of Appeal had found, that the hazardous operation was not over, when the negligent acts of the contractor had taken place, held the defendant liable for the negligent act of his contractor, the defendant not having therefore performed his duty to the plaintiff.

The recent case of *Black* v. *Christchurch Finance Co.* was decided upon the same principle, and is pertinent to the present case. In that case the plaintiff sued the defendant for damages by reason of having had his crops burnt by a fire lighted upon the defendants' land by their contractor, which spread on to the plaintiff's land. It was found by the court below, which finding was adopted by the Privy Council, that the defendants had contracted with a contractor to clear certain bushes off their lands partly by cutting the bushes and partly by burning them, and that, pursuant to such contract, the contractor lighted the fire which subsequently spread on to the plaintiff's land and caused the injuries complained of. The Privy Council, upon these facts, held the defendants liable upon the ground that the lighting of a fire on open bush land, where it might readily spread to adjoining property was an operation necessarily attended with danger, and a proprietor who executed such an operation was bound to use all reasonable precautions to prevent fire extending to his neighbour's property, and if he authorized another to act for him he was bound not only to stipulate that such precautions should be taken, but also to see that these are observed, otherwise he was responsible for the consequences, and the case of *Hughes* v. *Percival* was cited in support of this proposition.

Applying the principle laid down in these cases it appears to me that the district council in the present case owed the above-mentioned duty to the plaintiffs, and they have not performed it. Digging under gaspipes in use must necessarily be attended with risk unless all reasonable precautions are taken to guard against such risk. If a gaspipe be left unsupported it is obvious that it may thus become fractured, when an escape of gas with its attendant consequences will necessarily result, and, indeed, it is obvious from clauses 14, 45, and 46 of the contract in this case that risk was apprehended, for specific clauses were inserted therein so as to obviate the danger. It was not attempted to be proved on behalf of the district council that they had taken any precautions whatever, the sole point taken at the trial on their behalf was that they had delegated the performance of the works to a contractor, and therefore were not liable, and upon that they asked the learned judge to enter judgment for them, which he did.

It was argued before us that even if the learned judge should not have done so and the district council were liable, the damages sought to be recovered were too remote, and the case of *Sharp* v. *Powell* was referred to as showing that this was so. In that case it was not known to the defendant's servant (and I apprehend the court concluded that it was not to be held that he ought to have known), who was washing a van in the street, that the water he was using would not as usual run down a grating which was there for that purpose, and so escape; whereas it did not, by reason of a severe frost which existed, so that the grating got blocked with ice and the water overflowed, whereby the plaintiff's horse slipped and was injured. If in the present case it was not in the ordinary course of things if a gaspipe were broken, and the gas allowed to escape therefrom underneath a battered down surface, that it would percolate where it could and escape upwards upon the first opportunity, then the case cited might have some application; but in my opinion the explosion in the present case was the direct consequence of the act of negligence complained of, and oc-

curred in the ordinary course of events attendant thereon which would be known to any one of intelligence who cared to think about the matter.

For these reasons alone the district council are, in my judgment, liable, and the learned judge should not have acceded to their application and entered judgment for them.

This appeal must be allowed and judgment entered for the plaintiff against the defendant council with costs here and below.

RIGBY, L.J., read the following judgment:—In my judgment the defendants, the District Council of Idle, are liable to the plaintiffs in this action. I mention, in order to dispose of it at once, the objection that the damages claimed are too remote. The cause of action was an explosion of gas, which escaped from a main broken by the negligence of the defendant Thornton whilst excavating or filling up a sewer. The gas found its way into the house occupied by the plaintiffs and was there ignited. On the question of remoteness the case would have been the same if the gas company had negligently caused the escape. In my opinion the explosion in the plaintiff's house was the natural and probable result of the negligence. Gas will find its way by the line of least resistance, and in this case it was prevented by the ramming down of the earth from escaping into the open air. Where it would go could not have been predicted without examination of the surrounding soil, but that it might find its way to some place, where, being mixed with atmospheric air, it would be in great risk of being exploded, so as to do damage to person or property, was not only possible but in a high degree probable and quite natural. That place happened to be the plaintiff's house, and damage resulted, which, in my judgment, was not too remote.

Apart from the question of remoteness, the only defence set up on the appeal was that the defendant Thornton was an independent contractor for whose negligence the district council were not liable. I will assume, at first, that he was an independent contractor. His interference with the street would have been illegal but for the fact that he was acting as the agent and delegate of the district council of Idle, who, having power to do the work under section 150 of the Public Health Act, 1875, and other statutory provisions, employed Thornton to do it for them, so that he entered by reason of their authority and their authority only. If they had done the work by the hands of their servants it cannot be doubted that it would have been their duty to use all reasonable skill and care to prevent damage to any persons arising from their operations. The plaintiffs were, as the event proved, within the range of those operations and not too remotely connected with them, and the duty would have been owed to them among others.

Notwithstanding a great conflict of judicial opinion, many *dicta* and some decisions to the contrary, I consider it always to have been on the balance of authority and to be now clearly recognised as the law, that no one can get rid of such a duty by imposing it upon an independent contractor. As authorities it is sufficient to refer to the passage from the opinion of Lord Blackburn in *Dalton* v. *Angus*, already quoted by Lindley, L.J., the cases therein mentioned, and as approaching more nearly in its facts to the present case and in principle not to be distinguished from it: *Gray* v. *Pullen*.

The true distinction between the cases of master and servant, and employer and independent contractor, seems to be that, where the person actually doing the work does something for which he would himself be liable, the master is, whilst the employer is not liable for what is conveniently called collateral negligence, meaning thereby other negligence than the imperfect and improper performance of the work which the contractor is employed to do.

Here the contract in express terms imposed upon the contractor the duty of taking proper precautions against injury to any gaspipe that he might fall in with in the course of the excavation, the very duty (among others) which the law would have thrown upon the district council if acting by the hands of their servants. I am, however, for myself satisfied that under the contract in this case Thornton and his workpeople were for the purposes of the rule of law imposing liability for the negligence of servants on a master, in the position of servants of the district council. Under clauses 7 and 8 of the contract, as I read them, Thornton, his foreman, and workmen are bound to defer to the instructions and opinion of the inspector and obey his orders in every particular. Under clause 11 the inspector has power to stop the works or any part thereof absolutely at any stage and to enlarge, diminish, modify, alter, or vary the works or any part thereof without invalidating the contract. Clause 14 provides expressly that the contractor shall, as between himself and the district council, be responsible for any neglect or carelessness in terms apparently sufficient to cover any breach of duty which would be imposed by law on the district council, including particularly the protection of any gaspipes laid bare or otherwise interfered with; but this would not affect the nature of the relations between the parties. Independently of the wide general provisions before referred to it is made plain by clauses 45 and 46 with regard to gas and water pipes that the inspector is to have full control over the means adopted for the protection of gaspipes. In fact I have not been able to discover any single particular in which the contractor can act with greater freedom or independence than a hired servant could do. It is this unlimited right of control whether actually exercised or not which in my opinion is the condition for conferring the responsibility of a master.

The case is manifestly widely different from *Reedie* v. *London and North-Western Railway Co.*, where a power of superintendence only, was reserved, coupled with a power to dismiss any workmen not for disobedience to orders, but for incompetence only, a power analogous to that of rejecting improper materials during the progress of work and not depriving the contractor of his right of doing the work according to his own initiative so long as he did it in accordance with his contract. It is distinguishable also from the case of *Steel* v. *South-Eastern Railway Co.*, where the contract was not produced, but the foreman of the contractor speaking of Mr. Phillips, the company's surveyor, said, "Mr. Phillips was the person who told me what to do, but I was the responsible person to determine in what manner that which Mr. Phillips directed me to do should be carried out." The damage in that case was caused by negligence in doing work that was not only not ordered but positively forbidden to be done.

On all these grounds I am of opinion that the appeal should be allowed, and judgment entered for the plaintiffs against the district council according to verdict of the jury.

Appeal allowed.

Solicitors for the plaintiffs, *Jacques & Co.*

Solicitors for the district council, *Flower, Nussey, & Fellowes.*

From Q. B. Div. (Lord Esher, M.R., and Kay & A. L. Smith, L.JJ.) July 30, 1895.

BAYNES *v.* LLOYD. (*a*.)

Landlord and tenant—Covenant for title—Implied covenant—Covenant for quiet enjoyment—Demise.

In a lease for a term of years there is, in the absence of the word "demise," no implied covenant for title. Where there is an implied covenant for quiet enjoyment, such covenant only operates during the continuance of the lessor's estate.

Decision of Lord Russell of Killowen, C.J., 43 *W. R.* 524, *affirmed.*

Appeal by the plaintiffs from the judgment of Lord Russell of Killowen, C.J. (reported 43 W. R. 524).

The plaintiffs in this action sought to recover damages for breach of an implied covenant for title, and, in the alternative, for breach of an implied covenant for quiet enjoyment.

The said covenants were alleged to be implied in a lease under seal of the 31st of March, 1885, whereby the defendants let to the plaintiffs the basement of 21, Bush-lane, for a term of 10½ years, less one day, from the 25th of March, 1885, at a yearly rent of £40, payable quarterly.

The lease provided that "the landlords agree to let and the tenants agree to take" the premises in question.

The lease contained no express covenant for title or quiet enjoyment.

The defendants had as a matter of fact an estate in the premises for 8½ years only, but they acted honestly in executing the agreement and under a *bonâ fide* mistake.

At the expiration of the 8½ years the defendants' superior landlord brought an action against the plaintiffs and recovered possession of the premises, whereby the plaintiffs lost the benefit of about two years of their term.

The plaintiffs thereupon brought this action.

At the trial, Lord Russell of Killowen, C.J., held that in the absence of the word "demise" in the lease a covenant for title could not be implied, and that, though the law would imply a covenant for quiet enjoyment, such implied covenant determined with the interest of the lessor: see 43 W. R. 524.

He accordingly gave judgment for the defendants.

The plaintiffs appealed.

English Harrison and *Leck*, for the plaintiffs.

Swinfen Eady, Q.C., and *H. Sutton*, for the defendants.

July 30.—The judgment of the Court (Lord ESHER, M.R., KAY, L.J., and A. L. SMITH, L.J.) was delivered by

KAY, L.J.—The plaintiffs sue in this action for damages for eviction from a house of which they were tenants to the defendants. The tenancy was created by a lease under seal dated the 31st of March, 1885. The operative words of the lease were—the defendants "agree to let." The term was ten and a half years from the 25th of March, 1885. The defendants had only a leasehold interest, which expired on the 29th of September, 1893. The superior landlord after that date evicted the plaintiffs. The lease to the plaintiffs did not contain any express covenant for title or for quiet enjoyment, nor was the word "demise" used in it. The plaintiffs insist that there should be implied a covenant for title, or at least for quiet enjoyment, and that such covenants, or one of them, was broken by the eviction by title paramount.

These facts raise the following questions:—(1) Can any covenant be implied in this case? (2) If any, is such covenant one for title or only for quiet enjoyment? (3) Is such implied covenant an absolute covenant, or is it the ordinary limited covenant? (4) Whatever it was, did it not come to an end with the determination of the lessor's estate? With reference to the first question the law is thus stated in Sheppard's Touchstone at p. 165:—"If one make a lease for years by the words 'demise or grant,' and there is not contained in the lease any express covenant for the quiet enjoying of the land, in this case the law doth supply a covenant for a quiet enjoying of it against the lessor, and all that come in under him by title during the term. . . . But where there is an express covenant in the deed for the quiet enjoying of the land, there the law will not make this implied covenant." The learned author goes on to say that in the case of a lease for life reserving rent the law creates a warranty against all men, and this notwithstanding a warranty expressed in the deed. *Nokes's case* (4 Rep., 80b) is to the same effect. In this statement of the law three things are noticeable—(1) that the implication arises, not from the mere relation of landlord and tenant, but from the use of the words demise or grant; (2) that the covenant implied is for quiet enjoyment, not a covenant for title; and (3) that it is a limited covenant "against the lessor and all that come in under him by title." At pages 271, 272 it is said that the most usual and proper words for making a lease are "demise, grant, and to farm let," but that other words—"whatsoever word will amount to a grant"—such as "give, betake, or the like," will make the lease, but it is not said that there is any implication of a covenant from any of these other words. In Com. Dig. Covenant, A. 4, it is stated that in a lease for years covenant lies upon the word "demisi" or "concessi," and covenant for rent on the word "reddendo." In Viner's Abridgment, Covenant, F., "Action of covenant lies upon the words demise and grant in an indenture of lease, though there are no other words comprehending a warranty in them." In Bacon's Abridgment, Covenant, B., "There are some words which of themselves import no express covenant, yet being made use of in certain contracts they amount to such, and are therefore called covenants in law, and will as effectually bind the parties as if expressed in the most explicit terms. As if a man makes a lease for years of land by the words 'concessi' or 'demisi,' these import a covenant." In *Nokes's case* it is said there is a covenant in law on the words "demise, grant, &c."

All these citations are inconsistent with the view that a covenant can be implied from the mere relation of landlord and tenant, or from any words constituting that relation other than the particular words referred to. And this state of the law seems to be recognised by 8 and 9 Vict., c. 106, which in section 4 provides that the words "give" or "grant" in a deed shall not in future imply any covenant at law, but does not take away that effect from the word "demise" in a lease for years.

On the other hand is cited a *dictum* of Baron Parke in *Hart* v. *Windsor*, 12 M. and W., at page 85:—"It is clear that from the word 'demise' in a lease under seal the law implies a covenant, in a lease not under seal a contract, for title to the estate merely—that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let' or any equivalent words (Sheppard's Touchstone, 272) which constitute a lease have,

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

no doubt, the same effect, but not more (Sheppard's Touchstone, 165, 167)." This *dictum* was cited in the judgment in *Mostyn* v. *West Mostyn Coal Co.*, 24 W. R. 401, 1 C. P. D. 145. This statement of the law professes to be grounded upon Sheppard's Touchstone. But in that book it is not said that the covenant is implied from any words sufficient to make a lease, only from certain words, nor does the implied covenant, according to that authority, extend to an eviction by title paramount, but is only the ordinary limited covenant for quiet enjoyment. In *Bandy* v. *Cartwright*, 1 W. R. 415, 8 Exch. 913, the lease was by parol; it was held that a covenant for quiet enjoyment during the term could be implied, and further, that such covenant was broken by a distress for a rent-charge granted before the parol demise by a predecessor in title of the lessor under whom he claimed by purchase. The reason for this decision is not given in the report. Probably this parol lease was made by the word "demise," or in the absence of evidence that was assumed to be the case. The decision was followed in *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737, 11 W. R. C. L. Dig. 86.

The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease. But, supposing any covenant could be implied, according to Sheppard's Touchstone it is a covenant for quiet enjoyment only. This is also stated to be the law by Lord Eldon in *Iggulden* v. *May*, 9 Ves. 325.

In *Holder* v. *Taylor*, Hob. 12, a lease for years was made by the word "demise," and the lessee brought an action of covenant against the lessor, because at the date of the lease the lessor was not seised of the land, but a stranger. The lessee had not been ejected; but the court was of opinion that the action would lie, "for the breach of the covenant was in that the lessor had taken upon him to demise that which he could not, for the word 'demisi' imports a power of letting. . . . But if it were an express covenant for quiet enjoying, there perhaps it were otherwise." The case is very shortly reported, and the words quoted seem in the former sentence to intimate that the implied covenant is a covenant for title; but this is contradicted by the last words referring to an express covenant for quiet enjoyment as rebutting the implication.

In *Burnett* v. *Lynch*, 5 B. & C. 589, it was said by Littledale, J., that the word "'demise' imports a covenant in law on the part of the lessor that he has good title, and that the lessee should quietly enjoy during the term"; but he does not cite any authority for this. In *Line* v. *Stephenson*, 4 Bing. N. C. 678, 5 *Ibid.* 183, it is admitted somewhat doubtfully by Tindal, C.J., that the word "demise" may import a covenant for title as well as for quiet enjoyment; but it is put by Alderson, B., that it is a fallacy to say it imports two covenants; it imports one, of which, either want of title or eviction would be a breach.

The case of *Stranks* v. *St. John*, 15 W. R. 678, L. R. 2 C. P. 376, was referred to, in which there was an agreement in writing to let for seven years. This, by 8 & 9 Vict. c. 106, could not be a lease for seven years, because it was not a deed. It was therefore treated as an agreement to grant a lease by deed, under which the intended lessee would be entitled to investigate the lessor's title if he had not waived that right. The action seems to have been brought by the lessee on an implied contract to make a good title, the breach alleged being that the lessor never had any right or title to let for the term. Willes, J., said, in his judgment, that a lease for years is really only a sale of land for that period, and all sales of land imply a stipulation that the vendor has a good title. But it is clear law that no action will lie against a vendor for damages for contracting to sell land to which he has not a good title: *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Bain* v. *Fothergill*, 23 W. R. 261, L. R. 7 H. L., at p. 210; except, perhaps, to recover the expenses to which the purchaser has been put in investigating such title. The case was decided on demurrer, and is not of any value in the present discussion.

Then, is the covenant absolute or limited? In *Andrew's case*, 2 Leon. 104, Cro. Eliz. 214, it was held to be limited, and that upon the covenant implied from the word "demise" an action would lie if the lessor himself entered upon the lessee, but not if a stranger entered. This is consistent with the statement in Sheppard's Touchstone. On the other hand, in *Holder* v. *Taylor* the implied covenant seems to have been treated as an absolute covenant broken by the fact that the lessor had no title at the date of the lease. This seems also to have been held, as already noticed, in *Bandy* v. *Cartwright*.

Sufficient citations have been made to show that upon the first three questions there is considerable conflict of authority. Upon the fourth question there is more uniformity. It seems to be well settled that if the lessor's interest determines during the term, and the lessee is thereupon evicted, no action can be maintained upon the implied covenant. In *Swan* v. *Stransham*, Dyer, 257a, the lease was made by a tenant for life by deed using the words "grant and demise." The lessor died during the term, and the remainderman entered and evicted the lessee. The action was brought upon the implied covenant, but it was held "that the executors of the tenant for life should not be charged by this covenant in law, because the covenant in law ends and determines with the estate and interest of the lessor; and if it had been a covenant in fact or expressed, or warranty of the term expressed, it would be otherwise." This was followed in *Adams* v. *Gibney*, 6 Bing., 656. This is different to the ordinary limitation of an express covenant for title, which, according to the Conveyancing and Law of Property Act, 1881, is worded thus—"notwithstanding anything by the" lessor "or anyone through whom he derives title otherwise than by purchase for value made, done, executed, or omitted, or knowingly suffered." Such a limitation would have prevented the lessor being liable for the want of title in *Holder* v. *Taylor*, or the interruption in *Bandy* v. *Cartwright*, both of which were by title paramount, and could not have been a breach of a covenant so limited.

In the present case the Lord Chief Justice has followed the decisions in *Swan* v. *Stransham* and *Adams* v. *Gibney*, which seem fully to support his judgment. The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitors for the defendants, *Fishers.*

From Chan. Div. (Lord Herschell; and A. L. Smith and Rigby, L.JJ.) — Nov. 14, 25, 26, 28; Dec. 17.

MARA v. BROWNE. (a.)

Trustee—Breach of trust—Solicitor—Trustee de son tort *— Constructive trustee — Trust funds passing through solicitor's firm—Liability of partner.*

It is not within the scope of the implied authority of a partner in a solicitor's business to constitute himself a constructive trustee so as to bind his partner (who is not aware of the dealings by which the constructive trust is established) and make him also, liable as a constructive trustee.

B., a partner in a firm of solicitors, acting as well for the de facto *trustees as for the proposed new trustees of a marriage settlement, before the appointment of the new trustees, invested the trust funds on mortgages which resulted in a loss to the trust estate. In an action brought to make the solicitor and his partner liable to refund to the trust estate, losses which had occurred in consequence of improper investments,*

Held (reversing the decision of North, J., [1895] 2 *Ch.* 69), *that on the evidence the solicitor had acted throughout merely as the solicitor of the trustees, and that neither he nor his partner could be held liable as a constructive trustee.*

Appeal from North, J. (reported [1895] 2 Ch. 69, 43 W. R. Dig. 177), who had held the defendants, two brothers carrying on business as solicitors in partnership, liable to make good losses which had resulted to trust funds from improper investments.

The full statement of the facts will be found in the judgment of Lord Herschell.

The defendants appealed.

Hugh Browne, in person.—I am not responsible for the losses, because I acted merely as the agent of the duly appointed trustees.

Swinfen Eady, Q.C., and *Boome*, for the defendant Arthur Browne.—If Hugh Browne was not liable, obviously his partner Arthur Browne cannot be liable; moreover, no money passed through Arthur Browne's hands, and he had no control over it. Even if Hugh Browne acted so as to make himself a constructive trustee, he had no authority to do so, and his partner cannot be held liable.

They referred to *Barnes* v. *Addy*, 22 W. R. 505, L. R. 9 Ch. App. 244; *Robertson* v. *Armstrong*, 28 Beav. 123, 9 W. R. Ch. Dig. 88; *In re Barney*, 40 W. R. 637, [1892] 2 Ch. 265.

Cozens-Hardy, Q.C., and *C. E. E. Jenkins*, for the respondents.—A trustee can employ agents, but a trustee *de son tort* cannot, because he has no authority: *Attorney-General* v. *Corporation of Leicester*, 7 Beav. 176. [LORD HERSCHELL referred to *Fyler* v. *Fyler*, 3 Beav. 550.] There were no trustees in existence at the time of these transactions, and therefore there could be no ratification of Browne's acts by any person. Where a person stands in a fiduciary position, as a solicitor towards his client, it is his duty to tell the client that his (the solicitor's) interest may conflict with his duty to his client, and that therefore the client should have independent advice.

They referred to *Lee* v. *Sankey*, 21 W. R. 286, L. R. 15 Eq. 204; *Rhodes* v. *Moules*, 43 W. R. 99, [1895] 1 Ch. 236; and *Moore* v. *Knight*, 39 W. R. 312, [1891] 1 Ch. 547.

Swinfen Eady, Q.C., in reply, referred to *Foster* v. *Bates*, 12 M. & W. 226; *Stewart* v. *Edmonds*, Williams on Executors, 3rd ed., p. 313 (*n*), noted in *Foster* v. *Bates*; *Hill* v. *Curtis*, 14 W. R. 125, L. R. 1 Eq. 90; *Blyth* v. *Fladgate*, 39 W. R. 422, [1891] 1 Ch. 337.

Cur. adv. vult.

Dec. 17, 1895.—Lord HERSCHELL read the following judgment:—On the 30th of August, 1875, a settlement was executed on the marriage of Mrs. Mara, one as the plaintiffs in this action, with her first husband, Mr. Harold Reeves. The trustees of this settlement were Mr. James Walker and Mr. Bernard James. The latter was a solicitor, and his co-trustee left the management of the trust property almost entirely to him. Towards the end of the year 1883 Harold Reeves consulted the defendant Hugh Browne as to the course that should be taken, as Mr. and Mrs. Reeves entertained grave doubts as to the safety of the trust investments. The amount invested on these securities exceeded £10,000. The defendant Hugh Browne was a friend of Harold Reeves, and was in practice as a solicitor in Nottingham in partnership with his brother Arthur Browne, the other defendant. It was in consequence arranged that Walker should retire from the trust, and that the plaintiff Arthur Reeves should become a trustee in his stead. To this all parties, Mr. and Mrs. Harold Reeves, Walker, and Arthur Reeves, assented. Accordingly a deed was prepared, by which Mr. and Mrs. Reeves, in whom the power of appointment was vested, appointed Arthur Reeves as trustee in the place of Walker. This deed was executed by Mr. and Mrs. Reeves about the 7th or 8th of January, 1884. It was not executed by Arthur Reeves. On the 11th of January a meeting took place between Hugh Browne and James, which left upon the mind of Hugh Browne the impression that the securities were not in order, and, indeed, that some of them were forgeries. James, however, expressed his willingness to take over the securities himself and to pay the amount of the trust funds in cash, expressing himself willing to retire from the trust. A sum of £1,405 15s. was at once forthcoming from James, and this was placed in the bank of Yates & Co. at Liverpool, to the credit of an account opened in the joint names of James and Arthur Reeves. I may state at once that various moneys were from time to time paid by James to the credit of this account until the whole of the trust funds for which he was responsible were accounted for. Sometime in January, 1884, apparently, soon after James had expressed his willingness to retire from the trust, it was arranged that Marian Reeves should become trustee in his place. On the 9th of May, 1884, a deed was duly executed by Mr. and Mrs. Harold Reeves, as well as by the retiring and new trustees, by which Arthur Reeves and Marian Reeves were appointed trustees in the place of Walker and James. The transactions for which it is sought to make the defendants responsible in the present action all took place between the previous month of January and the date of that deed. The defendant Hugh Browne was undoubtedly asked by Harold Reeves, with the full knowledge of Arthur Reeves, to look out for investments by way of mortgage, to which the moneys paid in by James to the bank in Liverpool could be applied. Mr. and Mrs. Reeves were naturally anxious that the money should begin bearing interest as soon as possible. Hugh Browne accordingly suggested a series of investments. I do not differ from the learned judge who tried the case in the conclusion that the investments were not proper ones for trustees to make. The money was to be lent upon building property of a speculative character, and the margin was not satisfactory. If the action had been one charging the defendants with

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

negligence as solicitors, with a view to make them responsible for such loss as the trust estate had sustained owing to the investments made, it may well be that there would have been no answer to the action had it been brought in due time, but any such claim is now barred by the Statute of Limitations. The case sought to be made against the defendants is that their liability is the same as if they had been the appointed trustees of these trust funds, and bound as such to see, not only that the investments were within the terms of the investment clause, but that they were of a proper nature. The learned judge in the court below held that the plaintiffs had established their case. "The moneys," he said, "laid out by him (Hugh Brown) while there were no trustees were advanced upon his own responsibility, he being a principal in the matter, and not a mere agent for persons under whose lawful directions he was acting." I find myself quite unable to take this view of the facts. I becomes necessary now to advert more particularly to the manner in which the trust funds came into the hands of Hugh Browne. In each specific case the particulars of the investment which Hugh Browne had to propose were communicated to Arthur Reeves, and a cheque was drawn for the purpose of being applied to that particular investment, the cheque being signed by both Arthur Reeves and James, in whose names the banking account stood, and the money, when so received by Hugh Browne, was paid over to the intended mortgagors. It is true that in two instances Hugh Browne had himself advanced a portion of the sum which the mortgagor required, and, of course, paid over to the intending mortgagor the balance only, and that he sometimes delayed paying a portion of the sum agreed to be advanced until the mortgagor had proceeded further with the buildings he was erecting, but I do not think these circumstances make any difference. The moneys sent by Arthur Reeves and James were in every case applied to obtaining the investments for the purpose of which they were sent. James, indeed, probably was not made aware, as Arthur Reeves was, of the particulars of the proposed investments, and perhaps did not trouble himself about them, but he undoubtedly knew that the money was being sent for investment on mortgage securities which had been offered, since that very circumstance was employed as a means of putting pressure upon him to complete as speedily as possible payment into the bank of the full value of the trust estate. It was conceded by Mr. Cozens-Hardy, in his argument for the respondents, that, if the transactions now impeached had taken place after the date of the deed of appointment of May, 1884, he could not have maintained that the defendant Hugh Browne was to be regarded as a constructive trustee. North, J., appears to have taken the same view, for he refused relief in respect of advances made when the trusteeship was, as he said, full. In my opinion the distinction made is not a sound one. I do not think that it is correct to say that prior to that date there were no trustees. It appears to me that from the date, at all events, when the account was opened in the names of Arthur Reeves and James, down to the appointment by deed in the May following, those two gentlemen were the trustees of the settlement. It may be quite true that, when the circumstances of suspicion in relation to James's conduct became known to Arthur Reeves after the the 11th of January, he was unwilling to be joined with James as trustee, and that, if he had not intermeddled with the trust in any way, the deed of appointment executed by Mr. and Mrs. Reeves would have been ineffectual. But, in the circumstances which actually occurred, I cannot treat that instrument as a mere nullity. Arthur Reeves actually became a joint recipient with James of the whole of the trust funds, and jointly with him disposed of them at a time when James, though he had expressed his willingness to retire, was still a trustee. It is admitted that Reeves by so doing subjected himself to the responsibilities of a trustee in respect of that trust fund. He became, it is said, a trustee *de son tort*. But does it not seem strange thus to designate him when he had, immediately before this, been appointed a trustee with his assent by those who were competent to make the appointment? It is surely more reasonable to refer his acts as trustee to this appointment than to treat them as tortious. In my opinion, therefore, the trusteeship was full during the period covered by the transactions in question as truly as it was after the subsequent month of May, and the learned counsel for the respondents made, in my opinion, no greater concession than he was compelled to make when he conceded that, if the money had come into Hugh Browne's hands from duly appointed trustees for application upon specific investments, his responsibility would have been that of a solicitor, and not of a trustee. I think it right, however, to say that I am not satisfied that, even if Arthur Reeves is to be regarded as not having been duly appointed, the result would have been different. Hugh Browne was certainly not purporting or intending to act as trustee, nor was he supposed by any one to be so acting. He purported to act throughout as solicitor, and was understood by all parties to be so acting. Even conceding that he might in some circumstances, notwithstanding this, be held liable as a trustee, what are the circumstances here? James was undoubtedly a trustee, and Arthur Reeves, with the assent of Walker, the other trustee, and of those who had the power of appointing a new trustee, acted as such. Although James may not have troubled himself about the investments, I can entertain no doubt that both he and Arthur Reeves regarded and dealt with Hugh Browne as solicitor to the trust, and as such handed to him the trust funds to be applied to specific investments.

Under circumstances such as these I am not, as at present advised, prepared to hold that Hugh Browne would be liable as a constructive trustee. What I have already said is sufficient to dispose of the action. But I desire to add that, even if in the circumstances of this case Hugh Browne had been held liable as a trustee, I should still have come to the conclusion that the defendant Arthur Browne was not so liable. The only case against him is that, during the period covered by these transactions, he was in partnership as a solicitor with the other defendant. He took no part in them and was ignorant of their nature. In my opinion it is not within the scope of the implied authority of a partner in such a business that he should so act as to make himself a constructive trustee, and thereby subject his partner to the same liability.

I think the appeal must be allowed, and the action dismissed, with costs.

A. L. SMITH, L.J.—In this case North, J., has held two solicitors, Mr. Hugh and Mr. Arthur Browne, liable as constructive trustees to make good a loss which has accrued to a trust fund by reason of its having been invested in improper securities, and the question is whether either or both of these gentlemen are so liable. The plaintiffs are Mrs. Mara, who has a life interest in the trust funds, her two infant children, and the present trustees of the fund. No case is made against the defendants that they were liable to make good the loss by reason of negligence

whilst acting as solicitors, and, had it been, the defendants would have had a good answer to such a claim by either Mrs. Mara or the trustees, under the Statute of Limitations; for the investment of the trust funds, which is the subject-matter of complaint, took place as long ago as the months of February and March, 1884, and the writ in the action was not issued till the 7th of November, 1890; and, as regards the infant plaintiffs, the case in the House of Lords of *Rae* v. *Meek*, 14 App. Cas. 558, 38 W. R. Dig. 179, shows that they could not maintain an action for negligence against the defendants; for the breach of duty, if it existed, was to the trustees and not the beneficiaries.

The facts are these: [The Lord Justice stated the facts, which, so far as material, have been already set out in the judgment of Lord Herschell.]

North, J., found, and I agree with him, that eight of the mortgages taken for the trust funds were speculative and risky, and not such as could be justified by a trustee—in fact, these investments constituted breaches of trust. Although this might well render the trustees liable for a breach of trust, it certainly *per se* does not render their solicitors so liable. But it is said that the facts shew that there should be imputed to Mr. Hugh Browne the character of a trustee, or in other words that he was a trustee *de son tort;* and upon this ground the learned judge has held him liable. It is not contended on behalf of the plaintiffs that Mr. Hugh Browne has been guilty of any fraudulent or dishonest conduct to the injury of the *cestui que trusts*, nor, to use Lord Langdale's words in *Fyler* v. *Fyler*, 3 Beav. 550, at p. 561, did he, being a solicitor, "take advantage of his position to acquire a benefit for himself at the hazard, if not to the prejudice, of the trust"; but it was said that he had made himself a constructive trustee, which, as far as I know, is the same thing as a trustee *de son tort*. Now, what constitutes a trustee *de son tort?* It appears to me if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong—*i.e.*, a trustee *de son tort*, or, as it is also termed, a constructive trustee.

Lord Selborne, when Lord Chancellor, dealt with this question in *Barnes* v. *Addy*. He says, "That responsibility (*i.e.*, of a trustee) may, no doubt, be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust;* but on the other hand strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions of which a court of equity may disapprove, unless these agents receive and become chargeable with some part of the trust property, or unless they assent with knowledge in a dishonest and fraudulent design on the part of the trustees"; and James, L.J., added, "I most cordially concur in the general principle with which the Lord Chancellor began his judgment. I have long thought, and more than once expressed my opinion from this seat, that the court has in some cases gone to the very verge of justice in making good to *cestui que trusts* the consequences of breaches of trust of their trustees at the expense of persons perfectly honest, but who have been to some more or less degree injudicious. I do not think it is for the good of *cestui que trusts*, or the good of the world, that those cases should be extended." In this, if I may say so, I entirely agree.

In the present case Mr. Hugh Browne never became possessed of the trust funds excepting for the purpose of transferring them from the joint account at Messrs. Yates' Bank to the mortgagors, which he faithfully carried out, and which he did with the sanction of Mr. James and of Mr. Arthur Reeves, who had been appointed trustee under the circumstances above mentioned, and no one can suggest any knowledge in Mr. Hugh Browne of a fraudulent design on the part of the trustees, for the simple reason that no such design in fact existed. In my judgment, the true inference to be drawn from the facts of this case is that Mr. Hugh Browne between January, 1884, and the 9th of May, 1884, acted as solicitor for Mr. James and Mr. Arthur Reeves, and that he never assumed to act otherwise, that he never intended to act otherwise, and that, in truth, he never did act otherwise.

Mr. Cozens-Hardy, on behalf of the plaintiffs, admitted, and I think that his admission was well founded, that if the deed of the 9th of May, 1884, appointing Mr. Arthur Reeves and his sister Marian trustees had been executed in January, 1884, he could not have contended that Mr. Hugh Browne was acting otherwise than as solicitor to the trustees in what he did between January and the 9th of May, 1884, for he would then have been acting for principals — *i.e.*, for trustees in transactions within their legal power—but he contended that as the deed was not executed until the 9th of May, 1884, Mr. Arthur Reeves up till then was at the most a mere trustee *de son tort*, and that Mr. James, although an undoubted trustee, was not permitting Mr. Hugh Browne to act for him, and consequently, Mr. Hugh Browne having no principals, he must be held to have been a principal himself, and therefore a trustee *de son tort*. But why is it to be said that Mr. Arthur Reeves between January and the 9th of May, 1884, was merely a trustee *de son tort?* He had been appointed trustee by deed under seal in January, 1884, and he at once undertook the burden of the trust, and the impeached investments did not take place until afterwards—viz., between the 20th of February, 1884, and the 14th of March, 1884. In my judgment it is incorrect to hold that he was acting as trustee *de son tort;* why is this to be assumed? The learned judge came to the conclusion that Mr. Arthur Reeves never acted under the deed of January, 1884, and he holds that it was abandoned; but why is this to be so held? We find Mr. Arthur Reeves after its execution at once entering upon the business of the trust; and why is it to be assumed and held that he then acted as a trustee in his own wrong rather than as a properly appointed trustee? I can draw no such inference. It is true that in 1890 Mr. Hugh Browne ran his pen through the signatures of Mr. and Mrs. Harold Reeves, lest, as he said, any person should mistake the deed for a living one; but this was many years after it was executed and at a time when it was no longer needed, for the deed of the 9th May of 1884, was all that was then required. The learned judge also held that Mr. Hugh Browne could not say that he was acting as solicitor for James, for he had treated him as a hostile party. But with submission, although this was so at one time, the learned judge appears to me to have omitted to notice the part taken by James, as he made good the trust fund, in drawing the cheques in conjunction with Arthur Reeves upon their joint account at Messrs. Yates' bank with the express object that the moneys so obtained should be invested by Hugh Browne for the trust. Upon these questions of fact I find myself differing from the learned judge. In my opinion, between January, 1884, and the 9th of May, 1884, it has been proved that Mr. Hugh Browne was acting for Mr. James and Mr. Arthur Reeves in making

the investment, that they were the *de facto* trustees, and that he had them as principals, and that in what he did he was not, therefore, a trustee *de son tort*. This suffices to determine this case; but had Mr. Hugh Browne been acting as a trustee *de son tort* I do not see how that circumstance renders Mr. Arthur Browne, his partner, liable for the consequences attaching to such a position. It is not, however, necessary to discuss this, nor the point, so much debated at the bar, as to what would have been Mr. Hugh Browne's position if he acted for Mr. James, who was an actual trustee, and Mr. Arthur Reeves, if he had been merely a trustee designated and not actually appointed. For these reasons I think that this appeal should be allowed, with costs, and that the action must be dismissed, with costs.

RIGBY, L.J., stated the facts, and continued:—By the Conveyancing Act, 1881, s. 31, sub-section 1, Mr. and Mrs. Reeves had power to appoint him (Arthur Reeves) by writing, and their execution of the deed of appointment on the 7th or 8th of January, 1884, followed by his acceptance, operated as a valid appointment. By sub-section 5 of the same section every new trustee so appointed, as well before as after all the trust property becomes by law or by assurance or otherwise vested in him, is to have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument creating the trust.

Whatever was, at the time or afterwards, thought by the parties, Arthur Reeves and James were trustees in the interval between the acceptance of the trust by Arthur Reeves and the retirement of James, which followed on the 8th of May, 1884. It was during that interval that all the investments in respect of which relief has been granted were made; the investments themselves, however improvident they may have been, were within the legal powers of the trustees. The defendant Hugh Browne, in all that he did during the interval, acted in the capacity of solicitor for one of the two trustees, whose directions as to investments were accepted and acted upon by the other. The deed executed by Mr. and Mrs. Reeves on the 7th or 8th of January was very naturally left incomplete in order that a deed suitable to the new state of things might be substituted for it, but its effect as an appointment in writing was not in the least altered.

Under these circumstances it seems to me that Hugh Browne cannot be made liable as constructive trustee, and it is too late to make him liable as solicitor. I do not think that the circumstances of the appointment of Arthur Reeves, and the effect of the deed executed by Mr. and Mrs. Reeves as an appointment in writing under the Conveyancing Act, 1881, were so clearly called to the attention of North, J., as they were on the appeal. If they had been, I think that he would have arrived at a different conclusion from that at which he did arrive. I gather from his judgment that he would, if satisfied of the facts, have dealt with the questions of law as this court is now doing. The conclusion to which we have arrived renders it unnecessary to consider in detail the questions of law which might have arisen if Arthur Reeves had only been what was called in argument trustee designate. I wish, however, to reserve for future consideration, whenever the case may arise, how far a solicitor, acting as solicitor for a *de facto* trustee, can be made liable as a constructive trustee merely by reason of a defect in title of his principal. I think, also, with Lord Herschell, that it is not within the scope of a solicitor's business to constitute himself a constructive trustee, so as to bind a partner and make him also liable as a constructive trustee, although he is not aware of the dealings by which the constructive trust is established.

Appeal allowed.

Solicitors for the appellants, *Swann & Co.*

Solicitors for the respondents, *Steadman, Van Praagh, Sims, & Co.*

Mills v Lucas (1901) 2 KB. 196

High Court of Justice.

Q. B. Div. (Wills and Wright, JJ.) Feb. 25.

DENNY v. BENNETT. (*a*.)

County court—Practice—Action against a county court bailiff—Statutory defence—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 54—*Special defence, notice of—County Court Rules*, 1889, *ord.* 10, *rr.* 10, 18a.

The defence afforded to county court bailiffs by section 54 *of the County Courts Act*, 1888, *being a statutory defence, notice must be given as provided by the County Court Rules*, 1889, *ord.* 10, *rr.* 10, 18a, *if a county court bailiff intends to rely on the section as a defence to an action against him.*

Appeal of the defendant from the County Court of Lancashire.

The action was brought to recover treble damages and treble costs under 2 W. & M., sess 1, c. 5, s. 4, for proved breach and rescue of certain goods and chattels.

On the 23rd of November, 1894, a certificated bailiff, acting under the instructions of the plaintiff, distrained the goods and chattels of Howe, who was the plaintiff's tenant, for £14 10s. arrears of rent then owing by Howe to the plaintiff.

On the 10th of December the defendant, who was a county court bailiff, seized Howe's goods under three warrants of execution, notwithstanding the protests of the plaintiff's bailiff, and sold them.

At the trial of the action the defendant produced the warrants under which he seized the goods; but he had not given notice of his intention to rely on section 54 of the County Courts Act, 1888, as a defence to the action. The county court judge gave judgment for the plaintiff for the amount claimed. The defendant appealed.

The County Courts Act, 1888, s. 54, is as follows: No action shall be commenced against any bailiff . . . for anything done in obedience to any warrant under the hand of the registrar and the seal of the court until demand has been made or left at the office of such bailiff by the party intending to bring such action, or by his solicitor or agent, in writing signed by the party demanding the same, of the perusal and copy of such warrant, and the same has been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith by showing the said warrant to and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such bailiff or other person acting in his aid for any such cause as aforesaid without making the registrar who signed or sealed the said warrant defendant, on producing or proving such warrant at the trial of such action a verdict shall be

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

given for the defendant, notwithstanding any defect of jurisdiction or other irregularity in the said warrant. . . . The County Court Rules, 1889, ord. 10, r. 18*a*, provides that: When in any action the defendant relies upon any statutory defence or any defence of which he is required by any statute to give notice, he shall in his statement set forth the year, chapter, and section, or the short title thereof, and the particular matter upon which he relies. Ord. 10, r. 10, requires notice of the intention to rely on the ground of defence mentioned in ord. 10, r. 18*a*, to be filed five clear days before the return day.

Carrington, for the defendant.—Section 54 expressly enacts that no action shall be commenced against a bailiff unless the prescribed formalities have been complied with, and therefore this was not a case in which a notice of a special defence is required by the county court rules.

He referred to *Kay* v. *Atherton Local Board*, 42 J. P. 792; *Allright* v. *Perks*, 9 Times L. R. 235.

[Other points were also raised in argument, to which it is not necessary to refer in this report.]

Corrie Grant, for the plaintiff.—Any defence based on a statute is a statutory defence within the meaning of ord. 10, rr. 10, 18 *a*. If the defendant intended to rely on section 54 at the trial he ought to have filed the requisite notice.

WILLS, J., after dealing with the other points in the case, said: Under the circumstances of this action it is clear that section 54 of the County Courts Act, 1888, affords protection to the defendant; but he did not give notice of his intention to rely on that section. It does not seem to me to be possible to draw any distinction between a defence based on section 54 of that Act and the defence of insufficient notice of action under the Police Act, which the court held in *Allright* v. *Perks* to be a statutory defence requiring notice. Following that decision, I am of opinion that the defendant could not rely on section 54 unless he had previously complied with the rules as to notice. The county court judge would have had jurisdiction to adjourn the case on terms in order that the notice might be given, but no application was made to him to do so, and the only question for us is, whether he was right on the question before him? For the reasons which I have given I think he was right, and therefore the appeal must be dismissed.

WRIGHT, J.—I entirely agree. I think the case of *Davey* v. *Warne*, 14 M. & W. 199, strongly supports the view that this was a defence of which notice should have been given.

Appeal dismissed.

Solicitors for plaintiff, *T. R. Hargreaves*, for *Johnson & Tilly*, Lancaster.

Solicitors for defendant, *Kingdon, Wilson, & Webb*, for *Poole*, Barrow-in-Furness.

Q. B. Div.
(Lindley and Kay, L.JJ.) Feb. 11.

PEARSON (*Appellant*) *v.* THE BELGIAN MILLS CO. (LIMITED) (*Respondents*). (*a*.)

Factory—Cleaning of machinery—Child cleaning fixed part of machine in motion—Factory and Workshop Act, 1878 (41 *Vict.* c. 16), *s.* 9.

A child is not allowed, under section 9 *of the Factory and Workshop Act*, 1878, *to clean any part of a machine in a factory—whether such part be fixed or in motion—while the machine itself is in motion by the aid of steam, water, or other mechanical power.*

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Special case stated by justices acting in and for the division of Oldham, in the county of Lancaster.

On the 26th of June, 1895, an information and complaint preferred by the appellant, an inspector of factories, against the respondents, was heard and determined by the justices in petty sessions, and was dismissed by them.

The information and complaint was that on the 22nd of May, 1895, the respondents, being the occupiers of a certain factory within the meaning of the Factory and Workshop Act, 1878, did then and there, in contravention of section 9 of the Factory and Workshop Act, 1878, allow a certain child to clean a part of the machinery while the same was in motion by the aid of steam.

The following facts were proved or admitted upon the hearing.

The respondents are cotton spinners, and carry on business at the Belgian Mill, Royton.

The child gave evidence that he was eleven years of age, that he was employed at the respondents' mill as a "little piecer"; that on the day in question he was cleaning the front part of the roller beam when the appellant spoke to him, and that the machine (a spinning mule) was running at the time. A roller beam is a fixed part of a spinning mule.

In cross-examination the child stated that he was using a wire behind the creel to clean, and that he did not think that what he was doing was dangerous; that the piecing is done by the "big piecers" and the "minders," and that besides keeping the floors and the fixed machinery clean and tidy there was very little for him to do.

The secretary of the Master Cotton Spinners' Association and the president of the Operative Cotton Spinners' Association gave evidence that in their opinion this cleaning was not dangerous.

The appellant in his evidence stated that he saw the child in the Belgian Mill on the 22nd of May cleaning part of the machine while the machine was in motion by steam power.

It was admitted, and the justices found as a fact, that the part of the machine that the child was cleaning was not in motion, but that the machine, of which part was being cleaned, was in motion. They also found as a fact that the cleaning in question was not dangerous.

Section 9 of the Factory and Workshop Act, 1878, provides:—

"A child shall not be allowed to clean any part of the machinery in a factory while the same is in motion by the aid of steam, water, or other mechanical power; a child . . . allowed to clean or to work in contravention of this section shall be deemed to be employed contrary to the provisions of this Act"; and by section 96 a "child" means a person under the age of fourteen years.

The justices were of opinion that section 9 of the Factory and Workshop Act, 1878, does not prevent the cleaning of a fixed part of a running machine.

The question for the opinion of the court was whether section 9, paragraph 1, of the Factory and Workshop Act, 1878, applies to the cleaning by a child of a fixed part of a machine in motion by steam, water, or other mechanical power.

Henry Sutton, for the appellant.—The justices were wrong in their construction of the section. The word "same" in the section refers to the word

"machinery," and not to the word "part." The section, therefore, ought to be read thus: "A child shall not be allowed to clean any part of the machinery while the machinery is in motion." This clearly prohibits the cleaning of the fixed part of a machine while that machine is in motion; and that must have been the object of the section, as a child may be in as great danger while cleaning the fixed part of a machine in motion as in cleaning the moving part of the machine. The object clearly was to keep a child away from moving machines altogether. The justices have found that this cleaning was not dangerous; but this finding has nothing to do with the construction of the section. The appellant could have called evidence to show that it was dangerous, but he wishes to get a decision on the question of the construction of the section.

The respondents did not appear.

LINDLEY, L.J.—The question is an extremely short one, but it is an important one; and it turns on the construction of section 9 of the Factory and Workshop Act, 1878. There was a spinning machine, some portions of which were fixed, and the child was not cleaning any part of that machine which was in motion. The whole machine was in motion—that is to say, all the parts which could move were in motion; but the child was employed to clean the fixed parts, not those in motion. The question turns on the meaning of the word "same" in the section. The word "same" clearly means the machinery, not the particular part; so that the words "while the same is in motion" mean while the machinery is in motion. The section means not merely to prevent children cleaning the parts of a machine which are in motion, but also to prevent them cleaning any part of a machine in a factory while the same—that is, that machine, and not the particular part—is in motion. The magistrates found that this cleaning was not dangerous, and that the child was not injured. But it seems obvious that the object of the section is to prevent children being brought near the moving parts of any machinery, which they must be if they are allowed to clean the fixed part of a moving machine. The broad meaning of the thing is that children are to be kept altogether away from such places.

I think, therefore, that the justices ought to have convicted, and that the case must be remitted to them.

KAY, L.J.—The grammatical construction of the section is entirely against the finding of the justices. According to the grammatical construction, the word "same" refers to "machinery," not to the word "part"; and, when we consider the object of the provision, it seems to me unquestionable that that is the true meaning. If a child is employed to clean a part of the machine which never moves, while the machine itself is in motion, he is exposed to almost as great a danger as if he were touching a part of the machine which was moving. It is no answer to say that the child was not in danger in this particular case. That is not the question. The question is what the statute meant; and, to my mind, it plainly means that while the machine is in motion—that is, while all the movable parts of that machine which should move when the machine is acting are moving, then the child shall not clean any part of that machine, whether such part be fixed or in motion. Any other construction would be to place a child in the very danger which the section intended to provide against.

I therefore think that this case is not only entirely within the mischief contemplated by the section, but is within the very words of the section.

Appeal allowed.

Solicitor for the appellant, *The Solicitor to the Treasury.*

Q. B. Div.
(Vaughan Williams and Wright, JJ.) Jan. 25.

YATES (*Appellant*) v. HIGGINS AND OTHERS (*Respondents*). (*a*.)

Criminal law—Cruelty to animals—Domestic animal, what is—Tame seagull—Cruelty to Animals Act, 1849 (12 & 13 *Vict. c.* 92), *ss.* 2, 29—*Cruelty to Animals Act*, 1854 (17 & 18 *Vict. c.* 60), *s.* 3.

A seagull had been the property of one A. S. for three years, and was tame. It was kept in a field, with one wing pinioned so that it could not fly, but it could escape by means of a river running through the field. It would come to its owner when called and feed from her hand, and was used by her in her business of a photographer. The respondents were charged on an information with cruelly illtreating the seagull, and were proved to have been guilty of gross cruelty to the bird.

Held, that the seagull was not a "domestic animal" within the meaning of 12 & 13 *Vict. c.* 92, *s.* 29, *and* 17 & 18 *Vict. c.* 60, *s.* 3, *and that the respondents therefore could not be convicted on the information.*

Special case stated by justices for the petty sessional division of Buxton, in the county of Derby.

At a court of petty sessions held in the said division the respondents were summoned to appear upon an information preferred by the appellant, in which the appellant complained that the respondents did cruelly illtreat and abuse a certain animal, to wit, a tame seagull.

On the hearing of the said information it was proved that the seagull had been the property of Anne Simpson for three years, and was tame; that it was kept in a field adjoining her residence, one wing having been pinioned and the bird being unable to fly, but that it was able to get out of the field by going down the river which ran through it. It was proved that it would go to Anne Simpson on being called and feed from her hand, and that Anne Simpson, who was a photographer, had used it, together with two other birds, in her business.

The justices found as a fact that the respondents had been guilty of gross cruelty to the bird; but the information was dismissed upon the ground that the justices considered, in point of law, that the facts did not prove the seagull to be a domestic auimal within 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, s. 3.

The question for the opinion of the court was whether the justices were right in so holding. If yea, the dismissal of the information was to stand; if nay, the case was to be remitted to the justices with an order to them to convict the respondeuts.

By 12 & 13 Vict. c. 92, s. 2: "If any person shall cruelly beat, illtreat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, illtreated, overdriven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding £5." By section 29: "The word 'animal' shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal."

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

By 17 & 18 Vict. c. 60, s. 3: "The words and expressions to which a meaning is affixed by 12 & 13 Vict. c. 92, and which are introduced into this Act, shall have the same meaning in this Act, and the word 'animal' shall in the said Act and in this Act mean any domestic animal, whether of the kind or species particularly enumerated in clause 29 of the said Act or of any other kind or species whatever, and whether a quadruped or not."

Colam, for the appellant. — The decision of the justices in dismissing the information was wrong. There was ample evidence on which to hold that this seagull was a domestic animal within the statutes. It was perfectly tame, and also served a purpose useful to its owner—viz., by appearing in photographs. The case, therefore, comes within the principal laid down in *Colam* v. *Pagett*, 32 W. R. 289, 12 Q. B. D. 66, in which case linnets which had been tamed and were used as decoy birds were held to be domestic animals. *Aplin* v. *Porritt*, 42 W. R. 95, [1893] 2 Q. B. 57, is distinguishable, because in that case there was no evidence that the rabbits had become tame.

He also referred to *Harper* v. *Marcks*, 42 W. R. 605, [1894] 2 Q. B. 319.

No one appeared on behalf of the respondents.

VAUGHAN WILLIAMS, J.—In my judgment the magistrates were right in law in holding that on the facts set forth in this case it was not proved that this seagull was a domestic animal within the statutes in question. We might wish that the law were different, but we have no right to extend the ambit of the statutes. It cannot be contended that to bring an animal within the definition it is sufficient merely to show that the animal, being one of a kind ordinarily wild, has been made tame. In this case the facts are that the seagull had been the property of Anne Simpson for some years, and was tame; it would go to its owner on being called, and would feed out of her hand, and the owner had used the bird in the business of a photographer. We find, therefore, that the only fact stated in the case with regard to the bird, beyond the mere fact of tameness, is that a photographer used it in her business. In my opinion that fact does not alter the character of the animal in the slightest degree.

The case of *Colam* v. *Pagett* was relied on for the appellant. In that case linnets had been trained so as to be able to be used as decoys. The case, therefore, comes within the definition of domestic animal given by Cave, J., in *Harper* v. *Marcks*, [1894] 2 Q. B., at p. 322, where he says: "In some cases, no doubt, animals have been so deal with and altered as no longer to resemble the wild stock from which they came. I do not say that that is essential in order to bring them within the protection of the Acts; but you must at least show that the animal has been sufficiently tamed to serve some purpose for the use of man. The mere caging and keeping in captivity a wild animal is not enough to make it a domestic animal." I do not think that on the facts in this case it is possible to hold that this seagull served any purposes for the use of man.

The appeal must therefore be dismissed.

WRIGHT, J.—I am of the same opinion; but I regret that we are obliged to come to this decision, for I should like to see the class of animals protected from cruelty extended. That, however, is a question for Parliament, not for us. At the same time, I think it would be very difficult to give a satisfactory definition of the class to be protected without interfering with many cases where cruelty is necessarily inflicted.

Appeal dismissed.

House of Lords.

From C. A. (England). Dec. 17.

SAN PAULO (BRAZILIAN) RAILWAY CO. *v.* CARTER. (*a.*)

Inland revenue—Income tax—Profits and gains of English company owning railway abroad—Control in England—Profits received in England—Income Tax Acts, 1842 (*5 & 6 Vict. c.* 35), *s.* 100, *Schedule D, cases* 1, 5; 1853 (*16 & 17 Vict. c.* 34), *s.* 2, *Schedule D.*

An English company, with a registered office in London, was incorporated for the purpose of making and working a railway in Brazil. The directors resided in England, and controlled at the London office the whole conduct and management of the company, but the profits were earned in Brazil.

Held, that the company did not carry on its business exclusively out of the United Kingdom, and was therefore assessable to the income tax under case 1, *schedule D —viz., on the full amount of their net profits and gains.*

Decision of the Court of Appeal, 43 *W. R.* 339, [1895] 1 *Q. B.* 580, *affirmed.*

This was an appeal from a decision of the Court of Appeal (Lord Esher, M.R., and Lopes and Rigby, L.JJ.), reported 43 W. R. 339, [1895] 1 Q. B. 580, which had reversed that of the Divisional Court (Vaughan Williams and Wright, JJ.), reported 43 W. R. 109, on a special case stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners of Income Tax for the City of London.

The appellants, the San Paulo (Brazilian) Railway Co. (Limited), were an English company resident in England, the control and direction being in London, and the business of the company was carried on under the direction of the directors in London. The directors entered into contracts in England for the purchase of, and sent to Brazil the materials for additions, extensions, and improvements of their property, for repairs thereto, and for new plant, such as engines, waggons, &c. The accounts were kept in London, where the balance-sheets, reports, &c., were made out, all meetings held, and dividends declared and paid. The directors appointed a superintendent who resided in Brazil, and he was a salaried servant of the directors, removable at their pleasure, and bound to obey the orders sent out to him by the directors from London.

With an exception of transfer fees, amounting on an average to £128 per annum, and annual interest on money, amounting on an average to £1,423 11s. 3d. per annum, the whole revenue of the company arose from moneys paid to them in Brazil for the carriage of passengers, goods, merchandise, and cattle on the San Paulo Railway, and for other services and miscellaneous receipts connected with the railway.

The company were assessed under the First Case, Schedule D, of 5 & 6 Vict. c. 35, s. 100 (1), on the sum of £370,122: that is to say, the full amount of the balance of the profits and gains of the company upon an average of three years.

It was contended on behalf of the company that the company was chargeable, not under the First Case, but under the Fifth Case of Schedule D of 5 & 6 Vict. c. 35, s. 100 (1), only upon the sum of £295,070: that is to say, the full amount of the sums received in the United Kingdom upon an average of three years, and that the assessment should be restricted to that amount.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

The Commissioners were of opinion that the company was chargeable under the First Case, Schedule D, of 5 & 6 Vict. c. 35, s. 100 (1), and confirmed the assessment on the sum £370,122.

The Divisional Court (Vaughan Williams and Wright, JJ.) were of opinion that the case was governed by *Bartholomay Brewing Co.* v. *Wyatt*, 42 W. R. 173, [1893] 2 Q. B. 499, and that the company should be assessed upon the sum of £295,070 only.

Sir E. Clarke, Q.C., and *Bigham, Q.C.* (*A. M. Bremner* with them), for the appellants.—The case is within *Colquhoun* v. *Brooks*, 38 W. R. 289, 14 App. Cas. 493. *Sulley* v. *Attorney-General*, 8 W. R. 472, 5 H. & N. 711; *Bartholomay Brewery Co.* v. *Wyatt*, 42 W. R. 173, [1893] 2 Q. B. 499; *Cesena Sulphur Co.* v. *Nichols*, 25 W. R. 71, 1 Ex. D. 428; and *Imperial Continental Gas Association* v. *Nicholson*, 37 L. T. N. S. 717, 26 W. R. Dig. 102, can no longer be considered authorities. *Bank of Mexico* v. *Apthorpe*, 39 W. R. 564, [1891] 2 Q. B. 378, has no application.

Sir R. E. Webster, A.G., and *Sir R. T. Reid, Q.C.* (*W. O. Dunckwertz* with them), for the respondents.—*Colquhoun* v. *Brooks* is clearly distinguishable. The whole control of this business is in England. *Cesena Sulphur Co.*, *Calcutta Jute Co.*, and *Imperial Continental Gas Co.* are still good law, and govern this case.

Sir E. Clarke, Q.C., replied.

The House took time for consideration.

Lord HALSBURY, C.—I think one proposition has been conclusively established by the various cases that have come under your lordships' consideration, and that is, that where the trade is wholly or partially carried on in this country the trader is liable to pay income tax on the profits of his trade.

Now, in this case the appellant company is an English company, residing (so far as that abstraction a corporation can reside at all) in England. It has an office in London, and I am disposed to think (though it is unnecessary for the purposes of this case to say so) that its trade, if the word "trade" is strictly construed, is wholly carried on in England. It seems to me that, as was said by Cockburn, C.J., and Crompton, J., in the case of *Sulley* v. *The Attorney-General*, that "it is probably a question of fact where the trade is carried on," and it is probably true to say that that phrase may be understood in two different senses. It may mean where the goods in respect of which trading is carried on are conveyed, made, bought, or sold; or, speaking of land, where it is cultivated or used for any other purpose of profit. That makes the locality of the goods or the land which are the subjects of the trade to be in a certain sense the place where the trade is carried on, because it is the place where the things corporeally exist, or are dealt with. But there is another sense in which the conduct and management, the head and brain of the trading adventure, are situated in a place different from that in which the corporeal subjects of trading are to be found. It becomes, therefore, a question of fact, and, according to the answer to be given to the question where is the trade in a strict sense carried on, will the answer be, under the Income Tax Acts there is it liable to assessment.

It is therefore necessary to determine, upon these principles, where this appellant company carries on its business. It deals, undoubtedly, with land in the Brazils. In Brazil the payments are received, and in Brazil the passengers and goods are carried, but the form of trading can make no difference. If it were a mine, as in the Cezena case, or a jute mill, equally with a railway, the person who governs the whole commercial adventure; the person who decides what shall be done in respect of the adventure; what capital shall be invested in the adventure; on what terms the adventure shall be carried on; in short, the person who, in the strictest sense, makes the profits by his skill or industry, however distant may be the field of his adventure, is the person who is trading. That person appears to me, in this case, to be the appellant company. Every one of the tests I have applied are applicable to its proceedings. A shipowner, or, indeed, a shipbroker, may not have any one of the ships or the charter parties which he negotiates in England; but by correspondence, or by agency, he may have both charter parties and ships, not necessarily British ships, all over the globe. But if he lives in London, and by his direction governs the whole of this commercial adventure, could it properly be said that he is not carrying on his trade in London? So it appears to me that this appellant company is carrying on the trade in London, from which it issues its orders, and so governs and directs the whole commercial adventure that is under its superintendence.

I am, therefore, of opinion that the appeal must be dismissed with costs, and I move, your lordships, accordingly.

Lord WATSON.—The decision of this appeal does not involve any new controversy upon the construction of the Income Tax Acts. It depends, in my opinion, upon the answer which ought to be given to a single issue of fact.

The law which must govern the present case appears to me to be settled by the judgment of the House in *Colquhoun* v. *Brooks*. It was held, in that case, that the interest of a partner, resident in England, in the profits or a trade which was exclusively carried on in Australia by the other members of the firm, was chargeable with income tax, not under the first, but under the fifth case of Schedule D. The noble and learned lords who took part in the decision were of opinion that the interest of the English partner was included in the sweeping language of the first case; but they held that it also constituted, within the meaning of the first case, a possession in one of her Majesty's dominions out of the United Kingdom. The ground upon which the interest was held to be taxable in terms or the fifth case was that the Income Tax Acts contain no machinery for assessing, under the first case, profits accruing from any trade which is not wholly or in part carried on within the United Kingdom, whereas they do provide machinery for assessing under the fifth case all profits arising from trade exclusively carried on outside the United Kingdom.

In my opinion the decision in *Colquhoun* v. *Brooks* directly affirms the rule that every interest in the profits of trade, belonging to a person who is, within the meaning of the Acts, resident in the United Kingdom, must be charged under the first case of schedule D, if the trade is carried on, either wholly or partly, within Great Britain or Ireland, and is chargeable under the fifth case, if the trade is exclusively carried on in any of her Majesty's dominions out of the United Kingdom. The considerations which are applicable to trades wholly carried on in these dominions apply with equal force to trades exclusively carried on in foreign possessions which are not subject to the British Crown; and it appears to me to be matter of necessary implication that the interest of a resident here, in profits derived from a trade of the latter description, must also be assessed for income tax under the first case of schedule D.

When it has been ascertained that a person

interested in the profits of a trade has his residence in the United Kingdom, in such sense as to bring him within the incidence of the Income Tax Acts, the only question remaining for determination is whether the measure of his liability is to be found in the first or in the fifth case of schedule D; in the one case, he is liable to pay duty in respect of the net profits accruing to him from such trade; in the other, in respect only of such part of these profits as shall have been actually received by him in this country. But he cannot, according to the rule established in *Colquhoun* v. *Brooks*, escape from liability under the first case, unless he is able to show that no part of the trade is carried on within the United Kingdom, or, what comes to precisely the same thing, that it is exclusively carried on in a country or countries outside the United Kingdom, whether subject to her Majesty or not. If he succeeds in proving that fact, his liability will be under the fifth case.

The appellant is an English company incorporated with limited liability under British statutes and having its registered office in London. It is not disputed that the company has its domicile in England, and is liable to pay income tax in respect of any profits earned in the course of its trade. The only complaint made is that the amount of such profits has been assessed for duty under the first case, whereas the appellant maintains that it ought to have been assessed under the fifth case, because the trade of the company is wholly carried on beyond the limits of the United Kingdom. I have had no difficulty in rejecting that contention. It is not necessary to consider whether the whole trade of the company ought to be regarded as carried on in England. To my mind it is perfectly clear that, in point of fact, part of its trade is carried on there, and that is sufficient to bring its profits within the first case of schedule D.

It is no doubt true that the undertaking, in order to carry on which the company was incorporated, consists, as its memorandum bears witness, in "the making, maintaining, managing, and working" of a railway in Brazil, and in "the making, maintaining, managing, and working" of branch lines, roads, canals, and other means of communication in connection with the main line. It is also true that the directors, as authorized by the articles of association, manage and work the railway and its connections through a superintendent in Brazil, appointed by them in Brazil, and a staff of servants, who are under his immediate supervision; and that the receipts of the company, from which profits made by it are derived, are earned and paid in Brazil. But the substantial fact remains that the directors, subject to any resolutions which may be passed for their guidance by the members of the company, are vested with the sole right to manage and control every department of its affairs. Apart from the authority, express or implied, which they have from the directors, neither the superintendent nor any other servant of the company has any power to act in the carrying on of its trade. They are in no sense traders; they are merely servants, and in that capacity are remunerated for the services which they are employed to perform. The profits of the undertaking, although they are received by these servants, do not belong to them and are not in their disposal; their only duty, unless otherwise directed by the company, being to transmit them to London, and the company here is the sole judge whether they ought or ought not to be distributed among its members. The only persons who can with propriety be described as carrying on the trade of the company are its directors, who, for all purposes of administration and management, are the company itself. I do not think that in such circumstances the particular localities in which debts are incurred to the company or are paid to its agents are of any consequence in ascertaining by whom its trade is carried on.

I therefore concur in the judgment which has been moved.

Lord SHAND concurred.

Lord DAVEY.—I may content myself in this case with saying that the business of the appellant company is not, on the facts stated in the case, entirely or exclusively carried on abroad, and therefore that the case of *Colquhoun* v. *Brooks*, on which the appellants' counsel relied, is no sufficient authority for the proposition which they maintained. No doubt the profits of the company are derived from the profitable use of land in Brazil and from the business of carriers carried on in that country, and in that sense it is a Brazilian business. But it is not sufficient to say that the company are carrying on a Brazilian business (as Wright, J., thought) if the company is carrying on that business wholly or partially in this country. It is clear to my mind that the direction and supreme control of the appellant company's business is vested in the board of directors in London, who appoint the agents and officials abroad, and either by general orders or by particular directions control or may control their duties, remuneration, and conduct, and to whom any question of policy or any contract or other matter may, and if deemed of sufficient importance, I suppose, would be referred for their decision. The business is therefore in very truth carried on, in, and from the United Kingdom, although the actual operations of the company are in Brazil, and in that sense the business is also carried on in that country. I do not attach any importance to the fact of the railway and business belonging to a corporation and not to an individual, except that in the case of an English joint stock company formed for the purpose of carrying on a particular business, it is, perhaps, easier to say where is the seat of administration and direction. In my opinion, therefore, the case is outside both the decision and the reasoning of the learned lords, who gave judgment in the case of *Colquhoun* v. *Brooks*, because I find that every one of those noble and learned lords confined their observations to a case in which the business was entirely carried on abroad. Whether it would be possible in any case for a sole owner of a foreign business having exclusive power of control over it, but resident in this country, successfully to maintain that he did not carry on a business here it is unnecessary to say. That question, which is one of fact, will be dealt with when it arises according to the circumstance of the case.

I am, therefore, of opinion that the business of the San Paulo Co. is not a "foreign possession" within the meaning of the fifth case of section 100, schedule D, as interpreted in *Colquhoun* v. *Brooks*, and that being so, the case undoubtedly falls within the language of the first case, and it follows that the company has been rightly charged upon the whole of its profits or gains.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellants, *Clements, Withers, & Chapple.*

Solicitor for the respondent, *Solicitor for Inland Revenue.*

Court of Appeal.

From Chan. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) — Feb. 27.

In re Mason's Orphanage and the London and North-Western Railway Co. (*a.*)

Charity—Deed of foundation—Sale by trustees under power—Consent of Charity Commissioners—"Scheme legally established"—Charitable Trusts Amendment Act, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.

The deed of foundation of a charity duly enrolled under 9 *Geo.* 2, *c.* 36, *is not a "scheme legally established" within the meaning of section* 29 *of the Charitable Trusts Amendment Act*, 1855. *Consequently the trustees of such a charity in whom lands are vested cannot sell the lands under a power of sale contained in the deed without first obtaining the consent of the Charity Commissioners to the sale.*

The trustees of a charity having a power of sale can only exercise their power of sale with the express authority of Parliament, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Charity Commissioners.

Decision of Stirling, J. (*ante*, *p.* 61), *affirmed.*

This was an appeal from a decision of Stirling, J., reported *ante*, p. 61, where the facts are sufficiently stated.

Stirling, J., held that the deed of foundation of the charity was not a "scheme legally established" within the meaning of section 29 of the Charitable Trusts Act, 1855, and that consequently the trustees of the charity had no power to sell land without the consent of the Charity Commissioners.

The trustees appealed.

Hastings, *Q.C.*, *Warmington*, *Q.C.*, and *Ingle Joyce*, for the appellants.

Arthur Underhill, for the respondents, was not called upon.

Lindley, L.J.—There does not appear to me to be any doubt about the point. I cannot improve upon Stirling, J.'s judgment, or make the case plainer than he has done, and I will content myself with reading the section.

Bearing in mind that the Act of 1855 is, according to the 1st section, to be construed as one Act together with the Charitable Trusts Act of 1853, and that "any provisions of the principal Act inconsistent with this Act are hereby repealed," I think that section 29 of the Act of 1855 is an additional section to the Act of 1853. Under the Act of 1853 alone this point could not have arisen, because there is not contained in that Act any prohibition such as we find in section 29 of the subsequent Act of 1855.

Now, the prohibition is this: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion," and so on. Now, the language of that is plain enough, and it is admitted by the appellants that that is a prohibition subject to certain conditions. If they can make out that they have got the express authority of Parliament, either under any Act already passed or hereafter to be passed, or that they have got the authority of a court or a judge of competent jurisdiction, or that they have got a scheme legally established, or the approval of the Board, then all goes well; but if they have not got any one of those things, there is the prohibition, which is absolute.

Now, it is not contended that they have got any of these requisites except a "scheme legally established." The case is reduced to what is the real meaning of those words. I do not think that any lawyer who knows anything at all about charities, and who has been accustomed to the language which is applied to charities, would hesitate for a moment in saying that a "scheme legally established" is a technical expression and has a definite meaning as applied to charities. I understand by it this: A scheme either sanctioned by the Court of Chancery, or sanctioned by those other courts which, under the Act of 1853, could sanction schemes. I cannot read the language "according to a scheme legally established" as "according to trusts duly declared." That is not the meaning of it, and no one conversant with the language usually applied to a scheme would ever think that it was.

I think that the construction put upon the section by Stirling, J., is correct, and the appeal must be dismissed, with costs.

Kay, L.J.—I agree. I think that Stirling, J.'s judgment is quite accurate in every point as far as I can follow it, and I think when one looks to the history of this legislation, relating to charitable trusts and the dealing with them by the Court of Chancery, that the grammatical meaning of the words in this section 29 of the Act of 1855 is quite unmistakable. It was always the case that the Court of Chancery would under certain circumstances interfere in the administration of a charity and direct a scheme for its future administration. The word "scheme" is sanctioned by usage in the judicial experience of the Court of Chancery for more than a hundred years. The word "scheme" has a meaning with reference to charities which was completely settled and thoroughly well known long before this Act was passed, and therefore where "scheme" is used instead of "trust" or any ordinary word which would describe a trust, *prima facie* "scheme" must mean that which the courts have always understood by that word in relation to a charity, unless you find something in the context which contradicts that. Now, do you find anything in the context which contradicts it? To my mind the context shows plainly that that was the meaning of the word "scheme" in this section, because you have got appended to the word "scheme" "legally established." I will go back 150 years and take Lord Hardwicke's words in the case of *Attorney-General* v. *Smart*, 1 Ves. Sen. 72: "An information was brought to have the increasing surplus profits of a charity school founded by the Crown applied for the benefit of the master. There was a cross bill to have them applied for the benefit of the poor children." In point of fact, it was to have a scheme directed. Lord Hardwicke said: "This is a very causeless information and should be dismissed without any decree if it were not for the cross bill. The doctrine is true in general, that where there is an information it ought not to be dismissed, but there should be a decree"—What for?—"To establish the charity according to the intent of the donor; but that rule relates to private charities, for where there is a foundation for a perpetual charity by the Crown it is established as well as it can be already by a higher authority than this court." Looking to that use of

(*a.*) Reported by W. Shallcross Goddard, Esq., Barrister-at-Law.

the word "scheme" in that case, and from that time down to the present in connection with schemes when you have a charity established by a scheme, what can be the meaning of these words "scheme legally established" but this, that they mean a scheme for the administration of the charity established by that legal authority which was accustomed to establish schemes down to that time? Before the Act of 1855 was passed another mode of establishing schemes in the case of small charities whose incomes did not exceed £30 a year had been provided by the Act of 1853 and was confided to the court of bankruptcy of the district or to the county court. That again was a legal authority, and if you look at the sections of the Act they provide that that legal authority may in the case of such small charities establish schemes. As Stirling, J., pointed out, you have all this in the Act of 1853, and in this very Act of 1855 you find the word "scheme" used again and again with reference to that very thing—a scheme for the administration of the trusts of a charity established by judicial decision either by the courts which had power to do it under the Act of 1853 or by the original jurisdiction of the Court of Chancery.

Therefore, the words "scheme legally established," looking to the history of the dealing by the Court of Chancery with charities and to this legislation, seem to me grammatically to have as plain and clear a meaning as can be. They do not mean the original trust, unless that original trust was a trust founded by the Crown or by Act of Parliament, in which case you might treat it as having been established by higher authority even than the Court of Chancery. In the ordinary case of a charity they mean where the Court of Chancery or the courts which were empowered by the Act of 1853 to do it, have by an official decision established a scheme which may to some extent modify the original trust for the future administration of the charity. That is what I should say is the meaning of these words in this clause. But then look at the purpose of the clause. Before this time charities, even where they had not an express power of sale, had been in the habit in many cases of selling the property which belonged to them. The sale might not be good unless it was shown, and the *onus* was on the purchaser to show that it was for the benefit of the charity that the sale should be made. Then, in other cases they had express power to sell by the original instrument of trust, and that was a second case in which trustees of a charity might sell. Again, under the Act of 1853, they might sell where they had no express power to sell with the sanction of the Charity Commissioners. Take those three cases, I think they pretty well exhaust the cases in which the trustees of a charity could sell the charity property.

Now, with that knowledge the Legislature passed this Act of Parliament, containing for the first time an absolute prohibition to all trustees, whether they had got an express power or an implied power, or a power subject to the purchaser being able to show that it was for the benefit of the charity, or a power to sell with the assent of the Charity Commissioners. This clause comes and entirely prohibits it, and says "You shall not sell at all." It is not an enabling clause. It is a negative clause, preventing any sale in the future except under certain conditions. The conditions are, "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant otherwise than with the express authority of Parliament," that is one condition, "under any Act already passed or which may hereafter be passed or of a court or a judge of competent jurisdiction," that would be with the authority of the Court of Chancery or a Court of Bankruptcy or a county court where they had jurisdiction; "or according to a scheme legally established"—that must be a scheme established by judicial decision—"or with the approval of the board." If you come within any of these exceptions you may sell, but otherwise it is an absolute prohibition against you. I pointed out in the early part of the argument that this, of course, only applies to people who can sell; you cannot prohibit persons selling who cannot sell. Why it does not apply to every possible case in which they can sell unless they come within any of these exceptions, I confess I cannot for one moment understand. Look at the purpose of the prohibition. Trustees of charities, as one knows, were very often rather irresponsible and dealt in a somewhat arbitrary way with the property of charities, particularly small charities (I do not for a moment suggest anything of that kind has been done here), and it was found necessary in order to have a complete control over the dealing with charity property to introduce this negative provision into the Act of Parliament to say "Henceforward you shall not sell your property at all unless you come within one or other of these exceptions," one of which is to get the sanction of the board.

I think the decision of Stirling, J., in this case is perfectly right, and that the Act of Parliament applies precisely to this particular case, and that in this case, although the trustees had an express power of sale by their instrument of trust, it was not an instrument of trust founded by Act of Parliament or by a grant from the Crown, nor had it ever been the subject of "a scheme legally established," and, therefore, it does not come within any of the exceptions and the section seems to me to apply to this case.

SMITH, L.J.—The whole purview of the section is this, that trustees of a charity shall not sell or grant such mortgages or make such leases as are therein mentioned without some outside authority, which is in that section mentioned, being brought in to see that it is right, in other words, to give its consent. It seems to me hopeless in reality to say that my brother Stirling's judgment on the construction of this section is not right. The appeal ought to be dismissed.

Appeal dismissed.

Solicitor for the appellants, *Burton, Yeates, & Hart*, for *Johnson, Barclay, Johnson, & Rogers*, Birmingham.

Solicitors for the respondent, *C. H. Mason.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Kay, L.JJ.) } Dec. 4, 5; Feb. 21.

ATTORNEY-GENERAL v. BARON SUDELEY AND OTHERS. (*a*.)

Inland revenue—Probate duty—Undistributed residuary estate of English testator—Foreign mortgages forming part of such undistributed residuary estate—Liability to probate duty of the estate of English residuary legatee.

An English testatrix was entitled, under the will of her husband—a domiciled Englishman whose will was proved in England by English executors—to one-fourth share of his residuary estate. That estate included, among other property, money invested in mortgages of real estate in New Zealand. At the date of the testatrix's

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

death no part of the residuary estate had been distributed, nor had any of the mortgages been converted.

Held (Lord Esher, M.R., *dissenting*), *that the testatrix's share in her deceased husband's residuary estate was an English* chose in action, *and that probate duty was payable in England by her executors on one-fourth of the value of the New Zealand mortgages.*

Decision of the Divisional Court, 43 *W. R.* 700, *reversed.*

Appeal from the decision of the Divisional Court (Lord Russell of Killowen, C.J., and Charles, J., reported 43 W. R. 700) dismissing an information filed by the Attorney-General against the respondents, the executors of the will of Frances Louisa Tollemache, deceased.

The information sought to charge the respondents with probate duty upon a sum of £111,850 15s. 7d. to which Frances Louisa Tollemache was entitled under the will of her husband, Algernon Gray Tollemache.

The facts and arguments fully appear from the judgment of the Master of the Rolls.

Sir Richard Webster, *Q.C.*, *A.G.*, and *Sir Robert Finlay*, *Q.C.*, *S.G.*, (*Vaughan Hawkins* with them), for the Crown, cited *In re Ewing*, 29 W. R. 474, 6 P. D. 19; *Laidlay* v. *The Lord Advocate*, 15 App. Cas. 468, 39 W. R. Dig. 196; *Attorney-General* v. *Hubbuck*, 13 Q. B. D. 275, 32 W. R. Dig. 170; *Attorney-General* v. *Brunning*, 7 W. R. 308, 8 Ibid. 162, 8 H. L. Cas. 243; *Attorney-General* v. *Lord Ailesbury*, 36 W. R. 737, 12 App. Cas. 672; *Attorney-General* v. *Higgins*, 2 H. & N. 339, 5 W. R. Dig. 227.

Channell, *Q.C.*, and *Bremner*, for the respondents, cited *Yeoman* v. *Bradshaw*, Holt 42; *Walsh* v. *The Queen*, [1894] A. C. 144; *Attorney-General* v. *Dimond*, 1 Cr. & J. 356; and *Pearse* v. *Pearse*, 9 Simon 430.

The COURT took time to consider their judgment. By a majority the appeal was allowed, Lord ESHER, M.R., dissenting.

Lord ESHER, M.R.—This was the case of an information by the Attorney-General against the defendants, the executors of the will of Mrs. Frances Louisa Tollemache, in respect of their refusal to bring before the Commissioners of Inland Revenue a "corrective affidavit" required from them by the commissioners under section 41 of 55 Geo. 3, c. 184.

The information alleged that Algernon Gray Tollemache, the husband of Mrs. Frances Louisa Tollemache, died on the 16th of January, 1892, leaving to his wife one-fourth of his residuary estate for her life, and that the said A. G. Tollemache was at the time of his death possessed of personal estate exceeding in estimated value £1,250,000, and that her said personal estate included large sums, amounting in the whole to upwards of £400,000, invested on mortgages of real estate in New Zealand. The information then alleged that Frances Louisa Tollemache died on the 15th of April, 1893, having by her will appointed the defendants her executors, bequeathing her residuary personal estate to them upon trust for sale and conversion: and that the defendants proved her will in the Probate Division of the High Court. In the affidavits made by the defendants under section 38 of 55 Geo. 3, c. 184, for the purpose of obtaining probate, they specified the estimated value of the estate and effects of their testatrix for and in respect of which the probate was to be granted, at a certain sum. The defendants included as part of the estate of their testatrix one-fourth share of the estate of A. G. Tollemache given to her by his will, exclusive of the said New Zealand mortgages; but they did not include and they claim to exclude in estimating the value of such one-fourth share the whole of the said New Zealand mortgage securities. The information stated that the residuary estate of A. G. Tollemache had not been distributed at the time of the death of Frances Louisa Tollemache, and no part of the New Zealand mortgages had been transferred specifically to the defendants. The information then alleged as follows:—"That the executors of A. G. Tollemache afterwards brought in a residuary account of the estate of A. G. Tollemache, from which it appeared that the net value of the said New Zealand mortgage securities is £447,403 2s. 5d.; and the Commissioners of Inland Revenue have accordingly required the defendants, as executors of Frances Louisa Tollemache, to bring in under section 41 a 'corrective affidavit,' and to include the sum of £111,850 15s. 7d. (being one-fourth of £447,403 2s. 5d.) as part of the estate and effects liable to probate duty of the said Frances Louisa Tollemache, but the defendants refused," &c. The prayer of the information is "that it may be declared that the said sum of £111,850 15s. 7d. (being one-fourth of £447,403 2s. 5d., the value of the mortgage securities in New Zealand, forming part of the residuary personal estate of the said A. G. Tollemache) ought to have been included in the value for the purposes of probate duty of the personal estate of the said Frances Louisa Tollemache, and that the said sum was and is liable to duty, &c., and that the defendants may be ordered to pay the amount of such duty, with interest, to the Commissioners of Inland Revenue."

The answer of the defendants did not vary the facts stated in the information. What the information claimed was that £111,850 15s. 7d. ought to have been included, not that the value of a right of action should be included.

The case was heard before the Lord Chief Justice of England and Charles, J. It was contended before them and before us on behalf of the Crown that the only right of the defendants as to the New Zealand mortgages is a right as against the executors of Algernon Gray Tollemache to have his estate administered, and that such right is an asset of the estate of Frances Louisa Tollemache, and is an English asset. It was contended for the defendants that the right of action is not an asset at all of the estate of Frances Louisa Tollemache; that an asset of her estate was her share of New Zealand mortgage debts, but that such debts were payable in New Zealand, and the payment of them could be enforced only in New Zealand; that, therefore, they were, and her share in them was, a foreign asset, and therefore they were not liable to probate duty here.

The first question seems to be, What is in this case the asset which can be brought within the purview of the statute as to probate duties? The question is not, What in some courts or under some jurisdictions is called, and properly called, an asset? but what is in this case the asset within sections 38 and 41 and the schedule (Part III.) of 55 Geo. 3, c. 184? It is to be observed that the word "asset" is not used in section 38 or section 41, or in the schedule (Part III.). What is to be brought into the affidavit in section 38, and is to be subjected to the duty under section 41, is, according to the terms used in the statute, "the value of the estate and effects of the testator"; and the duty to be paid is a sum of money regulated by the money value of the estate and effects. The words "estate and effects" are, according to the decisions, to be limited to personal estate and effects. The value in money of anything which is called personal estate in English law is the money amount for which it can or could be sold on a fair sale. This description can be applied to a share of New Zealand mortgage debts.

It cannot be applied to the suggested "right of action." A law suit may be a suit in equity or an action at law. In either case the question to be determined by it is, What were the rights of the parties before the suit or action was commenced? The law suit does not create the right; it determines authoritatively that there was, before it began, a right, and it determines what that right was and is. What is called "right of action" is not the power of bringing an action. Anybody can bring an action, though he has no right at all. The meaning of the phrase is that the person has a right or claim before the action which is determined by the action to be a valid right or claim. The action or suit does not confer a right which did not exist before it; it only declares that a right did exist before it. An action or suit is therefore mere procedure. An action with regard to a will is no part of the estate of the testator; it is a procedure or means of determining authoritatively what was or was not a part of his estate, what was or was not an asset of his estate. In this case, therefore, the right of action by her executors against the executors of A. G. Tollemache was no part of the estate of Frances Louisa Tollemache; but her right to a share of the New Zealand mortgage debts was a part or asset of her estate.

The next question then is, Was that right an asset of her estate liable to pay probate duty, and ought the value of it therefore to have been disclosed in the affidavit under section 38 or in the corrective affidavit under section 41? The personal estate of a person must almost always consist of different parts. The affidavit made under section 38 in practice, in specifying what is the value of the estate, sets out the different items or parts of which it consists; and each of these items or parts is called an asset of—*i.e.*, a part of—the whole estate in respect of which probate duty is to be paid. Now it is not every asset of the estate that is to be valued for duty, but only such of the assets of the estate as were at the date of the death of the testator locally within the jurisdiction of the authority which grants the probate. This authority, which was formerly the Ordinary, is now the Court of Probate. The distinction between assets of the estate which are liable to probate duty and assets of the estate which are not liable to probate duty, though both are assets of the estate, was laid down, and the reasons were given for it in 1831 by Lord Lyndhurst, C.B., in *Attorney-General* v. *Dimond*, 1 Cr. & J. 356, p. 369. The distinction depends upon the locality of the asset at the time of the testator's death. If the locality is outside the jurisdiction, the asset is called a foreign asset, and is not liable. Where the asset is a specific tangible article there can be no difficulty in determining its locality. Where the asset is not a specific article, but what is called a *chose in action*, rules have been laid down to determine its locality. As to debts due to the testator at the time of his death, the rule to be deduced from the cases is, that if the debtor is at the date of the death of the testator abroad, and the debt is payable only abroad, and could only be got from him abroad, either by some act to be done there or some proceeding taken there, the debt is a foreign asset; but if, although the debtor is abroad, a legal proceeding could be taken here which would in law directly order and enforce the payment here of the debt, then the debt is an asset here, liable to probate duty. Thus in *Attorney-General* v. *Dimond*, the testator was a creditor of the French Government for 32,727*l.* of Rentes at 5 per cent. These were only payable by the French Government, the debtor, in France, and payment could only be obtained by some act done in France. It was for that reason held that the debt, the asset, was not such an asset as was liable to pay probate duty in England. So, in *Attorney-General* v. *Hope*, in 1834 (1 C. M. & R. 530), it was held in the House of Lords that goods in America at the date of the death of the testator, sent there by the testator for sale by his agents, and debts—both simple and contract debts, due to him in America, and money in American funds, were not liable to probate duty here, although all would eventually come to the hands of the executors here. So, in *Pearse* v. *Pearse*, 9 Sim. 430, in 1838, by Shadwell, V.C., notes of the Government of India, payable in India, were held not liable, because they were payable only in India. In *Attorney-General* v. *Bouwens*, 4 M. & W. 171, Dutch bonds due to the testator were held liable, but it was because they were payable in England. The case of *Attorney-General* v. *Higgins*, is really to the same effect. The head office of the railway company was in Scotland. The shares were therefore payable in Scotland. It was held that the executor ought to have exhibited an inventory in Scotland. In the present case the mortgage debt was payable by the mortgagor in New Zealand; the debtor was, at the time of the death of the testatrix, Frances Louisa Tollemache, in New Zealand, and no action could be brought in England by the defendants directly against the New Zealand mortgagor to obtain an order for, and recover payment of, the mortgage debt. The action by the defendants against the executors of A. G. Tollemache would not obtain the mortgage debts; it would oblige the executors of A. G. Tollemache to bring another action in New Zealand against the New Zealand mortgagors. Therefore, within the authority of all the cases, the New Zealand mortgage debts and the one-fourth share of them in which Frances Louisa Tollemache was interested were a foreign asset, and were properly omitted by the defendants from the affidavit under section 38, and the corrective affidavit under section 41, unless a different decision is to be the result in this court, from a consideration of the case before Lord Hannen, *In the Goods of Ewing*, in 1881. I cannot think that the case affords any authority upon any question in this case. It was an application by a legatee under the will of William Ewing to the Court of Probate to appoint an administrator of the will in England, although the executors of the will were duly administering the will which had been proved in Scotland. The Crown was no party to the application, and was not before the court. No question of probate duty arose or could arise at that stage. What was said by Lord Hannen may be authority for saying that the right of Frances Louisa Tollemache to a fourth share of the residue of A. G. Tollemache's estate, including the New Zealand mortgage debts, is an asset of the estate of Frances Louisa Tollemache. That is not denied. But nothing said by Lord Hannen goes to show that it is not a foreign asset. If it does show that, it is contrary to all other authorities. And certainly nothing is said in that case to show that Lord Hannen thought that an action or suit could be an asset of an estate. The claim of the Attorney-General is in form right—namely, that the value of the mortgage debt, not the value of the cause of action, should have been included. But that claim, so rightly stated, cannot be sustained.

I agree with the Lord Chief Justice and Charles, J., and am of opinion that the appeal should be dismissed.

LOPES, L.J.—The executors of Frances Louisa Tollemache are entitled to a fourth part of the residuary estate of her husband, Algernon Tollemache. A sum of £111,850 15*s.* 7*d.*, part of such residuary

estate, is the value of the one-fourth part of certain mortgages in New Zealand. The Crown claims probate duty on this sum. The executors resist the claim on the ground that the £111,850 15s. 7d. is a foreign, and not an English, asset, and, therefore, not subject to probate duty. The question is whether such sum is a foreign or English asset. I have come to the conclusion that it is an English asset, for the reasons which I will shortly give. [His lordship then stated the facts, and proceeded:—] It is to be observed that neither Frances nor her executors could claim any part of this estate *in specie*. The executors of her husband were not trustees of the estate for her; all she was entitled to was her proportion of the proceeds of her husband's estate after realization. Neither Frances nor her executors had any claim against these mortgagors to recover the mortgage debt or any portion of it. That was a claim enforcable only by the executors of Algernon. The right of the executors of Frances as against the executors of her husband is a right to have his estate administered. Administered where? The husband was domiciled in England, his will was proved in England, his executors are in England, and his estate is being administered in England, and the money recoverable will be brought to England. The executors of the husband can only be sued in the English courts by the executors of Frances. It is an English *chose in action* recoverable in England, and is, in my opinion, an English and not a foreign asset, and as such is subject to probate duty here. *In re Ewing* is in point, a case which, I think, is rightly decided.

The appeal will be allowed.

KAY, L.J.—I have arrived at the same conclusion as that expressed by Lopes, L.J. In this information the Crown claims probate duty on the estate of Frances Louisa Tollemache, who died in 1893. Her executors resist the claim as to £111,850 15s. 7d., part of such estate, on the ground that this sum is the value of one-fourth share of certain mortgages in New Zealand which, it is said by the terms of them, were not to be called in until a time which has not yet arrived. It is alleged that Frances was entitled at the time of her death to one fourth share of these mortgages. They were not vested in her. They were the property of her deceased husband, Algernon Gray Tollemache, who died in 1892, having by will given the income of his real and personal estate to her and his two sisters jointly for life, and, subject thereto and to another life estate which has expired, one fourth of the residuary personal estate to her absolutely. The other three fourths were divided by his will among a number of other persons. The testator empowered his executors to leave his residuary personal estate invested as they should find it at the time of his death, unless they thought proper to change any investment. The executors of Algernon retained the New Zealand mortgages and obtained a transfer of them into their own names. But the residue was not divided, of course, during the life of Frances, who was tenant for life of the whole estate jointly with the testator's two sisters.

It is evident from this short statement that the New Zealand mortgages were not assets of Frances, nor was any part of them. Neither she nor her executors could claim any part of them *in specie*. They could not sue the mortgagors to recover the mortgage moneys. Those mortgages were, in fact, outstanding assets of Algernon. The only right of Frances' executors was to call upon Algernon's executors to realize his estate, get in his outstanding assets, convert them into money, and, when the time for division arrives, to divide such proceeds among the residuary legatees of Algernon. The executors of Frances could not compel Algernon's executors to transfer to them any of the New Zealand mortgages in respect of her fourth share of the residue. That could only be done if these mortgages happened to remain unconverted when all debts and legacies were paid and the residue became divisible and all the residuary legatees agreed that the mortgages should remain unconverted.

What in law is the interest of Frances' executors in the estate of Algernon? It is a right to recover from Algernon's executors one fourth of the clear residue of his estate. So far as such residue consists of personal property, that is a *chose in action*. What is its locality? Algernon was domiciled in England. His will was proved here. His executors are in the country. They can only be sued by Frances' executors in the English court. It is therefore an English *chose in action*. If this be so, it seems to me that upon such an asset probate duty is payable. If Algernon had outstanding assets in many parts of the world I do not see how that would make any difference. The one-fourth share of this residuary estate which belonged to Frances would still be an English asset, because neither she nor her executors would have any right to any of such investments *in specie*.

It is suggested that Algernon's executors were trustees of one-fourth share of these mortgages for Frances' executors, and that therefore the case is the same as though Frances had invested her own money in mortgages in New Zealand in the names of trustees for herself. But the difference is that in that case she could have compelled the trustees to transfer such mortgages to herself. That seems to me the distinction between the supposed case and the present, and, in my opinion, makes an essential difference. In strictness, Frances' executors are only entitled to receive her one-fourth share of Algernon's estate in English money. I cannot see how this can escape probate duty.

In the case of *In re Ewing*, John Orr Ewing died in April, 1878. He was domiciled in Scotland and was entitled to a share in a Scotch partnership, which share was valued at £400,000 and was payable to his estate by ten annual instalments. By his will he gave certain annuities, and subject to them a legacy of one-sixth of £60,000 to his nephew, William Ewing, and he also gave to him one-sixth of his residuary estate. His will was proved in Scotland. Part of his assets at the time of his death were in England. William Ewing died in December, 1878, before he had received his share of John Orr Ewing's estate or the legacy to him. W. Ewing was domiciled in Scotland and his will was proved there by his executors.

A legatee under William Ewing's will cited his executors to accept or to refuse probate of his will in England or to show cause why administration with the will annexed should not be granted in England to such legatee. William had no assets in England except of trifling value. The ground of the application was, in the words of Sir James Hannen, "that the claim of the estate of William Ewing on the estate of his uncle, John Orr Ewing, is an asset of Mr. Ewing's estate in England by reason of some of the assets of the uncle's estate having been in England at the time of W. Ewing's death." That is the precise point raised in this case. The exemption from duty is claimed here on the ground that, the New Zealand mortgages being in existence at the death of Frances, the claim of her executors on the estate of Algernon is to that extent an asset in New Zealand.

Sir James Hannen rejected this contention. I cannot assent to the argument that what he said was

obiter. It seems to me to be the ground of his decision. These are his words: "The claim of the executors of W. Ewing in respect of the interest of their testator under his uncle's will is a claim on the executors of the uncle duly to administer his estate and to pay the legacy to W. Ewing out of the funds which may be applicable to that purpose. It cannot be disputed that this claim or interest in the estate of the uncle constitutes an asset of the estate of the deceased W. Ewing, because it is recoverable by the executors of W. Ewing *virtute officii*, but it appears to me that it is an asset in Scotland, and not in England. . . . The fact that some of the assets of J. O. Ewing were situate in England does not appear to make any difference. If I were to constitute the applicant administrator with the will annexed by W. Ewing, he could not in that character take possession of or recover the outstanding assets of the uncle's estate; he could not claim those assets themselves *virtute officii*, his only remedy would still be through and by means of his claim upon the executors of the uncle to have the estate duty administered." On these grounds Sir J. Hannen refused the application. The decision, or the reasons for it, are not binding on this court if we disagreed with them, but I must say that I agree with the reasons and decision entirely. This decision was referred to in *Laidlay* v. *The Lord Advocate*. A domiciled Scotchman was partner in a firm for working indigo and silk concerns in India. Probate was claimed on his share. There were sixteen partners, all of whom except two were resident in the United Kingdom. It was held that the seat of the business was in India, and that this must be treated as the locality of the testator's interest in the firm, and consequently that this interest was exempt from probate duty in England. *In the Goods of Ewing* was only referred to for a *dictum* of Sir J. Hannen to the effect that the locality of the share of a deceased partner would be the place where the business was carried on. But no doubt was cast upon the decision in *In the Goods of Ewing*.

I am compelled, with deference to the court below, to differ from their decision. I think the New Zealand mortgages were not an asset of Frances' estate. Her executors have no right *virtute officii* to any part of the mortgages. Their only right in respect of them is to call upon the English executors of Algernon to get in his outstanding personal estate and to convert and divide it when the time for division arrives. That right is, in my opinion, a part of Frances' estate whose locality is England, and its value, as in the case of all English assets, is subject to probate duty in England. I think that the appeal should be allowed, with costs here and below.

Solicitor for the appellant, *Solicitor of Inland Revenue*.

Solicitor for the respondent, *J. A. Bertram*.

High Court of Justice.

Chan. Div. }
Stirling, J. } Jan. 16; Feb. 26.

In re Macduff.
Macduff *v.* Macduff. (*a*.)

Will—Construction—Charity—Bequest for charitable or philanthropic purposes—Validity.

A testator by his will bequeathed a sum of money to be appropriated for some one or more purposes "charitable, philanthropic, or ."

Held, that this bequest was not invalid simply by reason of the blank; but

Held, further, that as the word "philanthropic" was wide enough to comprise purposes not within the technical meaning of "charitable," the gift was invalid.

By his will, dated the 24th of July, 1889, the Rev. J. R. Macduff, "formerly minister of Sandyford Church and parish, Glasgow, but now having my domicile in England," by clause (1) appointed his daughter, Annie Seaton Macduff, and A. Macduff and H. Macduff executors and trustees of his will, and by clause (2) he bequeathed all his property for the behoof, in the first instance, of his said daughter, the entire interest of the same to be enjoyed by her during her lifetime, with the reservation of certain legacies therein mentioned. By clause (7) he declared that "the aforesaid provisions or legacies are to come into immediate, or almost immediate, settlement at my death. The following and far more important bequest is for the future, and is retained under the seal of secrecy until my daughter's death, when my aforesaid trustees are empowered to open it. But until that time it is sacredly to be retained by my daughter, Annie S. Macduff, the provisions of the same being contingent on her wishes and other private considerations. It contains the bequest of a considerable sum of money for a purpose or purposes which cannot at present be disclosed, and the destination of which may be altered or modified at her discretion or, failing her, others whose names will be engrossed in this special deed." And all the rest of his property he gave absolutely to his said daughter. The testator made two codicils to his will which were not material on the present question. The testator also executed the following document, which was dated the 27th of August, 1889, and admitted to probate together with the said will and codicils:—"Special private and contingent bequests embodied at p. 3, paragraph No. 7, in my will dated the 24th of July, 1889.—As said private and contingent bequests are not to take effect in my daughter's lifetime, but only come into operation at her death, my two trustees mentioned in aforesaid will and settlement are then empowered to open this document and carry its provisions into execution, with any new specification or alteration that may have been resolved on by my daughter and left in her handwriting at the end of these presents. I, John Ross Macduff, will from my estate the entire sum of £10,000 to be appropriated and allocated for some one or more purposes charitable, philanthropic, or . The precise purpose or purposes I would desire to be named by my daughter, Annie S. Macduff. But should she from any cause fail or be unable to indicate these, I leave the elder surviving sons of my brothers, in co-operation with any others in whose wisdom and experience they can thoroughly rely, to see my wishes carried into effect. I am unable personally to tie myself down to any specific scheme, as many objects supremely claimant to-day may cease to be so after a series of years, while others at present undreamt of may be found urgent."

The testator died on the 30th of April, 1895, leaving his said daughter his heiress-at-law and sole next of kin.

On the 8th of July, 1895, an originating summons, to which her co-executors and her Majesty's Attorney-General were defendants, was taken out by the daughter (who was also residuary legatee under the will), asking (1) whether any bequest of £10,000 to take effect on the death of the said Annie S. Macduff was effectually made by the will and codicils of

(*a*.) Reported by W. Scott Thompson, Esq., Barrister-at-Law.

the said testator for any charitable or other purpose; and (2) whether the executors were at liberty, subject to providing for the payment of the testator's debts, funeral, and testamentary expenses, and the legacies effectually given by the said will, to assign forthwith to the said Annie S. Macduff the whole of the testator's personalty.

Hadley, for the plaintiff, the residuary legatee, argued that the bequest was invalid first, for uncertainty, by reason of the blank; and secondly, because the word philanthropic has a meaning wide enough to include purposes other than charitable purposes in the legal sense.

He referred to *James* v. *Allen*, 3 Mer. 17; *Ellis* v. *Selby*, 1 My. & Cr. 286; *Morice* v. *Bishop of Durham*, 10 Ves. 522; *Williams* v. *Kershaw*, 5 Cl. & F. 111, n.; *Kendall* v. *Granger*, 5 Beav. 300.

Whitworth, for the defendant trustees.

Ingle Joyce, for the Attorney-General, argued that the gift was valid as a gift to charitable purposes generally. The blank did not render the gift void for uncertainty: *Illingworth* v. *Cooke*, 9 Hare 37; *Gill* v. *Bagshaw*, 14 W. R. 1013, L. R. 2 Eq. 746. The word charitable was used to denote purposes within the popular meaning of the word, whilst the word philanthropic comprised purposes charitable within the technical and not within the popular sense.

STIRLING, J.—This summons raises a question as to the validity of a certain gift in the will of the Rev. J. R. Macduff. By his will the testator describes himself as "formerly minister of Sandyford Church and parish, Glasgow, but now having my domicile in England," and I desire to say that this case has been argued, and will be decided by me on the footing that that statement as to the domicile of the testator is according to the fact; for this reason, that there appears to be a difference between the law of England and the law of Scotland upon the point in dispute.

That being so, the testator, after giving legacies of various kinds, proceeds thus: [His lordship read the provision of the will and document above stated.] Now, the question is as to the validity of that disposition of £10,000. It was urged on behalf of the residuary legatee that that gift was invalid first, by reason of the blank left after the words "charitable, philanthropic, or "; and secondly, because the word philanthropic has a wider meaning than the word charitable, and would comprise purposes not within the technical meaning of the word charitable.

Now as regards the first of these objections, I think that this gift cannot be held to be bad simply by reason of the existence of the blank. The testator seems to have wished further to consider whether the sum he mentions should be devoted to any purposes, whether charitable or philanthropic; he never came to any final determination on the subject; and the will, in my opinion, ought to be read as if it had run thus: "for some one or more purposes, charitable, philanthropic, or of such other nature as I may hereafter name by codicil;" and then that the testator had died without making a codicil. The effect of this would be that the sum mentioned would be applicable for charitable or philanthropic purposes only. See *Illingworth* v. *Cooke* and *Gill* v. *Bagshaw*.

The question then arises whether a bequest for "charitable or philanthropic purposes" is valid according to the law of England. In order that it may be valid, the purposes as defined by the testator's will must be "charitable" in the technical sense in which that word is used in this court. The contention for the Attorney-General was that the word "charitable" in the will was not to be understood in the technical, but in the popular sense, while the word "philanthropic" was used to designate other purposes which, though not charitable in the popular sense, are nevertheless charitable in the technical sense. On the other hand, it was urged that, among philanthropic purposes may doubtless be included many which are charitable in the technical sense, but also many which are not.

In *James* v. *Allen* Sir W. Grant, M.R., had to consider a bequest for "benevolent" purposes. He says: "The question is, What authority would this court have to say that the property must not be applied to purposes, however benevolent, unless they also come within the technical denominations of charitable purposes. If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute." It was held that the gift was invalid.

In *Kendall* v. *Granger* the bequest was to be applied for amongst objects "encouraging undertakings of general utility." Lord Langdale, M.R., says (at p. 303): "Now, a charitable purpose may very well, I conceive, be a purpose of general utility; but the question, which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this court deems to be charitable? I own that, in my opinion, according to the decisions which have taken place in this court, they are not. The words general utility are so large, that they comprehend purposes which are not charitable, and, comprising purposes which are not charitable, the trustees have an option to apply them to purposes which are not charitable, and consequently to divert the trust fund from those purposes which this court is in the habit of considering charitable. I do not venture to say that I am well satisfied with all the decisions that have taken place on this subject. I think that there are older cases, showing perhaps that the court would, in a case where charitable purposes were mentioned, have taken care that the application should have been made to those purposes; but I do not feel myself at liberty to depart from the decisions which have been made on the subject. Conceiving myself bound by authority, I must declare that this is not a trust which can be carried into effect as a charitable purpose."

I respectfully agree with the concluding observations of Lord Langdale; but I am not at liberty, any more than he was, to depart from the decisions. The question is whether philanthropic purposes can be effectively distinguished from benevolent purposes or purposes of general utility. "Philanthropic," no doubt, is a word of narrower meaning than "benevolent"; an act may be benevolent if it indicates goodwill to a particular individual only, whereas an act cannot be said to be philanthropic unless it indicates goodwill to mankind at large. Still, it seems to me that the word "philanthropic" is wide enough to comprise purposes which are not charitable in the technical sense, and consequently that the trust declared by the testator cannot be supported.

Solicitors, *Thomas Webster; The Solicitor to the Treasury.*

Chan. Div. }
Stirling, J. } Dec. 12; Jan. 22, 23, 28.

In re BERRY.
DUFFIELD *v.* WILLIAMS. (*a.*)

Practice — Parties — Bankruptcy of defendant — Receiving order — Official receiver wrongfully added as a party to the action—R. S. C., 1883, *ord.* 17, *r.* 4 *—Bankruptcy Acts*, 1883 *and* 1890.

The mere making of a receiving order does not cause any change or transmission of interest or liability.

Consequently, where a receiving order had been made against the defendant in an action, and an ex parte *order adding the official receiver as a defendant thereto obtained by the plaintiff under R. S. C.*, 1883, *ord.* 17, *r.* 4, *the latter order, upon the application of the official receiver, was discharged.*

This was a summons taken out by Mr. Llewellyn Hugh Jones, the official receiver at Wrexham, and acting in the bankruptcy of John Lewis, one of the defendants in the above action, asking that an *ex parte* order, dated the 4th of November, 1895, whereby he was added as a defendant in the action, might be discharged.

The defendants Williams and Lewis were the executors and trustees of the will and codicil of the testatrix, Ann Berry, deceased, who died on the 14th of January, 1879.

On the 14th of March, 1894, an action for accounts, inquiries, and, if necessary, administration, of the estate of the testatrix was instituted against Williams and Lewis by the persons beneficially interested in the estate of the testatrix.

On the 30th of April, 1894, an order was made for an account, and the chief clerk, by his certificate dated the 5th of April, 1895, certified the sum of £2,245 3s. 5d. to be due from the defendants.

The defendants took out a summons to vary the said certificate, and the plaintiffs likewise issued a summons for payment into court of the said sum of £2,245 3s. 5d., both of which were still pending.

On the 24th of June, 1895, a receiving order was made against the defendant Lewis, on his own application, by the Wrexham County Court, and the official receiver, the said Llewellyn Hugh Jones, became the receiver of his the defendant Lewis's estate.

The said Lewis was not, however, adjudicated a bankrupt.

By an order made on the 4th of November, 1895, under ord. 17, r. 4, on the application of the plaintiffs, the said L. H. Jones was added as a defendant to this action, and from this order the said L. H. Jones now sought to be relieved.

M. Ingle Joyce, for the official receiver and the Board of Trade.—An official receiver cannot be made a party to an action before there has been an adjudication and he has been appointed a trustee, because the property of the debtor remains vested in the debtor, and not in the official receiver, until his appointment as trustee. In any event these proceedings can only be taken against the trustee with the leave of the Bankruptcy Court (Bankruptcy Act, 1883, s. 9). The official receiver is only the receiver of the property of the debtor (section 57), and no proceedings can be taken against him: *Rhodes* v. *Dawson*, 34 W. R. 240, 16 Q. B. D. 548-553; *Watson* v. *Holliday*, 31 W. R. 536.

Graham Hastings, *Q.C.*, and *D. Begg*, for the plaintiffs in the action.—The case is provided for by R.S.C. ord. 17, s. 4. The effect of the receiving order is to cause a change in the interest of the defendant, although no transmission of interest has occurred. The plaintiffs must continue the official receiver as a defendant, because the action is for a breach of trust from which the defendant Lewis is not relieved by section 30. The plaintiffs shall have to prove against his estate in bankruptcy. The action must, however, proceed in this court where it began. The plaintiffs are entitled to bring anybody here who has become interested, and the official receiver is very much interested. There may never be a trustee appointed. Section 9 of the Bankruptcy Act of 1883 does not apply where an action has been commenced. Official receivers have been made parties to proceedings before this: *Sartoris* v. *Sartoris*, 40 W. R. 82, [1892] 1 Ch. 11, 22. It is true that the property does not vest in the official receiver, but the debtor becomes a mere iustrument for the purpose of getting it in. Till there is a final discharge or release an action against a sole defendant proceeds against him and his trustee: *Ex parte Coker*, 24 W. R. 145, L. R. 10 Ch. App. 652. The plaintiff has to establish a debt against the estate and the trustee is a necessary party: *Barter & Co.* v. *Dubeux & Co.*, 29 W. R. 622, 7 Q. B. D. 413-417. If there had been an adjudication it would have been a matter of course to make the trustee a party. The plaintiffs are equally entitled to make the official receiver a party in order to bind the debtor's estate. He need not appear unless he wishes to do so.

Ingle Joyce, in reply.—On the merits of this case there is no reason for adding the official receiver as a party. The defendants' liability is joint and several, so the plaintiffs can go on with their summons without us. The debtor's estate is bound by the certificate unless we apply to vary it. But we dispute this point on general principles: *Lloyd* v. *Dimmack*, 26 W. R. 458, 7 Ch. D. 398. Most of the cases cited were under the Bankruptcy Act of 1869. The only essential difference between that Act and the Act of 1883 is section 168, but that section is material. Court in that section means the Court of Bankruptcy. Proceedings cannot be continued without leave against a trustee. In *Sartoris* v. *Sartoris* the official receiver made no objection to being added as a party. There is no provision in the Act that an official receiver may be sued, and you cannot fetter him by an order: *Emma Silver Mining Co.* v. *Grant*, 29 W. R. 481, 17 Ch. D. 122-131.

STIRLING, J. [after stating the facts, continued:] The order is sought to be justified under ord. 17, r. 4, which is as follows: — "Where, by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, ... it becomes necessary or desirable that any person not already a party should be made a party . . . . , an order that the proceedings shall be carried on between the continuing parties and such new party or parties may be obtained *ex parte* on application to the court or a judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence."

It is said that an event—*i.e.*, the making of a receiving order—has occurred since the commencement of the action, "causing a change or transmission of interest or liability," which renders it necessary or desirable that a person not already a party—*i.e.*, the official receiver—should be made a party to the action. In order to decide whether or not this is so, it will be necessary to carefully consider the provisions of the Bankruptcy Acts now in force. The sections which appear to me to be material to the

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

present question are these: Bankruptcy Act, 1883, ss. 5, 8, 9, 10, sub-section 2; ss. 15, 19, 20, 39, 57, 68, 70, 72; schedule I. of the same Act, rules 1, 8, 9; schedule II., rules 2, 22, 27; Bankruptcy Act, 1890, ss. 3, 12, 14, 16, 17. [His lordship read the sections of the Bankruptcy Acts enumerated above, and continued:—] On these sections it appears to me that no estate or interest has become vested in the official receiver: *Rhodes* v. *Dawson*. I think, therefore, that the making of the receiving order has not caused any change or transmission of interest, and if the defendant Lewis had been a plaintiff in the action, asserting his rights against some person or persons in this court, it appears to me that the defendant or defendants in such an action could not have insisted that, under ord. 17, r. 4, the official receiver ought to be made a party to the action.

Now at what time, according to the provisions of the Bankruptcy Acts, will a change, or transmission of interest or liability occur? One or other of the three following events may happen—*i.e.*: (1) The defendant may be adjudicated a bankrupt; (2) a composition or scheme may be made; (3) the defendant may pay his debts. If the first event happen, the estate will vest in the trustee in bankruptcy, and then there will be a change of interest; if the second event occur and a composition is accepted and approved, then under section 3 of the Bankruptcy Act, 1890, I think that a change of liability will only be caused when the scheme or composition has become binding—that is to say, when it has been accepted by the creditors and approved by the court. Whether or not the change of liability entails a change of interest depends on whether or not the scheme provides for the appointment of a trustee in whom the debtor's property is vested. In the third event—*i.e.*, if the defendant pay his debts—of course, no change of interest or liability will take place. Consequently I think that no change in interest or liability will occur until a composition or scheme has been approved by the court, or an adjudication in bankruptcy has been made.

Now, it may be (as the cases cited to me in argument appear to show) that, subject to the question of obtaining the leave of the Bankruptcy Court under section 9 of the Bankruptcy Act, 1883, the plaintiffs in this action will be entitled to join the trustee in bankruptcy, or of any composition or scheme, as a party under ord. 17, r. 4, because a change of liability or interest will have occurred; but I think that the official receiver stands in an entirely different position, for he has no estate vested in him, nor has he any power to bring or defend actions, which, of course, the trustee in bankruptcy may do. The object of his appointment is to protect the estate (section 5). His duties, so far as they relate to the administration of the estate, are confined to its management and protection, and his powers for that purpose are defined by reference to those of a receiver appointed by the High Court (section 70, sub-sections 1 and 2). He has no power as official receiver to divide the estate or any part of it among creditors, a thing which may be done by the trustee in a bankruptcy or of a scheme or composition. He has power to receive and deal with proofs, but only because the persons who may vote at meetings must first have proved as creditors. I think that sections 9 and 10 of the Act of 1883 show by their language that the official receiver was not intended to be mixed up in actions pending against the debtor. Section 9 prohibits the "commencing" of actions or proceedings, and I agree with the opinion expressed by North, J., in *In re Wray*, 36 W. R. 67, 36 Ch. D. 138-143, that it has no reference to proceedings actually pending against the debtor personally at the date of the receiving order. Such pending proceedings are dealt with by section 10. Sub-section 1 of this section applies to the interval between the presentation of the petition and the making of the receiving order; but sub-section 2 applies at any time after the presentation of the petition. The idea seems to be that actions and other proceedings pending against the debtor are to go on unless stayed either by the Court of Bankruptcy or the court in which they are pending in the exercise of the discretion vested in it. In this case the Bankruptcy Court has not seen fit to interfere, and I do not think that this court ought to interfere until there occurs a change of interest or liability within the meaning of ord. 17, r. 4, which in my opinion has not yet happened.

I think, therefore, the order must be discharged.

Solicitors, *Walter Murton; Duffield & Bruty; Simpson & Co.*, for *Kelly & Keene*, Mold; *Moore & Davies*, for *Lewis & Son*, Wrexham.

Chan. Div. }
Romer, J. } March 2, 9.

In re SEVERN AND WYE AND SEVERN BRIDGE RAILWAY CO. (*a.*)

Company — Shares — Declaration of dividends — Unclaimed dividends — Winding up — Statute of Limitations.

The declaration of a dividend by a company on its shares constitutes a debt which becomes payable to the shareholder in respect of his dividend, and the Statute of Limitations begins to run immediately.

The mere declaration of a dividend will not make a company a trustee of the dividend for the shareholder to whom it is payable.

The reasons upon which the rule is founded that the Statute of Limitations does not run in respect of a claim between partners during the continuance of the partnership do not apply to a claim for unpaid dividends between a shareholder of an incorporated company and the company.

This was a summons taken out by the liquidators of the above-named company, to which Josephine Robbins and E. B. Haygarth, the persons entitled to take out representation to the estate of William Robbins, deceased, a holder of stock in the above-named company, W. Lee, the legal personal representative of John Sherborne, deceased, who was another holder of stock in the said company, and the Sharpness New Docks and Gloucester and Birmingham Navigation Co., who were holders of stocks in the said company, entitled to participate in the division of the residuary assets of the said company under the Act 57 & 58 Vict. c. 189, s. 7, were respondents, for the determination of the following question—namely, whether the sums of £753 11s. 3d. and £349 4s. 3d., respectively representing unclaimed dividends which accrued upon the stocks respectively held by the said W. Robbins and John Sherborne respectively, prior to the year 1874, and which remained in the hands of the said liquidator, should be paid to the respective legal personal representatives of the said W. Robbins and John Sherborne; or whether they ought to be treated as part of the general assets of the said company available for distribution as such amongst the preference and ordinary stockholders as provided by the said Act.

The Severn and Wye Railway and Canal Co.

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

(hereafter called the "original company") was incorporated by Act of Parliament in the year 1809, and under an Act passed in 1879 the "original company" and the Severn Bridge Railway Co. were amalgamated, and the shareholders were united into one company and incorporated under the name of the Severn and Wye and Severn Bridge Railway Co. (the above-named company). The original company was prosperous in its early days, and paid dividends half-yearly on the production to its bankers of a notice issued by the secretary to the shareholders, and on their signing a special form of receipt.

Under the authority of an Act passed in 1894 (57 & 58 Vict. c. 189) called the "Transfer Act," the above-named company sold its undertaking to the Great Western and Midland Railway Cos.

This Act also provided that the amalgamated company should be wound up as if it were a company registered under the Companies Acts, 1862 to 1890, and had passed a special resolution for winding up voluntarily.

After providing for payments required by the Act of 1894, it was anticipated that there would be a surplus in the hands of the liquidators of £2,000, inclusive of £1,238 representing unclaimed dividends declared by the original company prior to 1873, and this surplus was, under the "Transfer Act," to be divided amongst the preference and ordinary shareholders of the above-named company in certain proportions.

By a scheme sanctioned by the court on the 20th of June, 1885, the share capital of the company had been consolidated and converted into (1) preference A stock, (2) preference B stock, (3) preference C stock, and (4) ordinary stock.

Prior to the amalgamation the dividends appeared in a dividend ledger of the original company, and this practice was continued in the same book after the amalgamation and down to the 30th of June, 1885, each shareholder having an account in the ledger.

In December, 1885, these were written off the dividend ledger and transferred to the general ledger to an account headed "Unpaid dividends," the whole being aggregated, and that account had ever since remained in the general ledger. In the half-yearly published accounts down to June, 1885, these dividends were entered under one item of "unpaid dividends and interest," but in subsequent half-yearly published accounts they were included in an item called "sundry outstanding accounts." The company had in some cases paid dividends which had been unclaimed for over six years. The £1,238 was made up entirely of unclaimed dividends on stock which represented shares in the original company, such dividends having all been declared more than twenty years ago.

The original shares in the original company were of the nominal value of £50 each, and there were subsequent issues of the nominal value of £20 and £10 each.

J. Sherborne was in 1810 the proprietor of ten ordinary £50 shares in the original company. These shares were by the scheme of 1885 converted in £250 of the ordinary stock of the amalgamated company. Dividends were paid on the shares from 1810 to 1855, after which date dividends accumulated down to November, 1873, when dividends ceased to be declared on that class of stock.

With regard to Robbins the circumstances were the same as those in Sherborne's case, with the exception of some difference in the dates prior to 1873, which is not material for the purposes of this report.

The Sharpness, &c., Navigation Co. were the holders of the classes of stock included in the scheme of 1885 mentioned above.

Frederic Thompson, for the liquidator, raised the Statute of Limitations.

Vernon Smith, *Q.C.*, and *Rowden*, for the Sharpness, &c., Navigation Co.—The claim for unpaid dividends is barred by the Statute of Limitations. The claim for unpaid dividends is an ordinary simple contract debt, and is barred after six years. The statement in Palmer's Company Precedents, 6th ed., p. 373, that in the absence of a clause in the articles barring the right to unclaimed dividends, it is doubtful whether less than twenty years would bar the right to dividends declared but not claimed is based on the principle that the articles constitute the debt a specialty debt. That is not applicable to this case. Sherborne's and Robbins' representatives will probably rely on *Barton* v. *North Staffordshire Railway Co.*, 36 W. R. 754, 38 Ch. D. 458, but that was a different case. Their claim is barred by the Statute of Limitations, which applies to an action by one partner against his co-partner, and therefore to an action by shareholders against a company. It is true that time only begins to run against a partner from an act of exclusion. From the time at which a dividend becomes payable, and is held by the company for the shareholder, that is what is equivalent to exclusion with respect to the dividend for the purposes of the Statute of Limitations.

They also referred to the Companies Act, 1862, s. 16, and sub-section (i), table A, cl. 76; Lindley on Companies, 5th ed., p. 437; and *Bush* v. *Martin*, 12 W. R. 205, 2 H. & C. 311; *Smith* v. *Cork and Bandon Railway Co.*, Ir. Rep. 5 Eq. 65.

Dibdin and *Cann*, for Sherborne's and Robbins' representatives.—The company held this money in a fiduciary capacity for the shareholders, and no question of the Statute of Limitations arises. The money was earmarked in the books both of the old and the amalgamated company: *Penny* v. *Pickwick*, 16 Beav. 246. There is no exclusion on the analogy of cases of partnership.

They also referred to *Gouraud* v. *Edison-Gower Bell Telephone Co. of Europe*, 57 L. J. Ch. 498, 36 W. R. Dig. 68; *Lands Allotment Co.*, 42 W. R. 404, [1894] 1 Ch. 616; Lindley on Partnership, 6th ed., p. 512; and *Barton* v. *North Staffordshire Railway Co.*

Vernon Smith replied.

Cur. adv. vult.

ROMER, J.—The liquidators have raised, as they were entitled to do, the defence of the Statute of Limitations in answer to the claims for unpaid dividends, which I have to consider. That defence is, in my opinion, fatal to the claims. The dividends in question were declared and became payable more than twenty years before the present claims were made, and constituted debts due to the shareholders for which they could have sued at law, as was pointed out by Lindley, L.J., in the passage in his treatise on company law (page 437), which was cited in the argument before me. Presumably, therefore, the Statute of Limitations began to run in favour of the company from the time the dividends became payable.

But the claimants contend that the statute never began to run against them, on two grounds. In the first place, they contend that the company was in the position of a trustee for them of these dividends. In my judgment this was not so. The declaration that the dividend was payable did not make the company a trustee of it for the shareholders. Nor did the company or its successor, the amalgamated company constituted by the Act of 1879, ever constitute itself a

trustee. In the books of the two companies an account was kept as of a liability in respect of the unclaimed dividends. But the entry in the books of a debtor of a liability to a creditor does not constitute the debtor a trustee of the amount of that liability for the creditor. There was no setting apart of any special part of the assets of the companies as being or representing these dividends, nor was any notice given to the shareholders, or any step taken by the companies, which, so far as I can see, could be treated as putting the companies in the position of trustees or as preventing the Statute of Limitations from running in their favour.

In the next place, the claimants contend that the statute did not run, on the ground that the shareholders and the company were in the position of partners, or in an analogous position. In my opinion that contention is untenable. Nor can I see that the reasons upon which the rule is founded, that the Statute of Limitations does not run in respect of a claim between partners during the continuance of the partnership, apply to a claim for unpaid dividends between the shareholder of an incorporated company and the company. The case of *Penny* v. *Pickwick*, relied on by the claimants, was one of a simple partnership which Lord (then Sir John) Romilly held under the circumstances was a continuing partnership. In the case of *Barton* v. *North Staffordshire Railway Co.* Lord Justice (then Mr. Justice) Kay decided that where persons entitled as stockholders in a railway company were suing to establish their position as such, their cause of action only arose when the company first refused to treat them as stockholders, and that the Statute of Limitations did not commence to run before that refusal. He did not say that the case was, in fact, analogous to a claim between partners, but only that, if the analogy were applicable, it would support his view, because the statute only runs against a partner from the time of his exclusion. Nor is the claimant's contention supported by the fact that, for many purposes, the directors of the company are held to be in a fiduciary position with regard to their shareholders as shown by by the cases, referred to by the claimants, of *Gouraud* v. *The Edison-Gower Bell Telephone Co. of Europe* and *In re Lands Allotment Co.* For these reasons, in my opinion, the claims fail. I should add that, though I cannot find any decision of the English courts on the point I have had to consider, the view I am taking was expressed in the Irish Court of Appeal by Christian, L.J., in the case of *Smith* v. *Cork and Bandon Railway Co.*

Solicitors, *Field, Roscoe, & Co.*, for *James Wintle & Son*, Newnham; *Peacock & Goddard*, for *Haines & Sumner*, Gloucester; *Janson, Cobb, & Son*, for *Haygarth & Lawrence*, Cirencester; *Arthur Cheese.*

Q. B. Div.
(Lindley and Kay, L.JJ.) Feb. 12, 13.

LIDDELL (*Appellant*) *v.* LOFTHOUSE (*Respondent*). (*a.*)

Gaming—Illegal betting—Unlawful user of a place for the purpose of betting—"Place"—Betting Houses Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.

The respondent, who was a bookmaker, was on several consecutive days standing on or near the same spot between two stays which supported a hoarding erected on a piece of vacant ground, and was there making bets on horse-races with persons who came to him for the purpose. The vacant ground was not circumscribed otherwise than by the hoarding which partially surrounded it.

Held, that the ground between the stays of the hoarding was a "place" within the meaning of section 3 *of the Betting Houses Act*, 1853, *and that the respondent was guilty of the offence under that section of using a place for the purpose of betting with persons resorting thereto.*

Doggett *v.* Catterns, 13 *W. R.* 390, *and* Whitehurst *v.* Fincher, 17 *Cox C. C.* 70, *distinguished.*

Case stated by justices of the borough of Stockton-on-Tees.

An information was preferred by the appellant under the Betting Houses Act, 1853, s. 3, against the respondent, for that he, between the 18th and 20th of June, 1895, at the borough of Stockton-on-Tees, "then being a person using a certain place situate on the river-side of the said borough, and known by the name of "The Betting Ground," did unlawfully use the said place for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to certain horse-races contrary to the form," &c.

At the hearing it was proved that "Hubback's Quay" was a piece of vacant land near the quay side, Stockton-on-Tees, and was partly surrounded by a timber hoarding supported by stays driven into the ground, but was not otherwise circumscribed. That on the days mentioned the respondent, with a number of persons, was frequently seen standing in a place between two of the stays of the hoarding and was calling out the odds on horse-races, and offering to lay odds against horses running in the Ascot races, which were then being held, and receiving and paying money and giving betting tickets to those who made bets with him.

There was no restriction upon anybody entering the ground, nor any charge for admission. The ownership of the ground was not proved, and it was not alleged that the respondent was either the owner or occupier of the ground.

On the part of the appellant it was contended that the respondent was using a "place"—namely, the space between two of the stays—for the purpose of betting. On the part of the respondent it was contended that this was not a "place" within the meaning of the Act.

The justices were of opinion that it was very doubtful whether the respondent was using a place for the purpose of betting with persons resorting thereto within the meaning of the Act, and the cases decided thereon, and they dismissed the information.

The question for the court was whether that decision was correct.

Tindal Atkinson, Q.C. (*Simey*, with him), for the appellant.—The magistrates ought to have convicted. The evidence shows that the respondent was using a place for the purpose of betting with persons resorting thereto within the meaning of sections 1 and 3 of the Betting Houses Act, 1853. It is not necessary that a place within those sections should be a definitely circumscribed area as long as there is some fixed spot where the betting is carried on: *Shaw* v. *Morley*, 16 W. R. 763, L. R. 3 Ex. 137; *Bows* v. *Fenwick*, 22 W. R. 804, L. R. 9 C. P. 339; *Gallaway* v. *Maries*, 30 W. R. 151, 8 Q. B. D. 275; *Eastwood* v. *Miller*, 22 W. R. 799, L. R. 9 Q. B. 440; *Haigh* v. *Sheffield*, 23 W. R. 547, L. R. 10 Q. B. 102. In *Snow* v. *Hill*, 33 W. R. 475, 14 Q. B. D. 588, the accused person had no fixed place in which he made bets, and in *Doggett* v. *Catterns*, 13 W. R. 160, 390, 17 C. B. N. S. 669, 19 *Ibid.* 765, the question was whether the person

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

who made the bets was the owner or occupier of the ground on which he stood, and so was liable under section 5 of the Act. Neither of the two last-mentioned cases have any application here: see *Reg.* v. *Preedy*, 17 Cox C. C. 433, where Hawkins, J., reviews the previous decisions.

Joseph Walton, Q.C. (*Charles Mathews* and *Stutfield* with him), for the respondent.—The object of the Betting Houses Act is to prevent the keeping of places for betting, not to make betting itself illegal: *Reg.* v. *Cook*, 32 W. R. 796, 13 Q. B. D. 377. The "place" must be an ascertained area capable of being declared to be "a common gaming-house" (section 2), and of being entered and searched (section 11). The *ratio decidendi* in *Doggett* v. *Catterns* was that the ground under a tree in Hyde-park was not a "place" within the Act. *Whitehurst* v. *Fincher*, 17 Cox C. C. 70, is also in my favour.

Simey, in reply.—It is pointed out in *Hornsby* v. *Raggett*, 40 W. R. 111, [1892] 1 Q. B. 20, that in *Whitehurst* v. *Fincher* there was no evidence of anything more than casual betting, and the same remark applies to *Snow* v. *Hill*. In the present case there was systematic betting carried on day after day.

LINDLEY, L.J.—In this case I think that the offence described by the Act of Parliament has been committed, and that the magistrates ought to have convicted the respondent. [His lordship then referred to the facts as set out above, and continued:—] It seems to me obvious that the respondent was using one particular little bay between two of the stays of this hoarding for the purpose of betting with persons resorting thereto. It appears to me that that is an end of the case unless the word "place" is so defined that this bay cannot be considered to be a "place" within the meaning of the Act. It is important to observe that the information in the present case was based on section 3 of the Act, which runs thus: "Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned or either of them"—that is, referring back to section 1, for the purpose of the owner, occupier, or person using the place, or any of the other persons mentioned in section 1, betting with persons resorting thereto, or receiving or paying money, &c., on any event or contingency relating to a horse-race. It is said that the decisions are in such a state that we cannot say that this is a place. If it were *res nova* I should have no shadow of a doubt, but it is necessary to consider what interpretation has been put on the word in previous cases.

There are only two cases as to which I feel any difficulty. The one is *Doggett* v. *Catterns*. That case turned on sections 4 and 5 of the Act, the question being whether the defendant was the occupier within section 4 of the ground under a certain tree in Hyde Park, so as to enable the plaintiff to recover from him under section 5 the money which he had deposited with him for the purposes of a bet. But section 3, under which the present proceedings were taken, applies not only to occupiers, but to any person "using" the place. The decision, therefore, in *Doggett* v *Catterns*, presents no real difficulty, although there are indications that the judges doubted whether the locality was a place at all within the meaning of the Act.

The other case to which I wish to refer is *Whitehurst* v. *Fincher*. There the alleged "place" was the bar of a public-house, and the judges came to the conclusion that it was not within the Act. That is a difficulty, but it is to a great extent removed by the remarks made by Mathew, J., in *Hornsby* v. *Raggett*, where he says that, in *Whitehurst* v. *Fincher*, "the facts only amounted to this: that the defendant was betting in the public-house on three occasions, and that, as betting in public-houses is not prohibited by the Act, we thought the defendant should not have been convicted. Here the magistrate finds that the house was habitually used for betting purposes."

This Act of Parliament is not directed against betting simply: it is directed against those who carry on the business of betting, and have a place where they carry on that business. In this case I think that the respondent was unquestionably using this place for the purposes of his business of betting. I think the place is sufficiently described in the information. It is more or less indefinite in boundary, but it is so described that it can be found by means of the description. I think, therefore, that the magistrates ought to have convicted, and the case must be remitted to them with that expression of our opinion.

KAY, L.J.—The facts proved or to be inferred are that the respondent was a bookmaker whose business it was to make bets, and that he resorted day after day for the purpose of carrying on that business to a spot (which is marked on the plan before us), close by one of the stays which support the hoarding, a place very much resembling the stall of a stable. In this locality, between two of the stays, this bookmaker, for three successive days, carried on his business of betting. Those are the material facts. Do they bring the case within the Act of Parliament?

It is said that the preamble of the Act restricts the language used in section 3. It appears from the preamble that the mischief aimed at is "the opening of places called betting-houses or offices." But if this bookmaker resorted to this place for the purposes of his business, why is that not "opening a place" for betting purposes? We must not give a narrow construction to the words of the preamble. I think the respondent was doing the very thing against which the Act is directed.

It is said that the place here is not sufficiently defined—that it must be circumscribed in some way; and it was argued that if a man said that he would be at the foot of a certain statue in Charing Cross for the purpose of betting, that would not be a place within section 3. I cannot see why it would not. It is not necessary that the place should be defined by metes and bounds, and I should have no doubt that the foot of a particular statue would be a sufficiently indicated place to come within the Act.

As to the cases which have been cited, the decision in *Doggett* v. *Catterns* was simply that sections 4 and 5 did not apply to the particular place in question, because section 5 refers back to section 4, which only deals with a person who is the "owner or occupier," and it could not be said that the man was the occupier of a piece of ground under a tree in Hyde Park. Section 3 is much wider, and covers a person who uses a place, although he is not the owner or occupier.

I think that *Whitehurst* v. *Fincher* comes nearer to this case than any other decision. There the person was seen on three days betting in the bar of a public-house; it not appear whether he was carrying on the business of a bookmaker, and I gather that the judges thought that he was merely betting there as any person might bet with another; and they held that he was not "using a place" for the purpose of betting. But here we have a professional bookmaker carrying on his business of betting in this spot, and I think that the facts bring the case within the Act of

Parliament, and that the magistrates ought to have convicted.

Appeal allowed.

Solicitors for the appellant, *Eldridge & Sprott*, for *Archer & Fisher*, Stockton-on-Tees.

Solicitors for the respondent, *Iliffe, Henley, & Sweet*, for *Barrow & Smith*, Darlington.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright and Kennedy, JJ.)

Jan. 18, 20; Feb. 8.

In re ARTON (No. 2). (*a.*)

Criminal law—Extradition—Falsification of accounts—Warrant of committal — Extradition Treaty with France, article 3, clauses 2, 18—French Code Pénal, art. 147—"Faux en écriture de commerce"—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 83—*Falsification of Accounts Act*, 1875 (38 & 39 *Vict. c.* 24), *s.* 1—*—Extradition Acts*, 1870 (33 & 34 *Vict. c.* 52) *and* 1873 (36 & 37 *Vict. c.* 60).

Where in proceedings for the extradition of a foreign subject evidence sufficient to justify a committal is given of the commission by him of acts which constitute a crime, both according to English law and according to the law of the foreign State, and within the Extradition Treaty, extradition cannot be refused on the ground that the crime imputed falls under different headings or classes of crime in the English and foreign systems of criminal law, or in the English and foreign versions of the Extradition Treaty.

The extradition was demanded of a French subject on a charge of "faux," the ordinary English equivalent of which is "forgery." He was committed by the magistrate upon evidence showing that he had committed acts constituting the offence of "faux en écriture de commerce" under article 147 *of the Code Pénal, and covered by head* 2 (*French version*) *of article* 3 *of the Extradition Treaty with France, and also constituting an offence* (*not amounting to forgery in English law*) *under section* 83 *of the Larceny Act*, 1861, *and section* 1 *of the Falsification of Accounts Act*, 1875, *and covered by head* 18 (*English version*) *of article* 3 *of the Extradition Treaty.*

Held, that the committal order was rightly made.

Argument of a rule *nisi* obtained on behalf of Emile Arton, a French subject, for a *habeas corpus* to bring up his body in order that he might be released.

The facts are sufficiently stated in the judgment.

Sir R. E. Webster, A.G., and *Sir R. Finlay, S.G.* (*Henry Sutton* with them), showed cause.—Extradition ought to be granted. The evidence shows that Arton has falsified the books of a public company, and that is "faux en écriture de commerce" within article 147 of the Code Pénal. It is also a crime according to English law: Larceny Act, 1861, s. 83; Falsification of Accounts Act, 1875, s. 1. It is also a crime within schedule 1 to the Extradition Act, 1870, which includes "fraud by a bailee, banker, agent, factor, trustee or director or member or officer of any company made criminal by any Act for the time being in force"; and within the schedule to the Extradition Act, 1873, which specifies "any indictable offence under the Larceny Act, 1861, or any Act amending the same," and therefore includes an offence under the Falsification of Accounts Act, 1875. It is also covered by article 3 of the Extradition Treaty with France.

Charles Mathews, in support of the rule *nisi*. — The English equivalent of "faux" is "forgery," and the different classes of "faux" mentioned in article 147 of the Code Pénal relate to the forgery of different documents. No such offence is disclosed by the evidence. Article 18 of the Extradition Treaty with France (made in 1878) does not cover offences under the Falsification of Accounts Act, 1875, and no committal can be made in respect of such offences. Arton has been committed in respect of an offence under section 83 of the Larceny Act, 1861 (to which article 18 of the treaty applies). This committal is not challenged; but the part of the committal order which is complained of adds a new offence to the treaty with France.

Sir R. Finlay, S.G., replied.

In re Windsor, 13 W. R. 655, 6 B. & S. 522; *In re Wilson*, 26 W. R. 44, 3 Q. B. D. 42; and *In re Bellencontre*, 39 W. R. 381, [1891] 2 Q. B. 122, were cited.

Cur. adv. vult.

Feb. 8.—The judgment of the Court (Lord RUSSELL OF KILLOWEN, C.J., and WRIGHT and KENNEDY, JJ.) was delivered by

Lord RUSSELL OF KILLOWEN, C.J.—In this case the French Government demanded the extradition of Arton under the treaty between the Queen and the French Republic, signed in 1876 and ratified in 1878. The demand was based on the allegation that Arton had committed a number of crimes against the law and in the territory of France, which are extradition crimes within the treaty. On the 6th of December, 1895, after inquiry before him, the chief metropolitan magistrate made a committal order to Holloway Prison, with a view to Arton's extradition in respect of the accusation against him of the commission of the crimes of "faux (falsification of accounts and using falsified accounts), fraud by an agent, fraud by a trustee, fraud by a director and public officer of a company, obtaining money and goods by false pretences, crimes by a bankrupt against bankruptcy law, larceny, and embezzlement within the jurisdiction of the French Republic." It is in reference to the first of these charges only that any question arises.

Subsequently, on the 21st of December, 1895, this court, on the application of Arton's counsel, granted an order calling on the governor of Holloway Prison to show cause why a writ of *habeas corpus* should not issue. The application was in argument based on the allegation that the chief magistrate had come to the conclusion that no forgery, according to English law, had been committed in the falsification of accounts, and in the using of falsified accounts imputed, and it was therefore contended that he could not properly commit Arton for "faux," the French equivalent or translation of "forgery," and, further, that he could not properly commit for such falsification on two grounds—(1) because the falsification was not in the order of committal described as committed by Arton as a director or member of a public company, or as clerk or servant, which would be necessary to constitute falsification a crime according to English law; and (2) that, even if the order of committal were amended in this respect, the magis- could not properly commit for falsification, on the ground that such falsification is not an extradition crime within the treaty."

Before proceeding to deal with these points, it will be well to make clear what we understand are the

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Law.

admitted facts. It is true that the chief magistrate did in fact come to the conclusion that there was no evidence of forgery according to English law, but he also came to the conclusion that there was sufficient evidence of the commission by Arton of the crime of fraudulent falsification of accounts in his character of member, director, or officer of a public company according to English law, and that such falsification of accounts constituted the crime of "faux" or "forgery" against the law of France within the meaning of the 147th article of the Code Pénal. The omission to state in the order of committal the character in which the falsification was committed is not a point of substance. I proceed, therefore, to consider the other alleged grounds.

The conditions of extradition, the fulfilment of which we have in this case to consider, are the following: (1) The imputed crime must be within the treaty; (2) it must be a crime against the law of the country demanding extradition; (3) it must be a crime within the English Extradition Acts, 1870 and 1873; and (4) there must be such evidence before the committing magistrate as would warrant him in sending the case for trial if it were an ordinary case in this country.

Is, then, the crime of such falsification a crime within the treaty? In my opinion it is. I take first the English version. The 18th head of article 3 of the treaty (English version) runs: "Fraud by a bailee, banker, agent, factor, trustee or director or member or public officer of any company, made criminal by any Act for the time being in force." At the time the treaty was signed, and at the time it was ratified, the Larceny Act, 1861 (24 & 25 Vict. c. 96), was in force. By the 83rd section it is provided that "Whosoever, being a director, manager, public officer, or member of any body corporate or public company shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular in any book of account or other document, shall be guilty of a misdemeanour." That this was regarded by the Legislature as a serious crime is shown by the punishment which may follow on conviction for it—namely, penal servitude for any term not exceeding seven years and not less than three years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement. Further, the Act passed in 1875 to amend the law with reference to the falsification of accounts was also in force. By the first section it is provided that if any clerk, &c., shall wilfully, and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security or account which belongs to or is in the possession of his employer, &c., or shall wilfully and with intent to defraud make or concur in making any false entry, &c., the person offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding seven years, or to be imprisoned with or without hard labour for any term not exceeding two years.

It seems clear, therefore, that the falsification charged, if committed by a member, officer, or director of a public company (which Arton in fact was), or by a clerk or servant, is within the English version of the Treaty. In other words, such a falsification is a crime against English law in respect of which the French Government has engaged (other conditions being fulfilled) to grant extradition.

I now turn to the French version of the treaty. The French version of the 18th head of article 3 of the treaty is certainly not a translation of the English version, nor does it in substance cover the same ground. It deals with the fraudulent misappropriation by officers and members of a company of the funds of a company. It has no reference to falsification of accounts pure and simple by such officers and members. The English version, on the other hand, is, as we have seen, much wider, and by its incorporation of the Acts of 1861 and 1875 includes falsification of accounts in the manner charged against Arton. We must therefore look to see whether such falsification of accounts constitutes a crime under any other head of the treaty according to the French version.

I turn to head 2 of article 3 (French version). That article, both in the English and French version, deals with forgery. As to the English version, it is clear that all falsifications of accounts do not constitute forgery, while it is equally clear that the falsification of accounts may take such a form as to amount to forgery at common law or under the Act of 1861 (24 & 25 Vict. c. 98) to consolidate and amend the statute law relating to forgery. But in the present case we must assume, as I have said, that the chief magistrate has come to the conclusion that there was no evidence before him in this case which warranted him in committing Arton for any such falsification of accounts as, according to English law, amounted to forgery, but that there was evidence before him of such a falsification of accounts as amounted to forgery according to French law and within the treaty. Was he warranted in that conclusion? I think he was. The French version of the second head of article 3 runs as follows:—"Faux ou usage de pièces fausses; contrefaçon des sceaux de l'État, poinçons, timbres, et marques, publics ou usage des dits sceaux, poinçons, timbres, et marques publics, contrefaits." There is no doubt, in my judgment, that the opening words mean forgery of or using false documents. Turning to the Code Pénal we find a number of articles dealing with various kinds of forgeries, as of money, of public seals, bank notes, &c., and then a group of articles relating to forgery of public and authentic writings and of writings of commerce or banking. Of this group article 147 is one. It runs as follows:—"Seront punies des travaux forcés à temps, toutes autres personnes qui auront commis un faux en écriture authentique et publique ou en écriture de commerce ou de banque; soit par contrefaçon ou altération d'écritures ou de signatures; soit par fabrication de conventions, dispositions, obligations, ou décharges, ou par leur insertion après coup dans ces actes; soit par addition ou altération de clauses, de declarations, ou de faits que ces actes avaient pour objet de recevoir et de constater." Does that article cover and include the crime of falsification of accounts according to English law? I think it clearly does. If so, it is an extradition crime according to and within both versions of the treaty. In the English version it comes under the 18th head of article 3; in the French version it comes under the second head of the same article. It is to be noted that in the "Extrait des Procédures Déposées au Greffe de la Cour d'Appel de Paris" amongst the crimes imputed to Arton is (following the words of article 147 of the Code Pénal) "le crime de faux en écritures de commerce." Further (French law being a question of fact to be determined as such in our courts), we are furnished with an affidavit from an expert in French law—M. Gabriel Astoul, a French advocate—which, after setting forth a translation of article 147, proceeds as follows:—"I am most clearly of opinion that falsification of accounts under the circumstances referred to in the depositions used at Bow-street police-court on the application for the surrender of Emile Arton constitutes the

offence of 'faux' mentioned in the treaty between Great Britain and France and set out in article 147 of the French penal code." The affidavit further explains the "the word 'other' in the said article means 'persons other than those referred to in article 146—viz., public functionaries or public officers.'" It seems therefore clear that the falsification of accounts, of which the chief magistrate has decided there was sufficient evidence, is a crime against the law of France and within the French version of the treaty; in other words, that such falsification of accounts is a crime in respect of which the Government of this country has solemnly engaged (other conditions being fulfilled) to grant extradition.

Further, it is clear that the crime in question, whether regarded as forgery or falsification of accounts, is an extradition crime within the meaning of the Extradition Acts, 1870 and 1873. The learned law officers of the Crown, for some reason which I failed to appreciate, seemed unwilling to admit that "faux" in article 147 means forgery. For my part it seems to me to be clear that it means that and nothing else, and it is to be observed that M. Gabriel Astoul does not suggest in his affidavit that it has any other meaning.

The matter then stands thus:—Evidence of the crime of falsification of accounts according to English law not amounting to forgery according to that law, and within the 18th head of article 3 of the treaty (English version); evidence also that that crime of falsification is a crime according to French law ranging itself according to that law under the head of forgery and within head 2 of article 3 of the treaty (French version). Why, then, is it not to be regarded as an extradition crime? I see no valid reason. English law, as I have said, treats some acts of falsification of accounts as forgery, but does not treat all of them as such. The French law, on the other hand (as we must conclude on the evidence of fact before us), treats such falsification of accounts as alleged in this case as forgery within article 147 of the Code Pénal. Is extradition to be refused in respect of acts covered by the treaty and gravely criminal according to the law of both countries because in the particular case the falsification of accounts is not forgery according to English law, but falls under that head according to French law? I think not. To decide so would be to hinder the working and narrow the operation of most salutary international arrangements.

It seems to me, therefore, that all the conditions which I have mentioned have in this case been fulfilled. In my judgment those treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent. I know no head of the French law for which an exact equivalent is to be found in the law of England. The British and French texts of the treaty are not translations of one another. They are different versions, but versions which, on the whole, are in substantial agreement. We are here dealing with a crime alleged to have been committed against the law of France, and if we find, as I hold that we do, that such a crime is a crime against the law of both countries, and is, in substance, to be found in each version of the treaty, although under different heads, we are bound to give effect to the claim for extradition.

I think I have correctly stated the view of the facts taken by the learned chief magistrate. We are not a court of appeal on questions of fact from him. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit. But, lest there should be any misapprehension, I think it well that the view of the court should be presented to him, and that the order of committal should be remitted to him, in order that it may be made clear in respect of what crime of "faux" Arton is committed. The first offence should, I think, be described as "the crime of fraudulent falsification of accounts as a director, officer, or member of a public company according to the law of England, and constituting the crime of 'faux en écritures de commerce' within article 147 of the French Code Pénal." The rule will therefore be discharged.

Rule discharged.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Solicitor for the prisoner, *Arthur Newton.*

Lunacy.

(Lindley, Kay, and A. L. Smith, L.JJ.) Feb. 3.

In re RAY. (*a*.)

Lunacy — Lunatic tenant for life — Conveyance by committee under Settled Land Acts—Covenants for title—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 124—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 62.

Upon a sale by the committee of a lunatic tenant for life selling under the powers of the Settled Land Act, 1882, *the court has power, under section* 124 *of the Lunacy Act*, 1890, *to authorize the insertion of such covenants for title as are usual and proper in a conveyance upon a sale.*

In re Fox, 35 *W. R.* 81, 33 *Ch. D.* 37, *explained.*

This case raised the question whether, upon a sale of property under the Settled Land Act, 1882, the tenant for life being a lunatic, his committee had power to bind his estate by conveying on his behalf as beneficial owner.

The facts of the case sufficiently appear from the judgments.

Section 124 of the Lunacy Act, 1890, enacts: "The committee of the estate . . . shall, in the name and on behalf of the lunatic, execute and do all such assurances and things for giving effect to any order under this Act as the judge directs, and every such assurance and thing shall be valid and effectual . . . accordingly."

Cookson Crackanthorpe, Q.C., and *Borthwick*, appeared for the committee, and argued that, notwithstanding the *dicta* of Cotton, L.J., in *In re Fox*, 35 W. R. 81, 33 Ch. D. 37, the court had jurisdiction to sanction a conveyance by a committee of a lunatic containing the usual covenants for title; and that if the lunatic was expressed to convey "as beneficial owner" his estate would be bound.

LINDLEY, L.J.—I do not think there is much difficulty in this case apart from *In re Fox*. I was a party to the decision in that case; and although one's memory may be rather treacherous, I cannot believe that we meant to go so far as to say that under no circumstances was there, under section 116 of the then Lunacy Act (Lunacy Act, 1853) jurisdiction to authorize a covenant to repay money. *In re Fox* was a peculiar case. We were asked to sanction a covenant by a committee of the lunatic to pay money—not for debts of his own, but other people's debts—

(*a*.) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

and we doubted whether that could be done, and would not do it. Certainly there are passages in the report which look at first as if Cotton, L.J., thought there was no power to do it. I doubt, myself, whether we intended to go to that length, and if we did we put an uncommonly narrow construction on section 116 of the Lunacy Act, 1853, and one not likely to be abided by.

Now, having made those observations, when we look at the present case we find it is a different one, and turns upon a different Act of Parliament. I think it would be a very unfortunate decision if we construed it so narrowly as to say there was no jurisdiction on the part of the judge in lunacy to sanction such a clause in a conveyance like this. The lunatic has been so found by inquisition, and he is entitled as tenant for life to one moiety of an estate. There is an advantageous proposition to sell both moieties of an estate, and the owner of the other moiety agrees, and there is no doubt felt by the judge in lunacy or anybody else that the proposed sale of the whole estate upon the terms which have been provisionally approved would be extremely beneficial to the lunatic.

Now, how is the lunatic to convey the half of the estate in which he is interested as tenant for life? Of course, apart from the Settled Land Act, he could only convey his life interest; but under the Settled Land Act, especially section 62, the judge in lunacy has power to authorize the committee of the lunatic to sell the whole estate as if the lunatic were *sui juris*. If one looks at sections 3, 4, 20, and 55 of the Settled Land Act of 1882, it will be found that a tenant for life who is not a lunatic can certainly enter into an arrangement of this kind, and I do not think there is any real difficulty about an ordinary tenant for life selling and expressing to convey as beneficial owner. What that means is that if those words are put in and he purports to sell under the powers of the Settled Land Act, and expresses to convey as beneficial owner, then section 7 of the Conveyancing Act, 1881, will be implied and incorporated. I do not see any difficulty so far. When you look at section 62 of the Settled Land Act, you find that when the tenant for life or a person having the powers of a tenant for life under this Act is a lunatic, or so found by inquisition, the committee may, in his name and on his behalf, under an order of the Lord Chancellor or other person entrusted with the care of a lunatic, "exercise the powers of a tenant for life under this Act, and the order may be made on the petition of any person interested in the settled land or of the committee of the estate." What does that mean? That means he may sell the fee simple under the powers conferred by sections 3 and 4, and the sale must be for the best price.

Then we go a little further. When we come to the Lunacy Act, 1890, there is a power to sell, and section 124 says: [His lordship read the section]. That appears to me to authorize the judge in a proper case to sanction an assurance by the committee in the way in which assurances are commonly executed according to the practice of conveyancers in dealing with real property. I do not see how it is possible for this committee to exercise his powers in the most beneficial way unless he enters into some covenant of title such as is proposed. It is a common one, and not an onerous one. First of all it imports the covenants which, by the Conveyancing Act of 1881, are implied when a man conveys as beneficial owner; but that is followed by a proviso that cuts it down immensely, and the whole effect of the covenant which we are asked to sanction is one that confines the covenant to the life estate of the lunatic. If we did not sanction this we should put a fetter on his power, which would be most prejudicial to the interests of those whom we are bound to protect. I think the language is sufficient for the purpose and that we ought to approve of this sale.

KAY, L.J.—Under the Settled Land Act a tenant for life is authorized to sell and convey the fee simple of the land, but he is not authorized to enter into any covenant at all. It was not the purpose of the Act, and it had nothing to do with covenants. It gave him a statutory power to convey the fee simple, and of course *prima facie* it applied to a case where the tenant for life was *sui juris* and could enter into such covenants as he pleased. But there is nothing in that Act referring to any covenants to be entered into by a tenant for life when he is selling and conveying land. Then section 62 provides: [His lordship read the section.] As I pointed out, it is no part of the power of a tenant for life under this Act to enter into covenants. Any covenant he had to enter into is not a statutory covenant under the Settled Land Act, and therefore this section does not by itself in any way authorize the committee of a lunatic to enter into any covenant. So far it is perfectly clear.

Then comes the Conveyancing and Law of Real Property Act, 1881, and I confess there is a little difficulty upon that. That provides by section 7 that in a conveyance for valuable consideration other than a mortgage the following covenants by a person who conveys and is expressed to convey as "beneficial owner" shall be implied. Then follow the usual covenants for title, but that only applies to where a person conveys and is expressed to convey as beneficial owner. It is rather difficult to say that a tenant for life under the Settled Land Act conveys the fee simple as beneficial owner. That he may be expressed to convey as beneficial owner I can understand, but perhaps it is expedient to give this clause of the Conveyancing Act the meaning that the main object was to prevent the necessity of setting out all these covenants at length, and when a person conveys as beneficial owner or is expressed to convey as beneficial owner these covenants are to be implied. It is a sort of compendious mode of having these covenants in a conveyance when they are not set out at length. Moreover, the tenant for life has some beneficial interest because he has a life interest, and therefore a conveyance which passes the fee simple includes his life interest. I think it is possible to say, without straining the words, that a tenant for life may convey under the Settled Land Act expressing himself to be conveying as beneficial owner for the purpose of introducing these covenants, and when he does so the covenants which I have referred to in the Conveyancing Act, may be considered as contained in the conveyance. So far the ground is clear.

Now we come to the Lunacy Act, 1890. So far I find nothing whatever to authorize a committee to enter into a covenant for title so as to bind the lunatic. The Conveyancing Act does not refer to a committee at all but to an ordinary person who is *sui juris* and is conveying as beneficial owner. By the Lunacy Act of 1890, s. 120, it is enacted that "the judge may by order authorize and direct the committee of the estate of a lunatic to do all or any of the following things," and the first is, sell any property belonging to the lunatic. Then it states in clauses lettered from A. to L. the various things the judge may authorize and order a committee to do. There is not in any one of those clauses any power to authorize the committee to bind the lunatic by any covenant. Then, in sub-section (1) of section 122, we find this: "The power to authorize leases of a lunatic's property

under this Act shall extend to property of which the lunatic is tenant in tail," and sub-section (2) says: "Leases authorized to be granted and accepted by or on behalf of a lunatic under this Act may be for such number of lives or such term of years at such rents and royalties, and subject to such reservations, covenants, and conditions as the judge approves." That cannot mean on the part of the lessee only. It is coupled with the word "reservations," and they would be favourable to the lessor. No doubt it includes covenants by the lessor—that is to say, the committee on behalf of the lunatic in such a case as this. Therefore, as regards a lease there is an express power for the judge to authorize the committee of the lunatic to enter into covenants. In section 124 there is no express power of that kind, nor can I find it in any of the sections referred to. I believe there is no such express power in the Act. But section 124 is this: [His lordship read the section].

Now, a covenant is not strictly an assurance. The point has been much contested as to the meaning of that word in the Bills of Sale Act. An assurance is really something which operates as a transfer of property, and an assurance can hardly be a covenant. But it says, "all such assurances and things," and those words are put in, no doubt, so as to enlarge the power. I should say that in furtherance of the general intention, this section is wide enough to enable the court to authorize a conveyance by a committee on behalf of a lunatic, with all such covenants as are usual in such a conveyance, including the ordinary covenants of title. But when this case came before me in my private room my attention was called to *In re Fox*. *In re Fox* was not a case under this Act of Parliament, but under an Act (Lunacy Act, 1853) worded somewhat differently, though very nearly in the same terms. In the Lunacy Regulation Act, 1853, by section 116, it was provided [His lordship read the section]. These words, to my mind, are quite as good as the words in section 124 of the Lunacy Act of 1890; and, indeed, the former section contains certain words which section 124 does not. Section 124 authorized the committee to execute and do all such assurances and things as the judge directs; and section 116 of the former Act authorized the committee to execute, make, and do all such conveyances, deeds, transfers, and things. Those words are quite as large, although perhaps not essentially larger, than those in the Act of 1890.

Now, in the case of *In re Fox* the lunatic was entitled in fee to one moiety of certain real estate as one of two co-heiresses of an ancestor who died intestate, and the real estate was liable to pay the debts of that ancestor, whose personal estate was insufficient to pay, and it was wanted to raise money for the payment of those debts, and a mortgage of the property of which one moiety belonged to the lunatic was sought to be authorized by the Court in Lunacy. The question arose whether there could be covenants for payment of the mortgage money. The mortgage money was not due from the lunatic, but from the ancestor, and the lunatic was only liable to it, so far as she obtained assets from that ancestor, and no further. Therefore a personal covenant to pay the money would be a new obligation. But, according to the report, Cotton, L.J., said: "I very much doubt whether the court can direct a committee to covenant in the name of a lunatic." Those words are large enough to express a doubt whether any covenant could be entered into by a committee to bind a lunatic. That may not have been the meaning. Again, Cotton, L.J., says: "I doubt whether we have jurisdiction to do more than give the mortgagee the rights of a mortgagee against the particular estate." There can be no doubt about the meaning of Cotton, L.J. He thought there was no jurisdiction to bind the lunatic's estate by a covenant of that kind, and he does not confine it to that particular covenant. Then, when he comes to give judgment, he says this: "It being clearly for the benefit of the lunatic's estate that this £5,000 should be raised," &c. [His lordship read the judgment of Cotton, L.J.] That decision makes it very difficult for the court to say that any covenant can be entered into on a sale by the committee so as to bind the lunatic. However, Lindley, L.J., who was a party to that decision, doubts whether the court intended to go so far as that, and whether the refusal went further than an exercise of the discretion of the court as to that particular covenant—namely, a covenant to bind the lunatic to pay money, which he was not bound to pay, to the extent of the assets received. The difficulty that arises from that case would, therefore, be removed if that is the true construction of it, and I agree that it is beneficial for the sake of lunatics in general to read section 124 of the Act of 1890 as authorizing the court, in a proper case, to allow the committee to bind the lunatic by such covenants as are usual on a sale. I will not go further than that. Of course the ordinary covenants for title are usual on a sale, and therefore I think in this case we may say that the difficulty arising from the decision in *In re Fox* being removed, the court has jurisdiction to approve of this sale.

A. L. SMITH, L.J.—The question in this case is whether or not a committee of a tenant for life who has been found lunatic by inquisition, has not only the power of selling the lunatic's estate, but of entering into covenants which are necessary for that purpose. There can be no doubt—in fact it is not disputed—that the covenant is a necessary covenant to carry out the sale if it is to be effected, and the sale has been found beneficial for the lunatic's estate. The question is whether there is the power. That drives one to the statute to see whether this power is given to a committee under these circumstances or not. Section 62 of the Settled Land Act of 1882 enacts. [His lordship read the section.] That is clear. Then comes the question what powers has a tenant for life, who is not a lunatic so found by inquisition as regards selling the estate. That drives one back to section 3, which enacts that a tenant for life may sell the settled land. Section 4 says: "Every sale shall be made at the best price that can reasonably be obtained." Then section 55 enacts that "where a power of sale is exercised by a tenant for life, he may execute, make, and do all deeds, instruments, and things necessary or proper in that behalf." It does seem to me that the conjoint operation of those sections would give a tenant for life power not only to sell, but to enter into covenants necessary for the purpose of effecting that sale.

The question does not rest there, because the Lunacy Act of 1890 also applies to a case like this. By section 120, "The judge may, by order, authorize and direct the committee of the estate of a lunatic to do all or any of the following things," and the first is sell any property belonging to the lunatic. Reading that in conjunction with the Settled Land Act, s. 62, there is power to sell the property of a lunatic when he is tenant for life. Then, what happens after that? By section 124 the committee of the estate on behalf of the lunatic may execute and do all assurances and things for giving effect to an order under this Act that the judge directs. If we were to put the limited construction on this Act which has been suggested, and which might be put upon it, we should be bringing

these two Acts of Parliament, as regards lunatics so found by inquisition, to a deadlock, because in numberless cases the committee could not effect a sale beneficial to the lunatic's estate without entering into proper covenants with the purchaser, who would not buy unless those covenants were entered into. Taking not what I call a broad view, but a correct view of these sections together, I think there is this power given to a committee to enter into proper covenants when he sells the estate of the tenant for life, who is a lunatic so found by inquisition.

Then we were referred to the case of *In re Fox*. I have nothing to say about that beyond what has been said. I do not read that as a decision that in no case can an order be made for a committee of a lunatic to enter into any covenants at all. The real decision was that on the facts there, the court did not see its way to do it. I think, therefore, we should confirm the agreement.

Solicitors, *Blunt & Co.*

Court of Appeal.

From Q. B. Div. (A. L. Smith and Rigby, L.JJ.) Jan. 20.

D'Erricо v. Samuel. (*a*.)

County court—Action commenced in High Court—Order remitting action to county court—Lodging writ and order with registrar—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 66.

Where an order is made under section 66 *of the County Courts Act*, 1888, *remitting an action to the county court, the action does not leave the High Court until the plaintiff has lodged the original writ and the order with the registrar of the county court.*

Appeal from an order of Lawrance, J., at chambers.

This was an action of tort commenced in the High Court.

On the 25th of November, 1895, the defendant obtained an order under section 66 of the County Courts Act, 1888, directing that, unless the plaintiff should give security for costs within a certain number of days, the action should be remitted to the City of London Court. The time, after being enlarged by consent, expired on the 12th of December, no security having been given. The order for remittal was not lodged, as required by the section, with the registrar of the City of London Court, and on the 13th of December, on the application of the plaintiff, an order was made by a master directing the defendant to give further and better answers to certain interrogatories which had been administered to him by the plaintiff.

Lawrance, J., reversed the order of the master, on the ground that the action having ceased to be in the High Court the master had no jurisdiction.

The plaintiff appealed.

Witt, Q.C., and *Rockingham Gill*, for the plaintiff, cited *Welply* v. *Buhl*, 26 W. R. 300, 3 Q. B. D. 253, and *Driscol* v. *King*, 49 L. T. N. S. 599, 32 W. R. Dig. 59.

P. Rose-Innes, for the defendant, cited *Harris* v. *Judge*, 41 W. R. 9, [1892] 2 Q. B. 565, and *Duke* v. *Davis*, 41 W. R. 673, [1893] 2 Q. B. 260.

(*a*.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

A. L. Smith, L.J.—In my opinion the decision of the learned judge cannot be supported. The master held that, notwithstanding the order of remittal, he had jurisdiction to make the order for further and better answers to interrogatories, because the order of remittal and the writ had not been lodged with the registrar of the county court. With regard to getting a case out of the High Court into the county court, section 66 of the County Courts Act, 1888, seems to me to be identical with section 10 of the County Courts Act, 1867. Under the earlier Act it was decided in *Welply* v. *Buhl* that the action did not leave the High Court until the writ and the order remitting the action had been lodged with the registrar of the county court. In my opinion, therefore, the case is concluded by authority. The cases of *Harris* v. *Judge* and *Duke* v. *Davis* do not seem to me to touch the point now in question.

Rigby, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiff, *C. T. Wilkinson.*

Solicitors for the defendant, *Micklem & Hollingworth.*

From Q. B. Div. (Lord Esher, M.R., and Kay and Rigby, L.JJ.) Nov. 18.

In re Arbitration between the Mayor, &c., of Burslem and the County Council of Staffordshire. (*a*.)

Local government—County council—Main roads—Urban district—Maintenance—Contribution—Paved footways—General Turnpike Act (3 *Geo.* 4, *c.* 126), *ss.* 111, 112—*Highways and Locomotives Act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 13, 15—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.

Where an urban authority claim, under section 11 *of the Local Government Act*, 1888, *to retain the powers and duties of maintaining any main road within their district, the liability of the county council to contribute to the costs of maintaining such road extends to the costs of maintaining the paved footways which run along the side of such road, even though the road was formerly a turnpike road which became a main road on being disturnpiked.*

In re Local Board of Warminster and the County Council of Wilts, 38 *W. R.* 670, 25 *Q. B. D.* 450, *approved.*

Appeal from a judgment of a Divisional Court (Grantham and Wright, JJ.) refusing to set aside an award of the Local Government Board.

The award was made under section 11 of the Local Government Act, 1888. Sub-section 1 of that section imposes on the county council the maintenance of all main roads. Sub-section 2 provides that any urban authority may retain to itself the powers and duties of maintaining main roads within its district, and enacts that in such case the county council shall make to such authority an annual payment towards the costs of such maintenance. Sub-section 3 provides that the amount of such payment shall be such annual sum as may be from time to time agreed on, or in the absence of agreement, may be determined by the arbitration of the Local Government Board.

The town council of Burslem and the authorities of certain other urban districts in the county of Stafford

(*a*.) Reported by F. G. Rucker, Esq., Barrister-at-Law.

claimed, under sub-section 2, to retain the powers and duties of maintaining the main roads within their districts; and an award was made by the Local Government Board determining the amount of contribution to be paid by the county council towards the cost of maintaining the main roads in each district. The award included contributions towards the costs of maintaining paved footways running by the side of the main roads where they passed through the urban districts.

The county council applied to the Queen's Bench Division to set aside the award, on the ground that the Local Government Board, by including the costs of maintaining the paved footways, had exceeded their jurisdiction.

In the present case, which was taken as a test case, the question arose with regard to a road passing through the borough of Burslem, which was formerly a turnpike road, but which on the expiration of the turnpike trust became a main road under section 13 of the Highways and Locomotives Act, 1878.

The Divisional Court, being of opinion that the case was governed by the decision of *In re Local Board of Warminster and the County Council of Wilts*, 38 W. R. 670, 25 Q. B. D. 450, refused to set aside the award.

The county council appealed.

Littler, Q.C., and *A. T. Lawrence*, for the appellants.

Lawson Walton, Q.C., and *Macmorran*, for the respondents.

Cur. adv. vult.

Nov. 18.—Lord ESHER, M.R.—This is an appeal between the urban sanitary authority of Burslem and the County Council of Staffordshire, and the dispute between them is precisely the same as in the case of *In re Local Board of Warminster and the County Council of Wilts*. The determination of this appeal depends on whether we agree with the decision in that case or not. The point in dispute is as to the liability to maintain the paved footways at the side of the carriage-way where a main road passes through a town or urban district. This question must be determined by the consideration of what is a main road. It seems strange to me that, in an Act of Parliament which deals with a matter the nomenclature of which was perfectly familiar to members of both Houses of Parliament—viz., county roads—they should have used words which they would never have used in ordinary conversation. A high road was a well-known thing; but a main road is a thing which was never talked of before the expression appeared in an Act of Parliament. There were many kinds of roads or ways, all of them well known, which were not high roads. A high road meant a road which went from one important place to another: it was a made road, in contradistinction to a green road, which was also a well-known thing. A green road might be a highway, but it was not a high road.

Now, section 11 of the Local Government Act, 1888, says that every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives Act, 1878, shall be maintained and repaired by the county council; provided that an urban authority may claim to retain the power of maintaining any main road within their district; and in such case the county council shall pay part of the expenses of such maintenance.

We must refer to the Act of 1878 to see what a main road is there defined to be. That Act says that turnpike roads, on ceasing to be turnpike roads, shall be deemed to be main roads, and it further provides that other roads—viz., such as form a medium of communication between great towns or lead to railway stations—may be declared to be main roads.

The question is, what is it that is thus said to be a main road? We must not say that it means the whole of the space between the hedges on either side. There may be no hedge or fence near, as for instance when a road passes over a mountain or across a common, or where in passing through a village it has a village green on one side of it. I think that a high road or a main road is that which has been dedicated to the public as a road for the use of carriages and foot-passengers in passing from one place of importance to another, and which has been accepted by the public as such. Such a main road may in certain parts of it have paved footpaths; for instance, it often happens that there are paved footpaths near a turnpike gate. And where a main road goes through a town, it generally has paved footpaths running along the sides of it. The paving is done not for the exclusive benefit of the inhabitants of the town, but for the general benefit of the public who use the road. While the road is passing through a country district, it is clear that it is only one highway; no one ever heard it suggested that it was two highways, one a footway for foot-passengers, and the other a carriage-way. Neither can this be said to be the case when it enters an urban district. It is still one highway, though part of the road is used as a carriage-way and part as a footway. Foot-passengers are not restricted to the footway, though carriages are for reasons of safety required to keep to the carriage-way. In my opinion, therefore, where a main road passes through an urban district and has footpaths on each side of it, the main road includes the footpaths as well as the carriage-way, and consequently, by section 11 of the Local Government Act, the county council are liable to contribute to the repair of the footpaths. I agree with the judgment on the case of *In re Local Board of Warminster and County Council of Wilts*, and I think that this appeal must be dismissed.

KAY, L.J., read the following judgment:—The county council of Staffordshire object to contribute to the repair and maintenance of various paved footways within certain urban districts in that county. Their liability to contribute depends upon section 11 of the Local Government Act, 1888, which enacts that "every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives Amendment Act, 1878," shall "be wholly maintained and repaired" by the county council, provided that any urban authority may claim to maintain such roads within their district, and in that case the county council are to contribute an annual sum towards the costs of the maintenance and repair of such road. The amount of such payment may be fixed by agreement or by arbitration of the Local Government Board. Such an arbitration has taken place in this case, and it is sought to set aside the award because it has directed contribution to the maintenance of paved footways in several urban districts at the side of the carriage-ways. Whether or not this was right depends upon the meaning of the words "road" and "main road" in the section to which I have referred. The Act of 1888 does not contain any definition of road or main road, but refers, as I have pointed out, for the meaning of main road to the Highways and Locomotives Amendment Act, 1878. Section 13 of this statute provides that any road which between the 31st of December, 1870, and the passing of that Act ceased to be a turnpike road, and any road which at the time of the passing of the Act was a turnpike road, but might afterwards cease to be such, should be deemed to be a main road,

and by section 15 the county authority, at the instance of the highway authority, might declare certain roads which had never been turnpike roads to be main roads. From the papers in this case which have been handed to me it does not appear whether all the roads in question were originally turnpike roads or not. If there be any which were never turnpike roads, but have become main roads, I do not understand how it can be argued that a pathway by the side of the carriage-way is not part of the road. Road must *primâ facie* mean the highway, and the pathway is undoubtedly part of the highway which is a main road.

But the argument for the county council is rested upon the assumption that all or some of these roads were formerly turnpike roads, and is derived from the history of the legislation as to turnpike roads. The statute 8 Geo. 4, c. 126, intituled an Act to amend the general laws now in being for regulating turnpike roads in England, contains a power (section 111) for turnpike trustees to make and keep in repair causeways for the use of foot-passengers "in, upon, or on the sides of the turnpike road in such manner as they shall think proper." But this is restricted as to any any town, village, or hamlet by section 112, which provides that nothing in the Act contained shall authorize the turnpike trustees "to lay down, continue, repair, or maintain any pavement or any paved or pitched causeway or footpath in or upon or at the side of any turnpike road within any town, village, or hamlet where such turnpike road shall pass through the same," but such pavement, paved or pitched causeway, or footpath is to be made, repaired, and maintained by and at the cost of the inhabitants of such town, village, or hamlet, or by other persons liable to make, maintain, and repair the same. This legislation was obviously intended to define the rights and obligations of turnpike trustees as between them and the inhabitants of a town, village, or hamlet. It has nothing to do with rights or obligations of the county council as to main roads. As between them and the inhabitants of a town, village, or hamlet, there is no such restriction, nor does there seem to be any reason for it. After turnpikes were abolished, and before the Act of 1888, the highway authority in any urban district maintained both carriage-way and footways adjoining. Then, by the Act of 1888, the duty is cast upon the county to maintain main roads, and there is nothing to restrict the meaning of these words to the carriage-way, excluding the footpath at or on the side of it. If the urban authority does not claim to maintain such road the county must do so. If the urban authority makes such a claim the county must contribute, and in either case the main road is *primâ facie* the whole highway, including the footway as well as the carriage-way. Any other construction is not warranted by the words of the Act, and would involve this most inconvenient result, that there must in every case be an inquiry—(1) Was the main road once a turnpike road? and (2) Was the footway upon the turnpike road or outside it? The point has been decided against the county council in the case of *In re Local Board of Warminster and County Council of Wilts*, and I agree with that decision.

The appeal should be dismissed, with costs.

Rigby, L.J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Byrne & Blakiston*, for *Hand & Co.*, Stafford.

Solicitors for the respondent, *Sharpe, Parker, & Co.*, for *A. Ellis*, Burslem.

High Court of Justice.

Chan. Div. } Dec. 14.
North, J. }

Jenkins *v.* Hope. (*a*.)

Patent—Action for infringement—Undertaking offered and refused—Injunction—Costs.

A plaintiff in a patent action is not entitled to an injunction as a matter of course, and if the infringement is innocent, and the defendant offers an undertaking, it should be accepted.

Motion for judgment.

The plaintiff sued the defendants, Wilson and Stafford, for infringement of a patent, claiming (1) an injunction to restrain the defendants and their servants from infringing; (2) damages, or an account of profits; and (3) delivery up or destruction of the infringing articles.

The defendants' solicitors soon after the issue of the writ wrote to the plaintiff's solicitors pointing out that the defendants had purchased the alleged infringing articles in the ordinary course of business, and that the sales had been small, amounting to less than £10. They also offered to account, and to deliver up or destroy all the alleged infringing goods in their possession, and to give an undertaking in the terms of the injunction asked for in the writ. The plaintiffs nevertheless delivered a statement of claim and particulars of breaches, and prayed for the relief indorsed on the writ. The defendants put in a defence and renewed the offer made in their solicitors' letter. The plaintiffs now moved for judgment against the defendants for a perpetual injunction in the terms of the statement of claim against these defendants and the defendant Hope, who did not appear.

A. J. Walter.—The plaintiffs are entitled to an injunction.

A. H. Jessell.—The plaintiffs ought to have been satisfied with our undertaking, and they ought to pay our costs subsequently to that offer: *Walter* v. *Steinkoff*, 40 W. R. 599, [1892] 3 Ch. 489; *American Tobacco Co.* v. *Guest*, 40 W. R. 364, [1892] 1 Ch. 630.

A. J. Walter, replied.

North, J.—I think that the plaintiffs ought to have accepted the undertaking of these defendants. I think that the plaintiffs were entitled to protection for their patent, but the undertaking was sufficient. An injunction is not granted as a matter of course. The court always has a discretion, but I think that the plaintiffs had the right to have their patent protected by having the undertaking given in court. The defendants must pay the plaintiffs' costs of appearing to a day, and also the costs up to the date of their letter, all the rest of the costs must be paid by the plaintiffs.

The order will be on the defendant's undertaking in terms of this letter, stay proceedings and order the costs to be paid as I have indicated.

Solicitors, *J. T. Lewis*, for *A. & M. Thomas & Co.*, Swansea; *Emanuel & Simmonds.*

(*a*.) Reported by R. Sillem, Esq., Barrister-at-Law.

Chan. Div.
Romer, J. Nov. 21, 22, 23.

LYNDE v. ANGLO-ITALIAN HEMP SPINNING CO. (a.)

Company—Shares—Contract—Misrepresentation—Promoter—Rescission of contract.

To make a company liable for misrepresentations inducing a contract to take shares, the shareholder must bring his case within one or other of the following heads: (1) *Where the misrepresentations are made by the directors or other general agents entitled to act and acting on its behalf;* (2) *where the misrepresentations are made by a special agent of the company acting within the scope of his authority, and whether the company has originally authorized him or has subsequently ratified his acts;* (3) *where the company know before completion of the contract that it is induced by misrepresentation; or* (4) *where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of them were material and untrue.*

A promoter of a company, but who was not either a director or the agent of the company to make representations, induced the plaintiff to take shares on the faith of certain allegations he was alleged to have made, but of which the company had no knowledge, though the directors did know he was endeavouring to procure subscriptions for shares.

Held, that even if the representations were made (which was not proved), the company could not be held liable for such representations made by a promoter; and that the contract to take shares could not be set aside.

Trial of action.

This was an action brought by William Alfred Lynde against the Anglo-Italian Hemp Spinning Co. for the rescission of a contract to take 300 shares in the company, on the ground of misrepresentation; for repayment of the sums paid in respect of the shares; and for consequential relief.

The company was registered on the 28th of November, 1890, with a share capital of £50,000, one of its objects being to acquire the lands, buildings, works, and mills known as the "Ferrara Hemp Works," situate at Ferrara, in Italy, theretofore carried on by Messrs. F. Navarra & Co.

By article 120 of the articles of association it was provided that the directors should adopt on behalf of the company an agreement made between Arthur Waithman and M. C. Thomson of the one part, and a trustee for the defendant company of the other part, whereby, after reciting that A. Waithman and M. C. Thomson (who were the promoters of the company) had arranged to obtain subscriptions for £20,000 in debentures, and that they had incurred various expenses in the promotion of the company, it was agreed that on the completion of the sale to the company of the Ferrara Hemp Works the company should pay to them £5,000 in cash, and that they should be entitled to have allotted to them certain founders' shares.

The plaintiff on the 9th of December, 1890, had an interview with A. Waithman, one of the promoters, who was a personal friend of his. He alleged that Waithman then represented to him on behalf of the company (1) that the business of F. Navarra had been bought as a going concern at a very low price; and (2) that it was a good business; (3) that no promotion money was to be paid; and (4) that A. Waithman was not to get anything out of the promotion of the company. The plaintiff received at that interview a copy of the memorandum and articles of association of the company. At another interview on the 16th of March, 1891, the plaintiff alleged that Waithman stated that he and M. C. Thomson had agreed to forego the benefits conferred on them by the agreement mentioned in art. 120.

The plaintiff alleged that these representions were false, and that relying on them he, on the 28th of May, 1891, applied for and had allotted to him on the 10th of June, 1891, 300 ordinary and three founders' shares in the company. The application form for the 300 shares stated that the plaintiff applied for the shares "subject to the memorandum and articles of association, of which a copy has been supplied to me." The application form had been obtained from the solicitor to the company and handed to the plaintiff by Waithman. The plaintiff paid for the shares on allotment and in consequence of calls, £153.

At the time of the alleged representations being made Waithman was not a director or general agent of the company, nor authorised by them to procure shares or to make representations to induce people to subscribe for shares. There were two directors who were acting as such. Both Waithman and Thomson actively exerted themselves to procure, and did in fact procure, persons to take up shares, and the directors in question knew they were doing so. No prospectus of the company was ever issued.

In December, 1891, Waithman and Thomson were appointed directors, and on the 14th of November, 1894, the plaintiff alleged that he had discovered the true facts as to the above representations, and sent a letter to the company repudiating the shares.

On the 20th of December, 1894, the company having declined to cancel the allotment, he issued the writ in this action.

The defence set up by the company was that the representations were not in fact made, and alleged that even if made, A. Waithman was not their agent or authorized to make representations on their behalf, and further alleged laches and delay, and counterclaimed for some over-due calls.

Eve, Q.C., and *Macnaghten*, for the plaintiff.—The representations were made for and on behalf of the defendant company. They knew Waithman was a promoter, that he was getting subscriptions for shares, and the case therefore comes within *In re Canadian (Direct) Meat Co.*; *Tamplin's case*, W. N., 1892, pp. 94, 146; and *Karberg's case*, [1892] 3 Ch. 1, 40 W. R. Dig. 41. The company adopted the representations, and is liable for their effect. [ROMER, J.—In *Karberg's case* the offer to take shares was based on a prospectus issued by the company; here there was none.]

Hopkinson, Q.C., and *Mulligan*, for the defendants.—The rule in this kind of case is that the representation must have been made by the person against whom restitution is sought, or his agent. Waithman was not the agent of the company for making representations. The company did not in fact know that untrue representations were being made. It has been held that even the secretary of a company is not its agent to make representations to induce people to take shares: *Newlands* v. *National Employers' Accident Association (Limited)*, 54 L. J. Q. B. 428, 33 W. R. Dig. 168. Nor are misrepresentations of one director sufficient to bind the company, *Holt's case*, *In re The Universal Provident Life Association*, 22 Beav. 48, and the same rule applies in the case of a promoter making similar representations when not authorized by the company: *In re Hull and London Life Assurance Co.*, *Gibson's case*, 6 W. R. 384, 2 De G. & J. 275. There

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

has also been delay in repudiating, sufficient to destroy the right: *In re Russian (&c.) Ironworks Co., Taite's case*, 15 W. R. 891, 3 Eq. 795; *In re Scottish Petroleum Co.*, 31 W. R. 846, 23 Ch. D. 413.

ROMER, J.—The first question I desire to deal with is this: Assuming that Mr. Waithman made material misrepresentations to the plaintiff which induced him to apply for the shares, could the plaintiff, on that ground, hold the company liable and have the contract set aside? It appears to me that, speaking generally, to make a company liable for misrepresentations inducing a contract to take shares from it, the shareholder must bring his case within one or other of the following heads:—(1) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf, as, for example, by a prospectus issued by the authority or sanction of the directors of a company, inviting subscriptions for shares; (2) where the misrepresentations are made by a special agent of the company while acting within the scope of his authority, as, for example, by an agent specially authorized to obtain, on behalf of the company, subscriptions for shares. This head, of course, includes the case of a person constituted agent by subsequent adoption of his acts. (3) Where the company can be held affected before the contract is complete with the knowledge that it is induced by misrepresentations, as, for example, when the directors, on allotting shares, know, in fact, that the application for them has been induced by misrepresentations, even though made without any authority; (4) where the contract is made on the basis of certain representations, whether those representations were known to the company or not, and it turns out that some of those representations were material and untrue, as, for example, if the directors of a company know, when allotting, that an application for shares is based on the statements contained in a prospectus, even though that prospectus was issued without authority, or even before the company was formed, and even if its contents are not known to the directors.

I think *Karberg's case* was one falling within and decided under this head. Lindley, L.J., said that one question he had to answer was this [1892] 3 Ch. 11: "Was the prospectus"—in that case being a prospectus issued before the company was formed—"the basis of the contract formed by the application and allotment of shares?" And he answers that question when he says, "The offer to take shares is an offer to take them on the terms of the prospectus and on no other terms, and the acceptance of the application by the allotment of the shares is the acceptance of the offer on those terms and not on other terms." And I gather that that was the ground of the decision in *Karberg's case*.

There may possibly be other cases not coming within the above heads, though none occur to me at the present time, but certainly the present case, if it does not come within any of the above heads, has no special features about it that would entitle the plaintiff to the relief he asks.

Now, it appears to me that the plaintiff does not bring his case within any of these heads. Such misrepresentations, if any, as were made to the plaintiff were made by Mr. Waithman, one of the two promoters of the company. But the company at the time had two directors entitled to act for it, and Mr. Waithman was not a director or general agent of the company. No doubt the promoters had a great deal to do with the company at the time and their wishes and views may have been highly regarded by the directors. But I see nothing to justify me in coming to the conclusion that the promoters are to be regarded as really constituting the company, or that the directors left everything in their hands, or were what may be called dummies, or left it to the promoters to do whatever they pleased in the affairs of the company. Nor was Mr. Waithman, when he made the representations he did make to the plaintiff, authorized to act on behalf of the company in procuring shares, or authorized to make any representations on behalf of the company to the plaintiff or others to induce him or them to apply for shares. The fact that Mr. Waithman was a promoter of the company did not in itself authorize him to procure shares for the company, or to make representations to the plaintiff on the company's behalf. A contract to take shares may be induced by misrepresentations made by an officer of a company, or by a promoter of a company, or by a person assisting in procuring shares of a company; but that fact alone will not be sufficient to enable the contract to be rescinded. The cases cited by Mr. Hopkinson are sufficient to show this. And although the company knew that Waithman was applying to his friends to get them to subscribe for shares, that did not in my opinion make him the company's agent, or put the company to inquire as to whether he had made any, and, if any, what representations to those friends to induce them to subscribe. In most cases directors must be aware that subscriptions for shares are obtained through the intermediary of persons interested in the company, and it would lead to the most astonishing results if that was held sufficient to affect the directors with knowledge of, or to put them upon inquiry as to, the representations (if any) made by those persons to the people applying for the shares. The fact that in the case of this company some applications, including that of the plaintiff, were made on printed forms prepared by the company's solicitor, does not in my opinion make any real difference. Mr. Waithman got his forms by applying to the company's solicitor, because he wanted his friends to make proper applications for shares. No authority was given by the directors to the solicitor to supply Mr. Waithman with forms, nor can the directors by seeing these forms used be held thereby to have adopted Mr. Waithman as as their agent in obtaining applications for shares. The directors did not issue any prospectus themselves, or try to get applications for shares, no doubt because they thought Waithman and Thomson would get a sufficient number of their friends to take up the necessary number of shares. But this did not in my opinion make Waithman and Thomson the special agents of the company to procure subscriptions on its behalf, or authorize them to make any representations on behalf of the company with a view of inducing their friends to subscribe.

And lastly this is not a case like *Karberg's case*, or coming at all within the fourth head. The application for shares made by the plaintiff was not one made conditional upon, or to the knowledge of the directors based upon, any special or other representations made by Waithman. The application was not even to the knowledge of the directors induced by representations by Waithman, though even if it had been whether that would in itself have been sufficient to bring the case within the fourth head or have entitled the plaintiff to rescind I need not now inquire.

On this ground therefore I hold that the action must fail, for in my judgment the plaintiff has not shown any ground upon which I can rescind this contract by reason of misrepresentations, if any, made to him which induced him to apply for these shares.

I should have been glad if I could have left the case

there, because the point of law I have decided is in itself fatal to the plaintiff's case. But the case may go elsewhere, and if it does I think the judges of the courts above are entitled to know what view the judge who tried the case took of the facts of it.

Were misrepresentations in fact made to the plaintiff by Waithman which he relied on, which were material and which led to this contract? The onus of proving that is upon the plaintiff, and he has not discharged that onus to my satisfaction. I am not convinced that any material misrepresentation was made, certainly I am not satisfied that any misrepresentation, if made, was relied upon by the plaintiff, and induced him to apply for these shares.

Representations undoubtedly were made by Waithman to the plaintiff, but they were all verbal. There is a direct conflict of testimony between the plaintiff and Waithman on all the really material alleged misrepresentations, and there is no evidence before me except that of these two witnesses. [His lordship commented on the evidence, and proceeded as follows:—] I need not go through the alleged misrepresentations in detail or further discuss the subject. I have stated the result upon my mind, which result is simply that the alleged misrepresentations are not established to my satisfaction.

Having decided the question of law, and expressed my opinion on the evidence on the questions of fact, I need not further deal with the point as to delay in bringing the action or the other points which have been discussed.

It follows that the action fails and must be dismissed with costs, and on the counter-claim there will be judgment for the defendant company with costs.

Solicitors for the plaintiff, *Bower, Cotton, & Bower.*

Solicitors for the defendant, *Bloxam, Ellisons, & Co.*

Chan. Div. | July 1, 8; Aug. 5, 1895.
Romer, J. |

In re COMMON PETROLEUM ENGINE CO. ELSNER AND MCARTHUR'S CASE. (*a.*)

Company—Shares—Fully-paid shares—Contract duly made and filed—Companies Act, 1867 (30 & 31 *Vict.* c. 131), *s.* 25.

The A. company entered into a contract with a trustee for the B. company, a new company to be formed, that the A. company should sell to the new company certain patent rights in consideration of £2,550 *in shares of the B. company or cash, and in consideration of the allotment and issue to each shareholder of the A. company who should apply for them, three shares of* £1 *each in the B. company, with* 19*s. credited as paid up on them, in respect of every two shares held by him in the A. company. The B. company was registered, and ratified this contract by a deed indorsed on it, and the contract with the indorsed deed were registered with the Registrar of Joint Stock Companies under section* 25 *of the Companies Act*, 1867, *and the patent rights assigned. Two persons, E. and M., not shareholders in the A. company, applied, as nominees of shareholders of that company who were entitled to have shares issued to them, for shares in the B. company, and, having paid* 1*s. per share, were registered as holders of fully paid-up shares in the B. company. On the B. company being subsequently wound up, and the liquidator applying for a declaration that these shares were held subject to a liability of* 19*s. per share,*

Held, that the contract and indorsed deed when registered was a sufficient contract in writing as required by section 25 *of the Companies Act*, 1867, *even though E. and M. were not named in it or parties to it, and that the shares issued to them must be treated as fully paid up.*

Carling's case, 24 W. R. 165, 1 *Ch. D.* 115, *and* Hartley's case, 23 W. R. 203, *L. R.* 10 *Ch. App.* 157, *followed.*

Summons by liquidator of a company.

The liquidator of the Common Petroleum Engine Co., Limited, took out this summons against the respondents, J. Elsner and W. McArthur, asking (*inter alia*) a declaration that certain shares issued to and held by the respondents were subject to liability of the payment of 19s. per share, beyond the amount already paid by them of 1s. per share.

By a contract, dated the 15th of February, 1892, and made between Spiel's Patent Petroleum Engine Co., Limited (in this report referred to as Spiel's Company), of the one part and J. Elsner of the other part, as trustee for a new company to be formed to purchase certain patent rights in petroleum motors, it was by clause 2 provided as follows: "The consideration for the said sale shall be the sum of £2,550, which shall be paid and satisfied by the issue to Spiel's Company (or their nominees) of 2,550 fully-paid shares of the new company of £1 each, such shares to be numbered in the books of the new company and in the share certificates for the same 8 to 2,557 inclusive, or at the option of the new company as to the whole or any part of the said sum of £2,550, by payment in cash in lieu of shares. The new company shall allot and issue to every shareholder in Spiel's Company who shall be willing to accept and shall apply for the same three shares of £1 each of the new company, credited with the sum of 19s. as paid upon each of the shares so to be allotted and issued in respect of every two shares of £5 each held by him in Spiel's Company, and such shares of the new company so to be allotted and issued as last aforesaid shall be numbered in the books of the new company and in the share certificates for the same 2,558 to 20,000 inclusive. Every such shareholder in Spiel's Company shall apply for such shares in the new company within the time limited by notice to be given to him of his right to apply for and accept the same, and undertake in writing to pay up the 1s. per share remaining unpaid on such shares either prior to or at the time of the allotment and issue of such shares to him, or by such instalments and at such times as may be fixed for the payment of the issue. If any such shareholder who may so apply for shares as aforesaid shall hold an odd number of shares in Spiel's Company he shall only have the right to apply for and have allotted and issued to him in respect of such odd share, one share of the new company of £1 so credited as aforesaid. All of the said shares of the new company not applied for by shareholders in Spiel's Company within the time so limited as aforesaid may be sold when and to such persons, and on such terms, or may be otherwise dealt with by the new company as the new company may think fit."

Article 3.—"The purchase of the said premises shall be completed on the 15th of March, 1892, when the said purchase price shall be paid and satisfied in manner aforesaid, and thereupon Spiel's Company and all other necessary parties shall execute . . . the conveyances."

Article 4.—"This contract or some other proper and sufficient contract shall be filed with the Registrar of Joint Stock Companies before the issue of any of the above shares under the contract."

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

The Common Petroleum Engine Co., the company contemplated in these arrangements, was incorporated on the 17th of March, 1892, and by its memorandum of association it was provided that 2,550 shares, numbered 8 to 2,557 inclusive, might be issued as fully-paid, pursuant to the contract of the 15th of February above stated, and 17,443 shares numbered 2,558 to 20,000 inclusive, might be allotted and issued with 19s. per share credited as paid thereon respectively. By the articles of association it was provided that the issue of the shares to the Spiel's Company should be in such form as to free the holders from liability beyond 1s. per share.

On the 19th of March, 1892, the new company by a deed indorsed on the contract of the 15th of February, 1892, and made between Spiel's Company of the first part, Elsner of the second part, and the new company of the third part, ratified and adopted the same and declared it binding on the new company. The contract of the 15th of February, with the indorsement, was then duly filed with the Registrar of Joint Stock Companies. On the 30th of March, Spiel's Company assigned to the new company the property in question in consideration of the £2,550 paid as to £350 in cash, and £2,200 in shares.

Elsner and McArthur in March applied as nominees of shareholders in Spiel's Company for 250 and 50 shares in the new company with 19s. per share credited as paid up. Both applied on a form sent to shareholders in Spiel's Company referring only to "extra shares." The shares were allotted on the 25th of March, the 1s. per share paid, and the applicants put on the register as holders of fully-paid shares.

On the 14th of November, 1894, the new company was compulsorily wound up and the respondents put on the list of contributories in respect of the above shares for 19s. per share.

H. Reed, Q.C., and *J. Bradford*, for the liquidator.—No contract in conformity with section 25 of the Companies Act, 1867, has been filed and the *onus* is on the respondents to show it has: *In re New Eberhardt Co. (Limited), Ex parte Menzies*, 38 W. R. 97, 43 Ch. D. 118. The contract of the 15th of February gave an option to the Spiel's Company's shareholders to take shares on paying 1s. per share. The respondents were not such shareholders, but only nominees of them.

Levett, Q.C., and *Butcher*, for Elsner.—The contract of the 15th of February, 1892, taken in connection with the indorsed deed, was, when registered, a contract in writing within the meaning of section 25 of the Companies Act, 1867. It is not necessary that Elsner should be a party to that contract to have the benefit of it: he was the nominee of a shareholder who was entitled to the protection of the section. In any event the real contract was that the shares issued were to be issued as having 19s. per share as paid up thereon.

Cooper Willis, Q.C., and *Whitaker*, for McArthur, adopted the foregoing argument.

Bradford replied.

Aug. 5.—ROMER, J.—The first question that arises on this summons so far as concerns the respondents Elsner and McArthur is one of fact. Were the shares the subject of this application allotted to them as nominees of shareholders in Spiel's Company in pursuance of the option given to those shareholders by the 2nd clause of the agreement of the 15th of February, 1892, confirmed by the deed of the 19th of March, 1892? I am satisfied on the evidence that the shares were so allotted, and that they were not issued as suggested on behalf of the liquidator of the new company (the Common Petroleum Engine Co., Limited) under the provisions of clause 2 of the agreement as shares not applied for by the shareholders in Spiel's Company. The circumstance relied on by the liquidator that Elsner's application was on a form labelled "extra shares" admits of easy explanation. The facts are that Spiel's Company (wholly without the authority of the new company) issued to their shareholders two forms of application for shares—one as for shares to which they were directly entitled under the agreement, and the other as for extra shares not taken up by some of the shareholders, and the applicants seem not to have noticed any distinction between the two forms, but used them indiscriminately. As a matter of fact, the new company, at the time the shares in question were allotted, had not authorized the issue of any shares, and did not, in fact, allot any shares except to shareholders of Spiel's Company or their nominees in respect of the shares to which they were entitled under the agreement. And I should add that the new company never limited a time within which the shares should be applied for though Spiel's Company did make an abortive and ineffectual attempt to limit a time.

The next question that arises is one of law, whether the agreement and indorsed deed which have been duly registered, comply with the provisions of section 25 of the Act of 1867. In my opinion they do having regard to the cases I am about to refer to. In the first place the agreement as confirmed by the indorsed deed is in itself a contract in writing made before the issue of the shares, and not a mere offer by this company to allot shares like the memorandum which formed the subject of the decision in *In re New Eberhardt Co.* By this agreement the new company were bound to allot to each shareholder of Spiel's Company his proportion of shares if he applied for them, and the fact that each shareholder had an option and was not bound to apply did not the less render the agreement a contract and one binding on the new company. The new company had no option in the matter, and moreover, notwithstanding the curious wording of the agreement and the form of the assignment made in pursuance of it dated the 30th of March, 1892, I think the option given formed part of the consideration for the sale of the property, the subject of the agreement. I cannot hold here that the consideration paid for the shares issued was illusory, or that the agreement was a mere fraud or excuse to enable these shares to be issued at a discount or as nearly fully paid up: see *Chapman's case*, 43 W. R. 553, [1895] 1 Ch. 771. It was suggested by the liquidator that Spiel's Company had no right to distribute a valuable option which was in the nature of capital amongst its shareholders. That may be so, but that is a matter which concerns Spiel's Company, and its shareholders and creditors, and which cannot now be relied on by the liquidator for the purposes of this application.

There being, then, a contract in writing filed with the Registrar of Joint Stock Companies before the issue of these shares, the next question is whether it is a sufficient contract within the meaning of section 25. Now, if the question were one arising for the first time I think a great deal might be said in favour of the contention that a contract within the meaning of the section ought to be (1) made direct with the allottee; and (2) showing on the face of it which are the shares to be allotted or issued to him. But the cases show that this is not necessary, and that the section (which is in the nature of a penal clause) must not be treated as by implication making essential, details with regard to the contract

in reference to the above points not mentioned in the section. For example, as to (1) it has been held that if the contract be to allot shares to A., the shares may be allotted to B. as A.'s nominee, and the contract will then protect B.: see *Carling's case*, 1 Ch. D. 115, and the observations of James, L.J., p. 124. And apparently even the company need not be directly a party to the contract. It is sufficient if the contract be with a trustee for the company and adopted by the company, see *Hartley's case*, L. R. 10 Ch. App. 157, where Cairns, L.C., observes, p. 159, "It is hardly necessary to advert to the argument that the . . . . shares ought not to be taken as paid up shares, because the agreement . . . was not with the company but with a trustee and before the company was formed. The Act of Parliament does not require the agreement to be with the company, and such agreements are very seldom made with the company directly." And with regard to point (2) it has been held that the contract need not on the face of it identify the shares, see *Ex parte Forde*, 33 W. R. 839, 30 Ch. D. 153, and *Hartley's case;* and see also on both points *Kirby's case*, 46 L. T. (N. S.) 682, 30 W. R. Dig. 37, decided by Fry, J., and *In re Buenos Ayres and Campana Railway Co.*, W. N. (1875) 59. In both these last-mentioned cases the registered contract did not specify the shares or the names of the allottees, and yet the allottees were held protected by the registered contract. In the last named case Sir G. Jessel, M.R., pointed out that section 25 did not render necessary the specification of the shares or of the name of the allottee, and he said that if the contract did not give such particulars the sole effect was to make it more difficult for the holders of shares not paid for in cash, to discharge the burden of proving that their shares had in fact been issued to them in pursuance of the registered contract. And with reference to these observations of the late Master of the Rolls, I need not again point out that in the present case the respondents have discharged the burden cast upon them, and satisfied me that their shares were issued in pursuance of the registered agreement.

Having regard to the above authorities, I do not see on what principle the registered agreement is to be held not sufficient. And, indeed, with reference to an agreement which cannot, I think on principle, be distinguished from that now before me, Cotton, L.J., in *In re New Eberhardt Co.*, 43 Ch. D. 118, cited above, observed, p. 126: "If the company had registered not this document, but the agreement between the new company and the liquidator, my present opinion is that that would have been a contract registered to issue these shares as fully paid up shares," and I gather that Bowen and Fry, L.JJ., do not differ in that case from the opinion of Cotton, L.J.

Under these circumstances the application must be dismissed, as against these respondents, with costs. The liquidator may take his costs out of the assets, it being a proper case to bring before the court.

Solicitor for the applicant, *J. B. Roberts.*

Solicitors for the respondents, *Foss & Ledsam; Eagleton & Sons.*

Chan. Div. } Dec. 5, 6, 9, 10, 11,
Vaughan Williams, J. } 12, 13, 18.

In re KINGSTON COTTON MILL CO. (No. 2). (*a.*)

Company — Winding up — Misfeasance by officers— Directors — Auditors — Damages—Payment of dividends—Value of assets—Manager's certificate—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

Directors who pay away the funds of a company under an honest and reasonable belief in a state of facts which would justify the payment will not be held liable to replace those funds merely because it turns out that on the true facts the payments were ultra vires.

The word "misfeasance" in section 10 *of the Companies (Winding-up) Act*, 1890, *covers every misconduct by an officer of a company as such for which such officer might have been sued apart from the section. Therefore charges against auditors of having, through want of the exercise of ordinary skill and diligence, sanctioned accounts containing false statements, if proved and coupled with pecuniary damage to the company, constitute a "misfeasance" within the section. Auditors are not entitled to rely on the certificate of the company's general manager as to the value of the company's stock-in-trade if an ordinary careful examination of the books would have led them to suspect the accuracy of the manager's figures.*

This was a summons taken out by the official receiver and liquidator in the winding up of the above-named company, which was being wound up by the court, that it might be declared that Samuel Lambert, Andrew Mouat, V. H. Parker, G. G. Macturk, J. W. Halden, and William Jackson, directors of the company, and Benjamin Pickering, a past auditor, were jointly and severally liable to pay to the applicant four several sums of £36 0s. 10d., £38 12s. 4d., £38 12s. 4d., and £38 17s. 4d., which, being moneys of the said company, were improperly applied in payment of dividends on certain preference shares in the said company for the years 1890, 1891, 1892, and 1893 respectively, together with proper interest on the said sums respectively from the respective dates of payment of the said dividends, and that Arthur Edgar Peasegood, a past auditor of the said company, was also liable to pay the said several sums of £38 12s. 4d. and £38 17s. 4d. applied as aforesaid for the years 1892 and 1893, together with such interest thereon respectively as aforesaid, and that the respondents might be ordered jointly and severally to pay to the applicants within four days from the service of the order the amounts which they respectively should be declared liable to pay to him in respect of the transactions aforesaid; and that it might also be declared with respect to each and all of the said respondents (but as to the respondent Arthur Edgar Peasegood only as from and after the date when his firm of Pickering, Peasegood, & Judge became auditors of the said company) that they respectively were guilty of misfeasance or breach of trust in relation to the said company in that they respectively authorized, sanctioned, participated, recommended, or permitted the issue and circulation of divers reports and statements of accounts of the said company, and in particular those for the years 1884 to 1892 inclusive, containing false and misleading entries with respect to (1) the value of the said company's mill, machinery, and site; (2) the value of the said company's stock-in-trade, particularly for the year 1887 and the subsequent years; and (3) the company's reserve fund.

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

The company was formed under the Companies Act, 1862, in 1879 for the purpose of taking over the business then carried on by an unlimited company called the Kingston Cotton Mill Co. of a cotton and spinning mill at Hull. The original nominal capital of the company was £210,000, divided into 21,000 shares of £10 each, 5,000 being preference and 16,000 ordinary shares. In 1882 the capital was increased by the creation of 4,000 new shares of £5 each called "£5 Preference Shares, 1882." The mill in which the company carried on its business was mortgaged to secure £30,000 and interest.

The articles of the company with regard to audit were the following:—

129. Once at least in every year the accounts of the company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors.

138. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

139. Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company. He may, unless he himself is an accountant, employ accountants or other persons at the expense of the company to assist him in investigating such accounts, and he may, in relation to such accounts, examine the directors or any other officer of the company.

140. The auditors shall make a report to the members upon the balance-sheet and accounts, and in every such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet, containing the particulars required by these articles, and properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs; and, in case they have called for any explanation or information from the directors, whether such explanation or information has been given by the directors, and whether the same has been satisfactory; and such report shall be read together with the report of the directors at the ordinary meeting.

The auditors did not report according to article 140.

Pickering, a chartered accountant, was appointed auditor of the company shortly after its formation, and he continued to be sole auditor till November, 1889, when his partner, Peasegood, chartered accountant, was appointed auditor with him.

The first directors were J. Gilby, J. W. Halden, T. Horncastle, H. P. Jackson, S. Lambert, G. G. Macturk, A. Mouat, V. H. Parker, W. H. Waite, W. F. West, and C. Wells. Halden, Lambert, Macturk, Mouat, and Parker continued to be directors till the date of the winding-up order—*i.e.*, the 18th of March, 1894. The other directors named above either died, retired, or became disqualified before the liquidation. William Jackson was general manager of the company from its formation, and was appointed a director in 1882. He continued to hold the offices of director and general manager until his resignation in March, 1894. Mouat died pending the taking out of the summons.

The official receiver found in his report that though the company had been trading at a loss the stock-in-trade had been inflated by the general manager to an extent sufficient in each year to conceal the loss and show a fictitious profit, and that while the company's stock-in-trade, was according to summaries in the stock journal and yearly accounts, apparently increasing, the sales for the years 1889-1892, were, according to the same accounts, exhibiting, on the whole, a considerable decrease, but no member of the board of directors other than Jackson made any inquiries into the actual amount of the company's stock-in-trade for the time being and that the figures which Jackson from time to time inserted in the trading account and balance-sheet as representing the value of the stock-in-trade were accepted by the board without investigation. Further, that in their reports for 1889, 1890, 1891, and 1892, the fictitious trading profits were referred to as if they had in fact being made, and that in 1890-1893 the directors paid dividends on shares in the company though no profit was made in those years.

Pickering signed the first balance-sheet with the words "examined and found correct," and he employed this form of words in certifying the result of his audit at the foot of the balance-sheet of 1880 and 1881. Afterwards at the foot of the balance-sheets of the years 1882 to 1886 inclusive his form of words was "audited and found correct." In 1887 the words used were "examined with the books and found correct," and this latter form of words was used in subsequent balance-sheets issued before the commencement of the winding-up.

The official receiver stated that the auditors, when conducting the audits of the company's accounts, never ascertained, or attempted to ascertain by independent investigation, the amount or value of the company's stock-in-trade as at the end of the year of account, or called for any independent valuation of it. That both Pickering and Peasegood accepted with respect to the stock-in-trade the figures set down by Jackson in the summaries in the stock journal. That in the first balance-sheet of the company, and in the years 1882 to 1892, the stock-in-trade was set down as being "as per manager's certificate" of a certain value, but in fact there was never even a certificate by Jackson, except that in some cases the summary of stock-in-trade in the stock journal was signed, and in another case initialled by him.

The official receiver's report also stated that the value of the company's mill, machinery, and site had been stated in the balance-sheets at a figure much higher than that given by a firm of professional valuers in 1884.

With respect to the reserve fund, the report stated that in the annual accounts of the company considerable sums were from time to time set down as standing and carried to the credit of a reserve fund, and that fund was repeatedly referred to in the director's reports, but in fact no part of the alleged reserve fund was ever set apart by separate investment, and the entries in the accounts relating to it were, from first to last, mere book entries.

In answer to the charges of the official receiver, the directors' case was: In so far as the summons charged improper application of moneys of the company in the payment of dividends (1), that the payments were not an improper application, because of the two accounts of the company the revenue account in the years in question showed a sufficient profit for payment of the dividends, because there was no obligation on the company to deduct losses in respect of fixed capital before arriving at the profit balance, and that, in so far as the deduction of the sums appearing in the balance-sheet in excess of the true value of the stock-in-trade was concerned, the actual figures appearing in the balance-sheet were accepted by the directors under the certificate of the manager; and that the directors were guilty of no want of reasonable skill and care in the performance of their duties by accepting such certificate of the manager without further inquiry, and that the directors accepted such figures in good faith and in the belief that they were true. The auditors' case was that in the balance-sheets and accounts which they certified the figures

in respect of the stock-in-trade were stated, as the fact was, to be by the manager's certificate, and that the auditors had no duty to go behind that certificate, and showed no want of reasonable skill and care in abstaining from so doing, since they believed the certificate to be true and had no ground for suspecting the contrary. In so far as the summons charged the directors with the issue and circulation of reports and accounts containing false and misleading entries with respect to the company's mill, machinery, and site, and the value of the company's stock-in-trade for the year 1887, and the subsequent years, and charged the auditors with sanctioning the same, it was urged that such misconduct or failure of duty, if proved, could not properly be made a subject of the misfeasance summons, not being a breach of trust, at all events so far as the charge relates to the auditors.

The *vivâ voce* evidence lasted for several days, and it was agreed that the summons should be confined to matters which occurred within six years of the date of the issue of the summons. The result of the evidence is stated in his lordship's judgment.

Cozens Hardy, Q.C., *W. D. Rawlins*, and *Marshall Hall*, for the summons.—The directors prepared and submitted balance-sheets and accounts containing misleading statements, and the auditors audited the balance-sheets containing such statements. Dividends were paid though there were no profits applicable to the payment of dividends. There was an enormous unreal value put upon the mill, and the value of the stock-in-trade was deliberately inflated by the manager. The auditors never attempted to ascertain the true state of affairs.

Haldane, Q.C., *Swinfen Eady, Q.C.*, and *Eve, Q.C.*, for the auditors, took the objection that there was no jurisdiction in the court to determine the present claim upon a summons under section 10 of the Companies (Winding-up) Act 1890. The section is only aimed at, and only deals with, matters in the nature of breaches of trust. The auditors have not been guilty of anything in the nature of a breach of trust.

Cozens Hardy.—The argument on behalf of the auditors implies that there is no distinction between "misfeasance" and "breach of trust." The word "misfeasance" includes cases of breach of duty committed by an auditor, such as, for instance, fraudulently preparing and signing a balance-sheet showing profits when in fact there are no profits, *London and General Bank* (2), *ante*, p. 80, [1895] 2 Ch. 673. The case of an auditor is clearly within the section. It cannot be said that he is deprived of his right to trial by jury, as a jury would be an incompetent tribunal to investigate complicated matters of account. *In re Liberator Permanent Benefit Building Society*, 71 L. T. (N. S.) 406, 42 W. R. Dig. 43, the case was not one of an auditor but of a solicitor. In the *London and General Bank* the auditors were distinctly made liable, not on the ground that they were parties to a breach of trust, but on the ground only that they had been guilty of "misfeasance." That case really decides the point in the present case. The observations of James, L.J., in *Coventry and Dixon's case*, 28 W. R. 775, 14 Ch. D. 660, are not against my view. Neither is *Lister* v. *Stubbs*, 38 W. R. 548, 45 Ch. D. 1. *Archer's case*, 40 W. R. 212, [1892] 1 Ch. 322, is an authority that section 10 deals with any matter involving a breach of duty in respect to which the company might be sued at law or in equity. The object of the section is to substitute a summary procedure for a more lengthy one. The effect of the authorities and the section is that an officer of a company who has assumed and accepted the duties of his office, and whose breach of duty has resulted in loss to the company, even though the loss could before the Judicature Act have only been dealt with by an action at law is amenable to the jurisdiction of this court, and that in a summary proceeding like this such an officer is liable to make compensation for misfeasance proved against him.

Haldane, in reply on the preliminary objection.—The official receiver's contention is quite unfounded—namely, that notwithstanding the carefully selected words limiting the section to certain specific cases, the section is to be read as if it were applicable to all cases where an action at law or a suit in equity could be maintained when the person proceeded against is an officer of the company. In the *London and General Bank* the auditor was held liable because he had knowingly assisted the directors to commit a breach of trust, and made himself a constructive trustee. The object of section 10 is to deal with simple and plain cases either of direct making away with the assets on the part of the directors who have control of the trust funds, or of fraudulent participation by other persons, who have not control of the assets, in assisting the directors to take a course whereby the company loses it property. *Archer's case* is an authority in my favour. *Bentinck* v. *Fenn*, 36 W. R. 641, 12 App. Cas. 652, decides that the word "misfeasance" in the section does not mean misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in loss to the company. In *In re Wedgwood Coal Co.*, 31 W. R. 181, 47 L. T. N. S. 619, a still further limitation was put on the corresponding section 165 of the Companies Act, 1862. The *dicta* in these last-mentioned cases are in no way inconsistent with the *London and General Bank*. *Barnes* v. *Addy*, 22 W. R. 505, L. R. 9 Ch. 244, shows the class of cases to which the section is pointed. [VAUGHAN WILLIAMS, J.—The section seems to me to mean that there is to be a special remedy against persons who, being in the position of officers of the company, have done wrong, though it may not have intended to alter the remedy in every case.] The wording of the section is clear. The procedure only applies in certain cases. It does not cover a mere omission on the part of an officer to perform some act which he ought to perform: *Wedgwood Coal Co.* [VAUGHAN WILLIAMS, J., referred to *Davies's case*, 38 W. R. 571, 45 Ch. D. 537.] In *Forest of Dean Coal Co.*, 27 W. R. 594, 10 Ch. D. 450, the late Master of the Rolls took the view that mere omission was not within section 165 of the Act of 1862. The circumstance that section 10 of the Act of 1890 was enacted subsequently to *Bentinck* v. *Fenn* and other similar cases affords a strong presumption that the Legislature intended to adopt the state of the law as the courts had up to that time interpreted it. [VAUGHAN WILLIAMS, J.—I shall not stop the case on this point, but I shall now proceed to hear the evidence of the auditors.]

Haldane then proceeded with the general case for the auditors, citing *Purves* v. *Landell*, 12 Ch. & F. 91; *London and General Bank*; and *Walker* v. *Goe*, 3 H. & N. 395, 6 W. R. C. L. Dig. 20; 4 H. & N. 350, 7 W. R. 289; and witnesses were examined.

Farwell, Q.C., and *Macnaghten*, for S. Lambert, cited the following cases: *In re Derham & Co.*, 32 W. R. 487, 25 Ch. D. 752; *Land Credit Co.* v. *Fermoy*, 18 W. R. 1089, L. R. 5 Ch. App. 763; *Barnard* v. *Bagshaw*, 3 De G. J. & S. 355, 11 W. R. Ch. Dig. 113; *Walker* v. *Goe*; *Poole's case*, 26 W. R. 823, 9 Ch. D. 322.

Yate Lee, for Macturk and Halden.

A. à B. Terrell, for Parker, cited *Wilmer* v. *McNamara*, 43 W. R. 519, [1895] 2 Ch. 245.

W. Jackson appeared in person.

Cozens Hardy replied on the whole case.

VAUGHAN WILLIAMS, J.—I think that perhaps I had better deal with the preliminary objection to my jurisdiction to entertain these claims under a misfeasance summons.

Now, the words of section 10 of the Act of 1890 are as follows:—"Where in the course of the winding up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied, or retained, or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied, or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company, by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the court thinks just." It seems to me that the word "misfeasance" covers every misconduct by an officer of the company as such for which such officer might have been sued apart from the section. The charge against the auditors here is that they, either knowingly or through the failure to use reasonable skill and care, certified accounts which ought not to have been certified. This is misconduct for which, in my opinion, either the company when solvent or the company in liquidation could have sued the auditors and recovered any pecuniary damage actually sustained by the company.

It is said that this is contrary to the *dicta* of the Lords Justices, and in particular the *dictum* of James, L.J., in *Coventry and Dixon's case*, when he said that "misfeasance" means "misfeasance in the nature of a breach of trust"—improper retention or application of the moneys or property of the company, or misfeasance by which the company's property has been improperly wasted or the company's credit improperly pledged to the pecuniary loss of the company. Now, I would first observe that this *dictum* was not necessary for the decision of the case; all that was necessary to be decided or was decided in *Coventry and Dixon's case* was, as is pointed out by Jessel, M.R., in *Flitcroft's case*, 31 W. R. 174, 21 Ch. D. 519, that an officer would not be liable to be proceeded against under section 165 of the Companies Act, 1862, unless he was guilty of some misconduct for which he might have been sued apart from the section, not, it will be observed, apart from the Act; secondly, it is to be remembered that the respondents in *Coventry and Dixon's case* were *de facto* directors, and that the Lords Justices are speaking of the liability of directors rather than of officers generally. At all events, the case of the *Leeds Estate Building Co.* v. *Shepherd*, 36 W. R. 322, 36 Ch. D. 787, is conclusive to show that the failure to use reasonable skill and diligence will render an auditor liable to an action for damages. And *Davies's case* shows that the omission or neglect by a trustee and manager of a savings bank to comply with certain statutory provisions as to audit may constitute a misfeasance within the meaning of the section. I hold in the present case that the charges against the auditors of having, through want of the exercise of ordinary skill and diligence, sanctioned accounts containing false statements do, if they are proved, and are coupled with pecuniary damage to the company, constitute a misfeasance within the meaning of this section.

I will now proceed to deal with the question of how far, on the evidence before me, the charges against the directors and auditors respectively have been proved. In my judgment it is proved that the mill was not of the value mentioned in the accounts published by the directors. I think that the figure therein mentioned purports to be value and not cost, and that the directors knew that the value of the mill, machinery, and site was not half the value mentioned in the balance-sheet, and that the respondent Pickering knew this, but not the respondent Peasegood. I think, further, that the value of the stock-in-trade was much less than that stated in the balance-sheet, to an increasing extent in each year subsequent to 1887, but that neither directors or auditors were aware of this, they having acted upon the certificate of the manager, Jackson, believing the same to be true, and Jackson having admitted that he deliberately gave false certificates. I find that the directors acted reasonably in accepting the certificate of the manager. I find, further, that on the true state of accounts, if you deduct from the assets the excess in value put upon the mill and the stock-in-trade, there were no profits out of which the dividends could be paid, and the same is true if you deduct the excess in either respect. Having found these facts, I will answer in the light of them first the question whether the directors are liable in respect of the dividends. With regard to the excess in value of the stock-in-trade, I should hold, if I were free to decide this case according to my own judgment, that a director is in no sense a trustee. The Act does not say that a director is a trustee. He is not the owner of the funds which he has to apply, and I should have thought that he might safely be treated as the paid manager and agent of the company, and might well be held not to be responsible for the misapplication of the funds of the company unless he, through want of care or fraud, misapplied those funds. If it is said that, his responsibility being thus defined, he would not be responsible if, by the direction of the shareholders, he applied the funds to a purpose which the company could not authorize because it was a purpose *ultra vires*, my answer would be that, if he did so without carelessness or fraud, he ought not to be held liable, and that if he did so, knowing that the purpose was *ultra vires*, or was careless, he ought to be held responsible, not because he is a trustee, but because the ownership of the company is limited—*i.e.*, is limited to the application of the funds to the statutory purposes, and his duty to the company as manager is not knowingly or carelessly to apply the funds to a purpose *ultra vires* of the company, even though he may have the authority of the shareholders; for a company does not seem to me, in regard to questions of *ultra vires*, to be an aggregate of the shareholders, but a substantive legal entity. I do not think that anyone can doubt that thus to define the duties of a director is more in accordance with commercial necessity and the sense of the commercial community than it is to hold directors liable to refund dividends which they have misapplied without fraud or carelessness, on the ground that legal principles compel lawyers to hold them liable in such a case as trustees or *quasi*-trustees. Nor is the view which I have suggested without high legal authority, for it seems to me that it is the basis of the decision of Chitty, J., in *In re Denham & Co.*, and of the *dicta* of James and Mellish, L.JJ., in *Rance's case*, 19 W. R. 291, L. R. 6 Ch. App. 104. James, L.J., says: "If, by placing unfounded reliance upon

the representations of their servants or actuaries, directors had arrived at the conclusion that they had made a divisible profit, this court ought not to sit as a court of appeal from that conclusion." And Mellish, L.J., says: "I quite agree that if the directors or a proper actuary had made out a profit and loss account the court ought to assume very strongly indeed that it was a correct account, and ought not, without very strong reasons showing that it was done *mala fide*, to set it aside or declare a dividend made upon it improper." It is to be remembered that, in arriving at a conclusion on the question whether a divisible profit has been made or not, the directors must, in regard to unrealized property, base their answer upon an estimate, and the judgment in *Stringer's case*, 17 W. R. 694, L. R. 4 Ch. App. 475, goes upon the assumption that directors who have exercised an honest but over-sanguine judgment are not to be held liable for the payment of dividends where events subsequently show that there were no profits out of which they could be declared. The point in *Stringer's case* was not as to the repayment of dividends, but arose on an application for an injunction.

There is, however, a considerable bulk of authority to show that directors are trustees for the company of such funds as are committed to their control in such sense that they will be liable for a misapplication of the funds which is *ultra vires* of the company independently of any proof of fraud or actionable negligence by the directors. The authorities as to the liability of directors as trustees seem to begin with the case of *National Funds Assurance Co.*, 27 W. R. 502, 10 Ch. D. 118, followed by *Flitcroft's case*, and more recently by the *Oxford Building Society's case*, 35 W. R. 116, 35 Ch. D. 502; by the *Leeds Estates Building Co.* v. *Shepherd*, and by the *Faure Accumulator Co.'s case*, 37 W. R. 116, 40 Ch. D. 141; but in no one of those cases can I find that directors were held liable unless the payments were made either with actual knowledge that the funds of the company were being misappropriated or with knowledge of the facts that established the misappropriation. Take, for example, the *Faure Accumulator Co.'s case*, in which Kay, L.J., expressly finds that no imputation whatever is to be made upon the honesty or honourable conduct of the directors, but goes on to find them liable for having committed breaches of trust in making certain payments out of the money of the company which were *ultra vires*, the purpose for which the payment was made being known to the directors, although they were ignorant of its illegality, as, indeed, were many, if not a majority, of the legal profession.

On the whole, I have come to the conclusion that there is no such bulk of authority as binds me to hold that directors who pay away the funds of the company under an honest and reasonable belief in a state of facts which would justify the payment must be held liable to replace those funds because it turns out that on the true facts the payments were *ultra vires*. Having arrived at this conclusion in law, it remains for me to inquire on this part of the case whether these directors in fact paid away these dividends in the honest and reasonable belief that the necessary profits had been earned. I have not the slightest doubt but that they honestly believed it, and that the grounds of their belief were the statements of the manager, whom they had no reason to suspect. The only matter to be urged against them is that the auditors, to their knowledge, did not comply with article 140. [His lordship read article 140, and continued:—] But, in my judgment, compliance by the auditors with the provisions of article 140 would not have led to the discovery of the fraud of the manager.

With regard to the over-statement of the value of the mill and machinery, it seems to me that, even assuming this statement to be a statement of value and not of cost, it is not, having regard to the decisions in *Lee* v. *Neuchatel Co.*, 37 W. R. 321, 41 Ch. D. 1, and *Verner's case*, L. R. [1894] 2 Ch. 239, a material misstatement so far as the declaration of the dividend is concerned, because, even assuming that to the knowledge of the directors such a depreciation in the value of the fixed capital had occurred as suggested, it would not make the declaration of the dividend *ultrà vires* nor prevent the payment of a dividend out of the excess of current receipts over current profits. It is no part of my duty to express an opinion on these decisions. I have only to follow the principles laid down within them provided I think that the facts of the present case are governed by those principles. It is true that the present case is not the case of a company formed to work a necessarily wasting property as was the case in *Lee* v. *Neuchatel Co.*, nor the case of an investment company as in *Verner's case;* but I think that this case falls within the principles of those two cases read together.

The remaining charge against the directors is that they, by the misstatement in the balance-sheet as to the assets of the company in regard to the mill and machinery and the stock-in-trade, were guilty, at all events in respect of the mill, of making a statement as to the value of the assets which they knew to be untrue, and that the company has been damaged thereby by continuing to trade on the assumption that the assets were of the value stated in the balance-sheet, and that the directors are liable to make good the losses of the company while it continued so to trade. It seems to me that the directors are not so liable, because, in my judgment, the damages are too remote, and are not proved in fact to have been the consequence of the misstatement in question. The suggestion that such damages may be treated as resulting from the overstatement of the value of the assets seems to be based principally on a passage in the judgment of Stirling, J., in *Leeds Estate Building Co.* v. *Shepherd*, but Stirling, J., arrived at no such finding in fact, and in the present case I do not think I can do so. The company, if one takes the stock-in-trade on the manager's statement and then calculates the assets with the mill, &c., at their true value, does not seem to me to have been insolvent until the last year of its existence, and it is to be remembered that so long as the mill was a going concern the mortgagees were not likely to call in their debt. I know it is said that the mortgagees would have called in the debt but for having the accounts shown to them with the inflated value of the mill, but I think that there is no proof of this in fact. I therefore hold that the directors are not liable in respect of any of the charges mentioned in the misfeasance summons. I am not sorry so to hold, because I think that the directors who held half the share capital of the company honestly tried to do their duty.

With regard to the auditors the case is more difficult. They are, of course, entitled to the benefit of my decision with respect to the dividends, so far as it is based on *Lee* v. *Nauchatel Co.* and *Verner's case*, and in regard to the remoteness of the damage, but with regard to the stock-in-trade their case is very different from that of the directors, for they certainly were not entitled to rely upon the manager's certificate if an ordinary careful examination of the books ought to have made them suspect that statement. Now, it is plain to me that if the auditors had added to the stock-in-trade at the beginning of any year the purchases of raw material in that year and had deducted therefrom the sales, they must have seen that the statement of the stock-in-trade at

the end of the year was so remarkable as to call for explanation, and they called for none. It is said that it is no part of the duty of an auditor to take stock. I agree it is not; but when it is said that it is no part of his duty to test the accuracy of the manager's certificate by a comparison of the figures in the books that require auditing I cannot agree. I think, therefore, that I must hold the auditors liable for the preference dividends which have been paid, with such costs as are applicable to this part of the case; and, having regard to the mode in which the auditors disregarded the articles as to the audit and the manner in which the audit was carried out, I do not think they ought to receive any costs. I think the directors ought to have their costs.

Jackson must be declared liable for the dividends improperly paid and the costs. If the auditors can distinguish between the costs which can be attributed to charges of fraud having been made and the costs of claims not involving a charge of fraud, they will not have to pay the former, but it will be difficult to make the distinction. The official receiver has only done his duty in making the inquiry, and will not be personally liable for any costs. He must, however, pay the costs ordered to be paid out of the assets at once, and not postpone the payment to other charges.

Solicitors, *Robbins, Billing, & Co.; Patersons, Snow, Bloxam, & Kinder; Chester, Mayhew, Broome, & Griffithes; Hicks & Son*, for *Leak, Till, & Stephenson*, Hull; *Collyer-Bristow, Russell, Hill, & Co.*

Q. B. Div.
(Lindley and Kay, L.JJ.)

Feb. 10.

REG. *v.* STEWART.
Ex parte BURNHAM. (*a*.)

Diseases of Animals Act, 1894—*Enforcement of Act—Justices—Right to prosecute—Local authority*—57 & 58 *Vict. c.* 57, *ss.* 2, 51, 52, 54, 57.

The local authority are not the only persons who have power to enforce the Diseases of Animals Act, 1894, *and the orders made in pursuance of the Act. Any person may prosecute for an offence under the Act or orders.*

Reg. *v.* Cubitt, 37 *W. R.* 492, 22 *Q. B. D.* 622, *distinguished.*

Rule *nisi* calling upon the stipendiary magistrate of Liverpool to show cause why a writ of *mandamus* should not issue commanding him to hear and determine a summons issued under an order of the Board of Agriculture, called the Animals (Transit and General) Order of 1895, made in pursuance of the Diseases of Animals Act, 1894.

The summons charged the defendant with three separate offences under the order. It was issued on the information of Burnham, who was the Secretary of the Liverpool branch of the Society for the Prevention of Cruelty to Animals. At the hearing the objection was taken that Burnham was not the proper person to prosecute. The objection was allowed and the summons was dismissed.

Section 2 of the Diseases of Animals Act, 1894, provides as follows: "The local authorities in this Act described shall execute and enforce this Act, and every order of Board of Agriculture so far as the same are to be executed and enforced by local authorities." The Council of the City of Liverpool were the local authority in the present case. The order of the Board of Agriculture contained the following provision: 30. The provisions of this order, except where it is otherwise provided, shall be executed and enforced by the local authority.

Dr. Commins showed cause.—The port sanitary authority, which was constituted by the City Council, are the sole persons who can prosecute for offences under the order of the Board of Agriculture; for, where an Act creates new offences, and at the same time prescribes a particular method of proceeding, that method only may be pursued: *Reg.* v. *Lovibond*, 19 W. R. 753, 24 L. T. N. S. 357, and *Reg.* v. *Cubitt*, 37 W. R. 492, 22 Q. B. D. 622. Section 57 of the Act provides that one half of the penalties recovered under the Act shall be paid to the person who proceeds for the same. If anyone were allowed to prosecute, the local authority would be deprived of a source of income which it was intended should belong to them: see *Cole* v. *Coulton*, 8 W. R. 412. A writ of *mandamus* is not the proper remedy. The prosecutor ought to have applied for a case to be stated or to have appealed: *Reg.* v. *Wisbech Justices*, 54 J. P. 743. They ought not now to be allowed to pursue the more expensive remedy of a *mandamus*.

Colam and *Bartley*, in support of the rule.—Section 54 provides that offences against the Act may be prosecuted and penalties recovered in the manner provided by the Summary Jurisdiction Acts; and section 55 provides that if any person thinks himself aggrieved by the decision of a court of summary jurisdiction, he may appeal therefrom to a court of quarter sessions. These sections, together with section 57, show that any person is entitled to prosecute and to sue for penalties, and that those rights are not restricted to a particular body. *Caswell* v. *Morgan* 28 L. J. M. C. 208, 7 W. R. 463; *Back* v. *Holmes*, 57 L. J. M. C. 37, 36 W. R. Dig. 108; *Walker* v. *Laxton*, 70 L. T. N. S. 690; and *Cole* v. *Coulton* are cases under other Acts in which it was decided that a private person might take proceedings to enforce the Act.

LINDLEY, L.J.—Having looked at the Act and the order, and having considered them together as one enactment, I have come to the conclusion that there is nothing in them sufficiently plain to deprive any person of the right and power to sue for the penalties under the Act and under the order. *Reg.* v. *Cubitt*, at first sight, appears to be an authority the other way. But the Act sued upon in that case was framed on different lines. There is no indication in that Act that any person had the power to sue.

Section 2 of the Diseases of Animals Act, 1894, does not in terms apply to the suing for penalties at all. That section is to be read in connection with section 34 and with the regulations of the Board of Agriculture. I do not see that either section 2 or section 34 are addressed primarily to seeing that the regulations are observed. Then we come to the penalty clauses. The language of these sections, which enable any person to sue, is most significant. Is that language elsewhere so clearly cut down as that no one but the borough council can sue? I can find no language in the Act which does so. The magistrate ought therefore to have heard the case, and the rule must be made absolute.

With regard to the second point raised, we have a discretion in the matter, and we think the application for a *mandamus* was, on the whole, the cheapest remedy.

KAY, L.J.—I am of the same opinion. When an Act imposes penalties for certain offences, and provides that those penalties are to be recovered under

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the Summary Jurisdiction Acts, that means, *primâ facie*, that anyone may take proceedings to enforce the Act, and, in order to cut down that general rule, you must find something in the Act, if not in express terms, at all events, unmistakably clear. I must say with regard to section 2 that it has nothing to do with the matter in question. That section merely describes who are to be the local authority. In section 34, again, there is nothing to indicate that the local authority is the only authority who may proceed to recover penalties. The important sections are section 51, which imposes the penalty, section 52, which describes the offences, and section 54, which provides the mode of procedure. In these sections there is nothing to indicate that no one but the borough council may prosecute, while section 57 contains a clear intimation of the real meaning of the Legislature. Half of the penalty is to be paid to the person who proceeds for the same. The object is to induce persons who know of an offence to come forward and prosecute. It is a provision with which one is familiar. But with regard to *Reg.* v. *Cubitt* there was nothing of that kind in the Act to which it referred. The other cases cited were more applicable to the present case than *Reg.* v. *Cubitt*.

Rule made absolute.

Solicitors for Burnham, *Gole*, for *Dixon & Syers*, Liverpool.

Solicitor for the defendant, *Sidney G. Polhill*.

Court of Appeal.

From Chan. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) } Feb. 28; March 3, 16.

In re HOLT & CO.'S TRADE-MARK. (*a*.)

Trade-mark — Rectification of register—Name—Fictitious character — "Trilby" in ordinary type — Patents, Designs, and Trade-Marks Acts, 1883-1888 (46 & 47 *Vict. c.* 57), *s.* 64 (1) (a), (b), (d), (e).

The names of imaginary persons are "words" within clause (e) *of section* 64 *of the Patents, &c., Acts*, 1883-1888, *and not names of "individuals" within clause* (a). *They may, therefore, be registered, though not "printed, impressed, or woven in a particular or distinctive manner."*

So held by Lindley *and* A. L. Smith, L.JJ.; Kay, L.J., *dissenting*.

Decision of North, J., ante, *p.* 269, *reversed*.

This was an appeal from the decision of North, J. (reported *ante*, p. 269).

The question was whether the word "Trilby" (the name of a chief character of a novel of that name), printed in ordinary type, was capable of registration under the Patents, &c., Act, 1888. Section 64 of the Patents, &c., Act, 1883, as amended by section 10 of the Patents, &c., Act, 1888, provides that "for the purposes of this Act a trade-mark must consist of or contain at least one of the following essential particulars: (*a*) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (*b*) a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark; or (*c*) a distinctive service, mark, brand, heading, label, or ticket; or (*d*) an invented word or invented words; or (*e*) word or words having no reference to the character or quality of the goods, and not being a geographical name."

North, J., was of opinion that the mark came within clause (*a*), and that as it was not "printed, impressed, or woven in some particular and distinctive manner," it did not satisfy the requirements of the Act, and must be struck off the register.

Holt & Co., the owners of the mark, appealed.

Swinfen Eady, Q.C., and *Micklem*, for the appellant.—Clause (*a*) is confined to individuals or firms in existence, and this mark is registerable under clause (*e*).

Sir R. Webster, A.G., and *Ingle Joyce*, for the Comptroller.—It is the practice in the office to allow the registration of the names of fictitious characters.

Vernon Smith, Q.C., and *Kerly*, for the respondents.—There is no reason for restricting clause (*a*) to existing individuals or firms. This mark comes within (*a*) and cannot, therefore, be registered under (*e*). Moreover, the mark is descriptive. [They referred to: *Harris' Trade-mark*, 9 R. P. C. 492; *Banks and James' Trade-mark*, *ante*, p. 32; *Farbenfabriken &c., Somatose case*, 42 W. R. 488, [1894] 1 Ch. 645; and *Burland* v. *Broxbourne Oil Co.*, 38 W. R. 89; 42 Ch. D. 274.]

Swinfen Eady, Q.C., replied.

LINDLEY, L.J.—This is an appeal from a judgment of North, J., removing the word "Trilby" from the register of trade-marks. The word is applied by the plaintiffs to ladies' gloves, aprons, and blouses. The question turns on the true construction of section 10 of the Patents, Designs, and Trade-Marks Act, 1888, which replaced section 64 of the Patents, Designs, and Trade-Marks Act, 1883. [His lordship read section 10, and continued:—] This section must be taken in connection with other sections of both Acts, and especially in connection with sections 68 to 76 of the Act of 1883. The decisions, however, on that portion of section 64 of the Act of 1883 which relates to fancy words and words not in common use, are inapplicable to the section which has been substituted for it, and which does not contain those words. Clauses (*a*) and (*b*), however, remain unaltered. The word "Trilby" can clearly be registered as a trade-mark. No one disputes this. "Trilby" is either the name of an individual, and within clause (*a*) of section 10 of the Act of 1888, or it is a word within clause (*e*) of that section. The difficulty is to determine which of these two it is. "Trilby" does not come within any of the other sub-sections of section 10. It may have been once an invented word within clause (*d*), but it long ago became too well known to fall under that head. On the other hand, "Trilby" is not a geographical name, nor has it any reference to the character or quality of goods. The argument that it has, is ingenious but unsatisfactory. To what character or quality does the word refer? The only answer suggested is that, when used with articles of ladies' clothing it has reference to such articles as are fit for a lady, or for such a person as "Trilby." This is too fanciful and far-fetched for any practical purpose. *In re Harris' Trade-Mark*, in which the Beatrice shoe was in question, turned on the fancy word clause in the Act of 1883, and not on the Act we have now to consider. The same observation applies to *In re Banks & James' Trade-Mark*, the "Shakespeare" cigar case. I do not think that the word "Trilby" can fall both within clause (*a*) and within clause (*e*). It must, I think, fall within one or the other, but not

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

within either at the option of the person desiring to register it. If "Trilby," or any other word, is the name of an individual within clause (*a*), it may be registered, but then it must be "printed, impressed, or woven in some particular and distinctive manner." This condition is essential to protect other persons of the same name in the right to use it in their own trade.

It was contended that a person might register his own name under (*e*), and that other persons of the same name would be protected by the proviso clause (3). But clause (3) is a proviso to clause (2), and not to clause (1), which states what may be registered. It would, in my opinion, be wrong in law to construe section 10 of the Act of 1888 as allowing a person to register under (*e*)—*i.e.*, in no particular or distinctive manner—any word which is the name of an individual within clause (*a*), and which under that clause must be "printed, impressed, or woven in some particular or distinctive manner." Such a construction would render the condition imposed by clause (*a*) nugatory. So far I agree with the judgment of North, J.

There remains, however, the real difficulty in this case, which is to determine whether the word "Trilby" is the name of an individual within clause (*a*) of section 10 of the Act of 1888. Clause (*a*) does not say that the name to be registered need be the name of a living person, nor the name of the applicant for registration. In this respect clause (*a*) differs from clause (*b*). The reference to a firm, however, points rather to real persons than to imaginary persons. In metaphorical language, an imaginary person may perhaps be called an "individual," but such a use of the word is unusual, and to my mind rather fanciful. It is hardly to be supposed that the Legislature meant "individual" to be taken in a fanciful or metaphorical sense, or meant it to denote an imaginary person who has not, and never had, any real existence. I do not think that such words as Hamlet, Sam Weller, Jupiter, Venus, &c., can be called names of "individuals" within the meaning of clause (*a*) of section 10. Such names fall within (*e*) rather than (*a*). "Trilby" is clearly a word within (*e*) unless it is the name of an "individual" within (*a*), and I am not prepared to hold it to be within (*a*). The language of (*e*) is clear; that of (*a*) ambiguous as regards the names of persons who have not, and never had, a real existence. That which is clear ought to prevail over that which is doubtful. On this point, therefore, I am unable to agree with North, J. The practice of the office has been to allow the registration of names of imaginary persons, although such names are not "printed, impressed, or woven in any particular or distinctive manner." The view taken in the office has been that such names are "words" within clause (*e*) of section 10, and not names of "individuals" within clause (*a*).

For the reasons I have given I think this view and the practice founded upon it are correct. No doubt the registration of such a name as "Trilby" would give rise to troublesome questions if a person of that name should hereafter make his appearance and wish to carry on business under his own name or to register his name printed in some distinctive manner under clause (*a*). Such questions would no doubt be avoided by deciding that such a name as "Trilby" could only be registered under (*a*). Again, to hold that such a word as "Trilby" can be registered under (*e*) is open to the objection that such a construction creates monopolies in the use of a great number of common names without imposing any condition whatever, and invites scrambles to obtain such monopolies. In this respect the Act of 1888 lets in words which were excluded by the Act of 1883, by reason of their being words in common use. On the other hand, as pointed out in the *Somatose case*, the Act of 1883, by letting in fancy words, was in some respects wider than the Act of 1888, which has left those words out and replaced them by invented words. All the court has to do, however, is to construe the words of section 10 of the Act of 1888, and of those sections of the Act of 1883 which have to be construed with it. The creation of monopolies in words was no doubt intended by the Legislature, but it is obvious, from section 10 of the Act of 1888, and from section 74 of the Act of 1883 (which relates to additions to trade-marks), that whilst on the one hand the Legislature has permitted the acquisition of monopolies in many words for trade purposes, on the other hand it has placed restrictions on that acquisition, with a view, no doubt, to lessen the inconvenience which every monopoly produces. This double object must not be lost sight of. But, after all, the true construction of the Act must be the ultimate guide in every case, and the construction which North, J., has adopted is, I think, too far removed from the ordinary meaning of the words "name of an individual" to be sustained. The appeal must therefore in my opinion be allowed, with costs.

KAY, L.J.—The question on this appeal is whether "Trilby" can be registered alone, as a trade-mark for ladies' gloves, aprons, and blouses. North, J., has held that it cannot. The question turns on the meaning of the Trade-Marks Act of 1888. That statute altered the requirements of section 64 of the Act of 1883. Section 10 of the Act of 1888 provides that "a trade-mark must consist of or contain at least one of the following essential particulars." Then there are a number of sub-sections which deal with four subjects—(*a*) and (*b*) a name of an individual or firm, (*c*) a distinctive device, (*d*) an invented word (*e*) "a word or words having no reference to the character or quality of the goods, and not being a geographical name." It is obvious that this last sub-section is not intended to include the matters dealt with by the preceding sub-sections. "Word" in this last sub-section (*e*) does not mean "name," or "invented word." These are provided for before. On any other construction the preceding sub-sections (*a*), (*b*), and (*d*), would be superfluous and unmeaning. The section is in this part of it an exact copy of section 64 of the Act of 1883, except that, instead of the words "fancy word or words not in common use," sub-sections (*d*) and (*e*) are substituted. No word, not being a name or a fancy word, could be registered alone under the Act of 1883. "Trilby" cannot be registered as a name alone, under (*a*) or (*b*), because it is not "printed, impressed, or woven in some particular and distinctive manner," nor is it the signature of the person applying to register. Nor could it be registered as an "invented word" under sub-section (*d*). It was not invented or first used by the person seeking to register it, which would seem to be necessary to obtain registration under sub-section (*d*). If "Trilby" is not a name of an individual, I cannot see how it can be a "word" under sub-section (*e*). If it is a word and not a name, it must be an "invented word," and that must be registered, if at all, under the previous sub-section (*d*). It is none the less an "invented word," because this applicant, not being the inventor, cannot register it under that sub-section. "Word" in sub-section (*e*) is contrasted with "invented word" under sub-section (*d*). In sub-section (*e*), "word" has its ordinary meaning, which, according to the dictionaries, is "a part of speech"—the expression of a mental idea or conception. A meaningless collocation of letters is not a "word" in the ordinary sense. Sub-section (*e*), contrasted with sub-section (*d*), seems to me not to apply to anything

which would not come within the ordinary signification of a "word."

Now, unquestionably, "Trilby" is a name. Otherwise it has no meaning whatever. It is the name of an individual? It is the name of a person in fiction. It is a personal name. It is not like the name of a heathen diety, as suggested. It is used as the name of a supposed human being. In that sense it is the "name of an individual." There is no evidence that it was ever the name of a living person. If it ever was I do not see that it would be possible to say that it was not the "name of an individual." "Name of an individual," as used in the Act of 1888, means, I think, a personal name, as distinguished from the name of a plant or an animal. If it is a personal name it cannot be registered, unless it is "printed, impressed, or woven in some particular and distinctive manner." When the name of a fictitious person is brought in for registration, is there to be an inquiry whether anyone has borne the name? And, if not, is it to be treated, not as an "invented word," but as a "word" which may be registered under sub-section (*e*)? We are told that it is the practice to put names like this on the register. But I believe this is the first time this question has been brought before the court, and we must decide what is the true effect of the statute in such cases. On the whole, my opinion is that "Trilby" is a "name of an individual," and that, to entitle it to registration, it must be "printed, impressed, or woven in some particular and distinctive manner." If this were not so, I should think it was an "invented word," which, however, this applicant could not register because he was not the inventor nor the person who first used it. But I do not think that an "invented word," which cannot be registered under sub-section (*d*), can come within sub-section (*e*) and be registered as a "word" under that sub-section.

The result is that I agree with North, J., and think that this word should be removed from the register.

A. L. SMITH, L.J.—The question in this case is whether the word "Trilby," printed in ordinary black type, can be registered as a trade-mark for gloves, ladies' blouses, and ladies' aprons, and this depends upon the true construction of section 10 of the Patents, Designs, and Trade-Marks Act, 1888, sub-sections (*a*), (*b*), and (*e*). This section is as follows: "For section 64 of the principal Act" (that is, the Patents, Designs, and Trade-Marks Act, 1883) "the following section shall be substituted—namely, 64 (1): For the purposes of this Act a trade-mark must consist of or contain at least one of the following essential particulars." This I read as meaning that if a proposed trade-mark has one of such essential particulars it may be registered as a trade-mark; *aliter* if it has not. [His lordship read clauses (*a*), (*b*), (*c*), (*d*), and (*e*), and continued:—] One of those five particulars it must have. Now, into which of those five cases, if any, does "Trilby" fall? First, is it a name of an individual or firm within sub-section (*a*)? If it is, then, in my judgment, it cannot be registered as it is registered, because, as I read sub-section (*a*), if it be the name of an individual or firm within the meaning of that sub-section, it must be "printed, impressed, or woven in some particular and distinctive manner," which it is not. It is clearly not within (*b*), for it is not a "written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade-mark." I may say at once that "Trilby" does not fall within (*c*)—*i.e.*, "a distinctive device," nor, in my judgment, within (*d*), for it is not a word coined for the first time by the owner of the trade-mark, for it was used by Du Maurier in his book in 1893, and was therefore not an invented word in 1895, when the appellant registered his trade-mark: see the *Somatose case*.

The real question, to my mind, is, Does "Trilby" fall within (*a*), and, if not, within (*e*)? In my judgment, if it falls within (*a*), it does not fall within (*e*); but, if not, then it does fall within (*e*). North, J., has held that the true reading of this section 10 is that sub-sections (*a*) and (*b*) are the sub-sections which alone deal with names, and in reality he reads sub-section (*e*) as if it ran "a word or words other than a name having no reference to the character, &c., of the goods," and he holds that "Trilby" is a name and therefore a trade-mark *per se* within (*a*) and cannot come within (*e*), for such sub-section does not embrace names of any sort at all. With all respect I cannot read this section in this way, for it is inserting words which are not to be found in the sub-section, and which, in my opinion, need not be inserted in order to make sense of the whole section. I read the phrases "individual or firm" in sub-sections (*a*) and (*b*) as indicating the same thing, that is, the name or written signature of a real human being or a real firm. It seems to me that the same construction must be placed upon the words "individual or firm" in sub-section (*a*) as in sub-section (*b*)—indeed it is not admissible to read them otherwise; and how sub-section (*b*) can be read to embrace the name of an unreal person, which "Trilby" is, or of an unreal firm, I do not see. The words of sub-section (*b*) are a "written signature of the individual or firm apply for registration thereof as a trade-mark." This clearly must mean a real individual, for how can a fictitious person or fictitious firm apply for the registration of a trade-mark? As it is quite impossible, in my judgment, to make "Trilby" fall into sub-section (*b*) as being an individual as therein designated, so it appears to me equally impossible to make "Trilby" fit into sub-section (*a*). In my judgment these two sub-sections do not embrace fictitious names such as emanate from the pen of novel writers or from the creative brain of other composers, and this being what the name of "Trilby" is, it does not fall, in my opinion, within sub-section (*a*). That the name of "Trilby" is a word I do not doubt. It is nothing more nor less than a fictitious fancy name—*i.e.*, a word. Is it then a word having reference to the character or quality of the goods, or is it a geographical name? I agree with North, J., in this, and I say it is neither. Then why is it not within sub-section (*e*) of section 10? In my judgment sub-section (*e*) embraces a name which does not fall within sub-section (*a*), and as "Trilby," for the reasons which I have given, does not fall within (*a*), and as it has the essential particulars named in sub-section (*e*) of being a "word" having no reference to the character or quality of the goods and not being a geographical name—I would point out that geographical names are dealt with in sub-section (*a*)—I think that "Trilby" is a good trade-mark within sub-section (*e*), and for these reasons I think that this appeal should be allowed.

Appeal allowed.

Solicitors, *Sharpe, Parker, Pritchards, & Barham*, for *W. A. Jones*, Manchester; *Solicitor to the Board of Trade; Le Voi.*

From Chan. Div. (Lord Herschell; and A. L. Smith and Rigby, L.JJ.) Nov. 29; Dec. 7; Feb. 3.

JAMES v. BUENA VENTURA NITRATE GROUNDS SYNDICATE (LIMITED). (a.)

Company — Shares—New Shares—Allotment—"Member"—Right of representative of deceased member—Companies Act, 1862, Table A, article 27.

In 1891 a special resolution of the defendant company was passed and duly confirmed increasing the capital of the company by the creation of new shares, and authorising the directors to issue such shares. On the 21st of April, 1893, a special resolution of the company was passed that the new shares should be offered for allotment at par to the members of the company who, at the date of the confirmation of the resolution, should be the registered holders of the fully paid-up shares of the company. This resolution was duly confirmed on the 11th of May, 1893. The company was one to which Table A applied.

The plaintiff was the executrix of a member of the company who was living at the date of the special resolution increasing the capital, and was, therefore, by virtue of article 27 of Table A, entitled to the offer of a proportion of the new shares, but who died in 1892, i.e., before the actual issue of the shares pursuant to the special resolution passed in April, 1893. On the 11th of May, 1893, circular letters were addressed to the shareholders calling upon them to state within ten days whether they wished to take the new shares to which they were entitled. One of these letters was addressed to "the executor" of the deceased member at an address which was not the registered address of the deceased member, and the letter never reached the plaintiff.

In May, 1894, the plaintiff became aware of the allotment of the new shares, and applied for the allotment to her of the shares to which the deceased member would have been entitled. The disposal of these shares had been deferred, and they were still in the hands of the company. The deceased member's name was still upon the register of shareholders.

Held, that the plaintiff was entitled to an allotment of the deceased member's proportion of the new shares.

Appeal by the plaintiff from the decision of Chitty, J., refusing to order certain shares in the defendant company to be allotted to the plaintiff. The facts are fully set out in the judgment of Lord Herschell.

Byrne, Q.C., and *R. J. Parker*, for the plaintiff.—When the resolution sanctioning the increase of capital was passed, H. B. James was a member of the company, and he is consequently a "member" within the meaning of article 27 of Table A. The company could not, without first altering article 27, make a different allotment from the one thereby provided for. The shares are still at the disposal of the company and the delay has not prejudicially affected the position of the company. *In re Bowling and Welby's Contract*, 43 W. R. 417, [1895] 1 Ch. 663, merely decided that representatives of deceased members were not members within section 199 of the Companies Act, 1862.

They referred also to *Imperial Hydropathic Hotel Co., Blackpool*, v. *Hampson*, 31 W. R. 330, 23 Ch. D. 1; *In re Agriculturist Cattle Insurance Co., Baird's Case*, 18 W. R. 1094, L. R. 5 Ch. App. 725; and *New Zealand Gold Extraction Co.* v. *Peacock*, [1894] 1 Q. B. 622.

Farwell, Q.C., and *Method*, for the respondents.—It was not necessary to alter article 27, for if a company has power to abrogate an article *in toto*, as it has under section 50 of the Companies Act, 1862, it must have power to do so for a special occasion: *In re Bank of Hindustan, China, and Japan, Hippisley's Case*, 22 W. R. 113, L. R. 9 Ch. App. 1. "Member" means *primâ facie* a living person, not a dead one. Article 13 of Table A provides for representatives of deceased members being registered as members. As to the letter, we did the best we could and the plaintiff must be taken to have received it: *Household Fire and Carriage Accident Insurance Co., Limited*, v. *Grant*, 27 W. R. 858, 4 Ex. D. 216; *Henthorn* v. *Fraser*, 40 W. R. 433, [1892], 2 Ch. 27.

Byrne, Q.C., in reply.—It is very unfair that a "member" should include a member whether living or dead when the case is one of liability, and should refer only to a living member when an advantage attaches to the membership.

Cur. adv. vult.

Lord HERSCHELL.—In this case the plaintiff claimed a declaration that, by virtue of a special resolution passed at a meeting of the defendant company held on the 21st of April, 1893, and confirmed at a meeting held on the 11th of May 1893, the plaintiff as the legal personal representative of Harry Berkeley James, deceased, is entitled to an allotment at par of fifty of the 500 shares of £10 each in the capital of the company directed to be offered for allotment by that special resolution; and an injunction restraining the defendant company and its directors from allotting or otherwise disposing of the said 500 shares without allotting to the plaintiff or her nominees fifty of such shares.

At an extraordinary general meeting of the members of the company held on the 2nd of March, 1891, a special resolution was passed, which was duly confirmed on the 28th of July, 1891, in the following terms:—"That the capital of the company be increased to £15,000 by the creation of 50 new shares of £100 each, and that in pursuance of article 26 of Table A appended to the Companies Act, 1862, the directors be and they are hereby authorized to issue such shares." It may be well here to state that, with a few modifications which it is not necessary to specify, the articles contained in Table A applied to this company. Article 27 of Table A provides that "subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company." No direction to the contrary was given by the meeting which, by the resolution referred to, sanctioned the increase of capital. At the time the resolution was passed and confirmed, Mr. James was registered as a member of the company owning ten shares. The effect, therefore, of article 27 was to entitle him or the person who should at the time of the issue of the new shares be his successor in title to those ten shares, to an offer of his proportion of the new shares.

On the 6th of March, 1893, a special resolution was passed, which was confirmed on the 24th of March following, adding a clause to the articles of associa-

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

tion of the company, empowering it by special resolution to divide its capital by sub-division of its shares into shares of a smaller amount than that fixed by the company's memorandum of association.

On the 21st of April, 1893, the following special resolution was duly passed, which was duly confirmed on the 11th of May, 1893:—"That the share capital of the company, which now consists of shares of £100, be sub-divided into shares of £10 each, and that each of the 100 existing fully paid-up shares of £100 be divided into ten fully paid-up shares of £10 each, and that each of the 50 existing shares of £100 each on which nothing has as yet been paid be divided into ten unpaid shares of £10 each, and that such last-mentioned shares be offered for allotment at par to the members of the company who, at the date of the confirmation of this resolution, shall be the registered holders of the fully paid-up shares of the company, and in the proportion of one unpaid share for every two fully paid-up shares, and that any shares which may not be capable of being so allotted, or which may not, within a time to be prescribed by the directors, be accepted by the members holding fully paid-up shares, be allotted to such persons in such manner and on such conditions as the directors may from time to time prescribe."

A good deal of argument was addressed to us on the question whether this resolution sanctioned a different allotment of the shares from that provided for by article 27, and, if so, whether it was competent by a special resolution to sanction a departure from the provisions of article 27 without having first by a special resolution duly altered that article. I am not satisfied that it would be competent for the company thus to act. It is unnecessary, however, to decide the point, as I do not think that the resolution of April, 1893, prescribes any different mode of allotment from that provided for by article 27. The words used in the resolution—"the members of the company who, at the date of the confirmation of this resolution shall be the registered holders of the fully paid-up shares of the company"—appear to me aptly to describe the members entitled to an offer of the shares under the resolution sanctioning the increase of capital, when read with article 27. The words cover the persons who were members at the time when the resolution for an increase of capital was passed, and any persons who at the time of its issue were the successors in title of such members. On the 21st of April, 1893, at a meeting of the directors of the company, the secretary was instructed to send a circular to the shareholders, asking them to state immediately, in anticipation of the resolution to divide the shares being confirmed at the meeting to be held on the 11th of May, whether they would wish to subscribe for the new shares which would be offered first to them, for the space of ten days—viz., till the 21st of May—and requesting them to state within that period if they wished to take the shares to which they were entitled, informing them at the same time that, if by the 21st of May they had not applied for the shares, the directors would proceed to allot them as they thought right. Accordingly, on the 11th of May, a circular letter to that effect was sent by the secretary to the members. It is to be taken as a fact that such a circular was sent addressed to "the executor of the late H. B. James, 23, Leadenhall-street." It is denied that any such letter was received by, or came to the knowledge of, the plaintiff, and I think this also must be taken to be the fact. The registered address of Mr. James in the books of the defendant company was "9, Gracechurch-street." It appears that this was the address of the San Jorge Nitrate Co., who were in the habit of receiving letters for him, and that they had changed their offices prior to May, 1893, to 23, Leadenhall-street.

On the 24th of May, 1893, a meeting of the directors of the defendant company was held, at which it was resolved to allot the shares applied for and to issue certificates to the allottees, and to defer the disposal of the shares unapplied for (being the proportion to which Mr. H. B. James, deceased, would have been entitled). Mr. James died on the 22nd of July, 1892. His will was proved on the 3rd of March, 1893. The probate was not produced to the secretary of the defendant company until December, 1894. The delay was due to accidental circumstances, for which no blame can be attributed to the plaintiff, the executrix. On the 21st of May, 1894, the solicitor for the plaintiff, having just before then ascertained that there had been the allotment of new shares referred to, applied for an allotment to her of the shares to which she was entitled. The proportion of the new shares claimed still remained unallotted, but the company refused to make any allotment to her; hence the present action.

Chitty, J., decided against the plaintiff on the ground that at the time the resolution of April, 1893, was passed, Mr. James, being dead, was no longer a member of the company. It is no doubt the fact that, strictly speaking, although Mr. James's name was still on the register, he was not, being dead, a member of the company. It seems to me, however, perfectly clear that the word "member," as used in some of the articles of the company, must be held to include those whose names are on the register, though they are no longer living. The article, for example, which in the case of this company is substituted for article 72 of Table A, authorizes the directors to distribute the profits of the company "between the members" by way of dividend. It cannot be doubted that they would be warranted in paying the proportionate share of the profits to the representative of a deceased member, although the word "member" only is used, and that such representative would be entitled to claim that dividend. For this purpose the deceased member must still be regarded as a member within the meaning of the article. In a somewhat similar case James, L.J., said "the estate is the member." This is, of course, a metaphorical expression, but it sufficiently indicates the legal situation of the parties. Again, where a liability arises with respect to the shares—as, for example, where a call is made on the "members"—it seems equally free from doubt that the liability attaches to the estate of the deceased member, and must be discharged by his representative, even though, being deceased, he is no longer, strictly speaking, a member of the company. Other instances might be cited where the articles require this effect to be given to the use of the word "member," but those I have given will suffice. I can see no sufficient reason why the estate of a deceased member should be subject to the burdens of membership and should not have every pecuniary benefit accruing to the shares in respect of which he is registered.

It is said that there may be a greater difficulty, where the benefit is of the nature of an offer to be made to the holder of shares, in making that offer to the legal representative of a member, than to the member himself. But, even if this be so, I do not think it is a sufficient reason for denying to the estate of a deceased member an advantage which is offered to all the other persons who are members of the company, whilst continuing to hold that estate liable to all the burdens attaching to the shares registered in his name. In the present case the offer of the shares was to remain open to the shareholders entitled to an

allotment for ten days, if they applied for an allotment within that time. The notice conveying the offer was not sent to the registered address of the deceased member. Even if this would have been sufficient, had better means of communication with his representative been known, I am not satisfied that it would have sufficed where, as in this case, the company had, prior to the date of the resolution, been in communication with the solicitor of the executrix with reference to other matters relating to the shares of the deceased. It is not necessary to decide what would have been the rights of the parties supposing the company had sent by post a letter containing the offer directed to the representative of the deceased at his registered address, or directed to the place of abode or business of such representative or her solicitor, and, not having received an answer applying for the shares within the time limited, had proceeded to dispose of them otherwise.

In the present case the shares are still at their disposal, and I do not see that they have in any way acted to their prejudice on the assumption that the shares would not be applied for. For the reasons I have given I think the plaintiff was entitled to have the offer of shares, which was made to the members of the company, made to her also. As soon as she became aware of this right she elected to exercise it, and I think that, the shares not having been in any way disposed of by the directors, they were bound to allot them accordingly.

RIGBY, L.J., after stating the facts said:—It will be seen that this resolution (the resolution passed on the 21st of April and confirmed on the 11th of May, 1893) is in no sense a resolution sanctioning, within the meaning of article 27, the increase of capital, nor does it purport upon the face of it to alter article 27. This resolution, however, is not necessarily inconsistent with article 27. The registered holders of shares at the date of the confirmation of it must necessarily have been the same persons as, or successors in title of, the persons who were members when the resolution sanctioning the increase of capital became operative; giving the same meaning to the word "members" in each resolution, the persons indicated as being entitled to an option would be the same. But, even if this were not so, no majority of the shareholders, even by special resolution purporting to alter the regulations of the company, could retrospectively affect, to the prejudice of non-consenting owners of paid-up shares, the rights already existing under article 27. At the date of the confirmation of the last in date of the resolutions, the name of Mr. James still appeared upon the register of members as the holder of the ten fully paid-up shares which he held when the resolution sanctioning the increase of capital was passed, and under both special resolutions five £100 shares out of the new capital, or fifty £10 shares into which they were sub-divided, would have to be offered in respect of those fully paid-up shares, unless his death in the meantime had set those shares free to be otherwise disposed of by the directors.

The plaintiff had proved James' will before April, 1893, but it had been necessary to send out the probate to the Argentine Republic, and without any default on her part it was not produced to the company until December, 1894. In May, 1893, the death of Mr. James was known to the company, and the secretary sent to the address of a company in which Mr. James held shares, though it was not his registered address for the purpose of the articles, a circular addressed to the executor of the late Mr. James, but the circular never reached Mrs. James. Similar circulars were sent to all the members, and all prescribed a limit of ten days for them to come in and exercise the option of taking new shares, and as the option was a valuable one all of them claimed their proportion of shares, and on the 24th day of May, 1893, 450 out of 500 new £10 shares were allotted, and the fifty which would have gone to Mr. James, if he had been alive, were reserved, and had not been dealt with when Mrs. James for the first time heard of the allotment of new shares and applied for an allotment to her in May, 1894.

The real question is whether the provision of article 27 of Table A for offering the new shares to members, is intended to be confined to members in the stricter sense of the word, or whether it may not include the representatives of deceased members.

Speaking generally, the executors of a deceased member of a limited company as representing the estate, are entitled to all the profits and advantages attaching to the shares belonging to their testator, and subject to all the incidental liabilities, although in terms such profits, advantages, and liabilities would seem to attach to members only. Thus, under article 72 of Table A, which provides that the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares, it would be difficult to hold that the estate of a deceased member, and his executors as representing his estate, are not entitled to a proper proportion of dividend, though the executors may not be themselves registered members. So it could hardly be contended that under article 4, providing that the directors may make calls upon the members, the estate of a deceased member, and his executors as representing that estate, are not liable to bear calls made after his death, so long as his share remains untransferred. The liability for calls exists, notwithstanding the fact that the required notice cannot effectually be given to a dead man, because it may be given to his representatives; though, if the company is not aware of his death, notice served at his registered address is sufficient when the articles provide for such service upon members: *New Zealand Gold Extraction Co.* v. *Peacock*.

In all these cases the result is arrived at by treating the word "member" as including deceased member so long as his name is on the register, or, what comes to the same thing, treating the estate of the deceased member as being a member for the purpose both of profit and liability: *In re Agriculturist Cattle Insurance Co., Baird's Case*. In my judgment a similar construction should be applied to article 27 of Table A; with the result that the estate of Mr. James, as represented by his executrix, who is now registered owner of his paid-up shares, is entitled to an allotment of the fifty new £10 shares reserved in May, 1893.

The main argument against the construction arises from the possible inconvenience to the company arising from delay in communicating with the personal representatives of deceased members. There may be cases in which it would be a hardship on a company not to be able to dispose of shares which would have gone to the estate of a deceased member, where loss would arise from postponing the allotment, but no such case arises here, and it would be quite easy to provide for such cases when sanctioning the increase of capital, and the mere fact that such an inconvenience may arise, does not appear to me to afford a sufficient reason for construing article 27 in such a manner as to produce inequality instead of equality among the holders of shares. A. L. SMITH, L.J., has read and concurs in this judgment.

Appeal allowed.

Solicitors, *Parker, Garrett, & Parker*, for *F. F. Clarke*, Walsall; *Budd, Johnsons, & Jecks*.

From Chan. Div. (Lord Herschell; and A. L. Smith and Rigby, L.JJ.) — Nov. 21, 22, 23; Dec. 18.

In re DALMEYER. (*a*.)

Will — Advances — Hotchpot — Interest chargeable on advances as from period of distribution only.

The testator gave to his sons in succession an option exerciseable after twenty-one, to succeed to his business, the son electing to succeed to be debited with the value thereof; and gave his residuary estate to trustees upon trusts for conversion. The testator empowered his trustees until the period of distribution to apply income of the residuary trust estate for the maintenance, &c., of his children, and directed the surplus income to be accumulated for a term of years, and upon the determination of such term he directed his trustees to stand possessed of the trust estate for his children then living and the issue per stirpes *of deceased children. He also empowered his trustees to advance his sons out of capital, any sums so advanced to be taken in part satisfaction of each son's share.*

Held, that no interest was chargeable until after the period of distribution (1) *in respect of the value of the business against the son who succeeded to it; nor* (2) *in respect of advances made out of capital to another son* (Rigby, L.J., *dissenting on the second point*).

Appeal from a decision of Kekewich, J.

The testator Dalmeyer, was at his death carrying on business as an optician at 19, Bloomsbury-street, London; he was seised of a mansion and grounds at Hampstead, and possessed of personal estate of considerable value.

By his will dated the 18th of February, 1880 (divided into numbered clauses), after certain specific bequests the testator, by clause 3, declared that his sons Thomas, Sydney, and Owen should have the option in succession according to seniority after attaining twenty-one years, of succeeding to his business of optician, and in the said clause 3 was the declaration following:—"And I declare that immediately on any son of mine electing to succeed to such business, the whole of the said business and the capital thereof, and the stock-in-trade, machinery, plant, and effects employed therein, and the benefit of all contracts subsisting, and all book debts due to me in respect thereof at the time of my decease, and the lease of the messuage, offices, and buildings situate at No. 19, Bloomsbury-street aforesaid, in which the said business is carried on, and the office and other furniture and effects used for the purposes thereof shall, subject to, and charged with, the contingent payment thereout hereinafter mentioned, belong to him, and he shall be debited with the value thereof estimated in such manner as my trustees shall think fit in the division of my residuary estate, and in case such value shall exceed the total amount of the expectant share of such son in my residuary estate estimated in manner aforesaid at the time such option is declared, he shall refund such excess to my residuary estate by instalments or otherwise in such manner and at such time or times as my trustees shall determine."

By clause 5 the testator bequeathed certain pecuniary legacies including the following legacies:—"To my son who shall elect to succeed to my said business, the sum of £500 to be paid to him as soon as may be after he shall have declared such election and commenced to carry on my said business"; and "Unto and equally between such of my children (except the son who shall elect to succeed to my said business) as being sons attain the age of twenty-five years or being daughters attain the age of twenty-one or marry under that age, the sum of £4,000." Then followed a direction that the legacy of £4,000 should carry interest at 5 per cent. per annum to be applied by his trustees at discretion in or towards their respective maintenance and education during minority and as to sons in or towards their maintenance, education, or benefit until they should attain the age of twenty-five, and the testator authorized his trustees at any time after any of his said sons should have attained the age of twenty-one years to advance either the whole or any part of his then expectant share in the said legacy of £4,000 in or towards establishing him in business.

Clause 7 contained a devise and bequest of all the testator's real estate and all his personal estate not otherwise disposed of by his will or any codicil thereto to his wife and other trustees upon trusts for sale and conversion, with a declaration that his sons Thomas, Sydney, and Owen should have the option in succession of purchasing his mansion and grounds called Sunnyfield at a price calculated at three-fourths of the amount of valuation to be made as therein directed.

The testator by clause 8 directed that his trustees should out of the moneys to arise from the sale and conversion of or forming part of his residuary estate pay his funeral and testamentary expenses, and debts, and legacies, and the legacy duty therein mentioned, and should invest the residue of such moneys in the investments therein mentioned; and should (clause 9) out of the income of the said trust premises (meaning thereby the investments arising from the sale and conversion of his residuary estate) pay to his wife, whilst his widow, an annuity of £600 reducible to £100 on her marrying again.

Clauses 11, 12, and 13 were as follows. Clause 11: My trustees may, at their discretion, at any time or times before the period of distribution hereinafter mentioned, apply out of the surplus income of of the said trust premises in or towards the maintenance or education of any son or daughter of mine such yearly sums, and in such manner as my trustees shall think fit, all sums so advanced for the maintenance or education of any son or daughter of mine who shall have attained the age of twenty-one years to be taken in part satisfaction of the share to which he or she or his or her issue may respectively become entitled of the said trust premises. Clause 12: My trustees may invest in their names the surplus income of my said trust premises after satisfying the said annnuities, and the discretionary power next hereinbefore contained, and all expenses incident to the execution of the trusts of this my will, upon such securities as are hereinbefore specified, with the like power of transposition, and by similar investments shall accumulate at compound interest the resulting income for the term of twenty-one years from my decease, if any child of mine shall so long live and be under the age of twenty-one years, and shall, upon the determination of the said term upon the attainment of the age of twenty-one years by my youngest living child (which determination is hereinafter referred to as the period of distribution), stand possessed of the said trust premises with the accumulations thereof (subject to such of the trusts hereinbefore contained as shall then be subsisting) in trust for my child or children living at the period of distribution, and the issue then living of any child or children dying before such period, such objects to take as tenants in common according to the stocks and not to the number of individuals composing the class, the shares of children to be paid immediately, and the shares of other issue being males at the age

(*a*.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

of twenty-one years, or being females at that age or marriage. Clause 13: My trustees at any time or times before the period of distribution may apply out of the capital of the said trust premises any sum or sums of money not exceeding in the whole one-half of the capital share in or towards the establishment of each or any son of mine in any profession or business to be approved of by my trustees, or his advancement in the world in any other manner which may appear to them expedient, the sums so advanced to be taken in part satisfaction of the shares to which my said sons or their issue may respectively become entitled of the said trust premises.

The testator died on the 30th of December, 1883, and his will was proved by his widow on the 15th of February, 1884.

He left five children—viz., the sons, Thomas, Sydney, and Owen, mentioned in his will, and two daughters. Thomas, the elder son, was born in 1859, and therefore attained the age of twenty-one in his father's lifetime.

The youngest child, a daughter, was born in 1873, was about ten years old when her father died, and attained the age of twenty-one in 1894. Thereupon the term of twenty-one years during which accumulations were directed to be made came to an end, and the residuary premises, comprising a considerable sum arising from accumulation of income, became distributable.

In 1884 Thomas, the eldest son, under the provisions of clause 3 of the will, elected to succeed to the testator's business, and the value of the business and assets was ascertained by the trustees at a sum of about £15,000, which did not exceed the total amount of the expectant share of Thomas in the residuary estate at the time when the option to succeed was declared.

Sydney, the second son, had received in three separate sums £8,200 under the power of advancement contained in clause 13; and the younger children, or some of them, had received, since attaining twenty-one, certain sums under the power of advancement contained in clause 11.

The questions raised on the appeal were whether Thomas, Sydney, and the younger children respectively were to bring into hotchpot any and what interest on the value of the business and the advances.

Kekewich, J., decided that the capital sums only were to be brought into hotchpot.

It was conceded on the appeal that interest on all the sums must be brought into account as from the date when the residuary estate ought to have been distributed—that is to say, from the date of the youngest child attaining twenty-one—and that the order appealed against must to that extent be varied.

The contest was therefore confined to the periods which elapsed before that date.

Renshaw, Q.C., and *Sargeant*, for the appellants, referred to the following cases: *Hilton* v. *Hilton*, L. R. 14 Eq. 468, 21 W. R. Dig. 281; *Ackroyd* v. *Ackroyd*, L. R. 18 Eq. 313; *Field* v. *Seward*, 5 Ch. D. 538, 25 W. R. Dig. 311; *In re Rees*, *Rees* v. *George*, 29 W. R. 301, 17 Ch. D. 701.

Bramwell Davis, Q.C., and *Percy Wheeler*, for Thomas Dalmeyer, argued that as no child took a vested interest until the period of distribution, interest was not chargeable prior to such period.

Warrington, Q.C., and *B. Horsbrugh*, for Sydney Dalmeyer.

Rowden, for the trustees of the will.

Renshaw, Q.C., replied.

Lord HERSCHELL.—In this case two questions arise upon the construction of the will of Mr. Dalmeyer. The first turns upon a bequest by which his sons, in order of seniority, after attaining twenty-one were to have the option of succeeding to his business of an optician, such option to be intimated by notice in writing to his trustees and executors. [His lordship referred to the will, and continued:—] One of the testator's sons exercised the option of succeeding to the business. The value of the business at the time he declared his option did not exceed the total amount of his expectant share in the residue, so that no payment fell to be made by him. The time of distribution having now arrived, he has of course to be debited with the value of the business in the division of the testator's residuary estate. It is contended that he should also be debited with interest upon the sum representing that value from the time when he succeeded to the business. I can find nothing in the will to justify such a conclusion. The testator has expressly defined what the position of a son taking the business is to be. The value of the business is to be ascertained at the time he declares his option, the amount of his expectant share in the residuary estate is to be also then determined. If the value of the business exceeds the amount of such expectant share he is to refund the excess to the trustees at such times and by such instalments as the trustees may determine. The business is to belong to him on these terms, and I can see no warrant for adding the further term now contended for.

The other question which arises has reference to a claim to debit interest upon advances made to one of the testator's sons. [His lordship referred to clause 13 of the will, and continued:—] Advances were made to one of the sons from time to time, amounting in the whole to £8,200. It is not disputed that he must be debited with these in part satisfaction of the share to which he is entitled; but it is contended that in addition to this, he ought to be debited with interest on those advances from the time they were respectively made. The contention is based on the fact that the testator directed the accumulation of the surplus income of the whole of the trust premises; that the advances made, diminished *pro tanto* the amount of the trust premises bearing interest, and consequently the accumulations; and that if the son who received advances is allowed to have an equal share of the accumulations, he will obtain an advantage over his brothers and sisters, while the scheme of the testator was that there should be equality. If the contention be tenable I think it follows that the son receiving advances must be debited with compound interest on the sums advanced and not simple interest merely; if this be not done the equal treatment which is alleged as the justification for debiting interest, will not be secured.

I think the matter in controversy must be determined by a study of the language used by the testator. No case was cited in which any rule was laid down governing the present case.

In the case of *In re Rees*, *Rees* v. *George* the authorities with reference to debiting interest on sums advanced, were reviewed by the late Master of the Rolls. The attempt there made was to debit a child with interest in respect of sums advanced during the father's lifetime, and which were to be brought into hotchpot upon the distribution of the estate. The Master of the Rolls decided that interest ought to be debited from the period of distribution only. I can find nothing in that decision, or in the language of the Master of the Rolls, when read as it must be in connection with the point he was then considering, which supports the appellant's contention. I feel free,

therefore, to allow myself to be guided by what appears to me the intention of the testator as indicated by the language he has used, untrammelled by any technical rule.

The first observation I have to make on the words of the will is that it prescribes only that the sums advanced are to be taken in part satisfaction of the shares to which his sons may become entitled in the trust premises. It does not provide that the sums advanced "with interest thereon" shall be thus taken in part satisfaction. I turn then to the clause which ascertains the share to which the children are entitled. It no doubt directs the investment of the surplus income of the whole residuary estate, and its accumulations at compound interest; but this must be read subject to the clause immediately following which sanctions the diminution of the trust premises to the extent of the sums advanced under its authority. They then cease to bear any income which the trustees can invest. The surplus income which is to be invested and accumulated must, in my opinion, refer to the income of the trust premises which the trustees receive. When the period of distribution arrives the trustees are to stand possessed of "the said trust premises with the accumulations thereof" in trust for his children. This, I think, must mean the accumulations actually in the hands of the trustees as the result of their investment and accumulation of the surplus income. I cannot see any warrant for treating the sums advanced to a son as if they had continued part of the trust premises vested in the trustees the income of which was to be accumulated and so added to the actual accumulations as a condition of allowing the son, who has received the advances, to share equally in the accumulations with the other children.

Of course the same result in a matter of figures might be arrived at in other ways than by debiting compound interest on the advances. It was suggested during the argument that the accumulations ought to be regarded as accretions to the expectant shares of the several children; and that as from time to time advances were received by one of them, his interest in the accumulations ought to be treated as *pro tanto* diminished: but this is not in my opinion the scheme of the will. The persons who are to share in the division of the trust premises and the accumulations thereof are to be ascertained only at the period of distribution. I quite admit that the conclusion at which I have arrived does involve some inequality of treatment. The son who has obtained advances will be placed in a position of advantage as compared with the other children; but I am not satisfied that the testator did not so intend. When a father makes advances to some of his children during his lifetime it is conceded that, though the sums advanced are to be taken into account, when he has directed division amongst his children of his residuary estate, no interest is to be debited in respect of the advances. Yet in that case the result is that there is not complete equality of treatment. The child who has obtained the advances may have had the use of the money many years before the other children receive anything; and it may not unreasonably be presumed that if the father had retained the money and received the income thereof, the estate left by him for distribution would have been greater. In the present case, having postponed the division of his estate for a lengthened period, it seems to me that he may have intended to put his trustees in *loco parentis* so far as advances to his children were concerned, and that these advances should be treated in the same manner as if made by himself. I do not dwell upon this or assert that it was his intention. I only give it as a reason why I am not prepared to depart from that which I understand to be the meaning of the provision which the testator has inserted in his will. Moreover, I think that it would not in all cases necessarily secure fair treatment if effect were given to the contention of the appellants. It may be that no injustice would be done, where as in the present case an adult child receives advances; but the clause which authorizes these advances is not limited to such a case. It would apply equally where the trustees paid a sum of money for the purpose of apprenticing an infant or establishing him in some profession or business; and I can well conceive hardship arising in such a case, if interest could be debited in respect of such advance in the manner proposed. For these reasons I think that the judgment should be affirmed and the appeal dismissed.

A. L. SMITH, L.J., stated the facts, and proceeded:—Now, taking the will it seems to me clear that the testator has not directed that Thomas is to be debited with interest upon the value of the business to which he had succeeded when the time came for the division of the residuary estate. The words are "he shall be debited with the value thereof" and in case "such value" shall exceed—as I read it—what is coming to him when the residuary estate is divided, then he is to refund such excess in such way as the trustees may direct. There is not a word about his being debited with interest, when the division takes place, over and above the value of the business. The appellants would read this clause as if it ran "he shall be debited with the value thereof with interest thereon," which is clearly not what the will says nor as far as I can see what the testator intended.

Now, as regards the moneys advanced to the son Sydney for his advancement in life the will directs "that the sums so advanced are to be taken in part satisfaction of the share he is entitled to upon the distribution of the testator's residuary estate." Here, again, there is no direction that the moneys which the trustees may advance to Sydney for his advancement in life are to be debited with interest upon the division of the residuary estate. As regards these advances the trustees are placed by the testator in the same position as he would have been in had he not died. They are to do what presumably the father might have done had he been alive. It is not, in my experience, the usual thing for a father when he makes provision for his son in life to charge him interest upon money he then advances to him, and unless it be stipulated for, I certainly should draw the inference that the advances were made free of interest, not that they were to be interest-bearing loans. By the will the testator has not directed that either Thomas or Sydney is to be debited with interest upon what they may receive out of the testator's estate prior to the division of his residuary estate whenever that might take place. But it was argued for the appellants that as regards the advancements made to Sydney unless the will directed the contrary, the rule of the Court of Equity was that in dividing the residuary estate of a testator which was to be equally divided amongst his children, interest upon moneys advanced by way of advancement of a child in life was always debited with interest from the time of its having been so advanced down to the period of distribution of the residuary estate. The reason assigned for this rule was that otherwise those of the children who had not had advances made to them for their advancement in life were not on an equality when the time came for the distribution of the estate with those who had had such advances, inasmuch as those to whom advances had been made had had the use of the money advanced and had deprived the estate of its use,

which, if it had not been advanced as regards the interest accruing thereon, would have gone to swell those accumulations in which all, when the division came, were to participate in, equally.

But this, with submission, begs the question as to what the children at the time of distribution were to participate in equally. In my judgment, by this will, it is directed that the children are to participate equally in the capital of the testator's estate, together with the accumulations which may happen to have been made after making the advances and other disbursements as directed by the will, subject to this: that, in making the division, Thomas and Sydney are to bring into account what they have in fact had out of the testator's estate—the one, the value of the business, the other, the moneys advanced. It is in what the trustees might have in hand when the period of distribution arrives that the children then living were to participate as tenants in common, not in what the trustees might have had if no advancement to the son had been made. If the rule exists, and the reason assigned for it is well founded, surely the money advanced to Sydney for his advancement in life must be debited with compound interest and not merely with simple interest, for the hypothesis is that the child advanced must make good to the estate that which he has had to the impoverishment of the estate, which cannot be brought about unless compound interest upon the advances is calculated. The appellants' counsel, when faced with this, flinched from asserting that any rule existed to debit advances with compound interest, and it consequently appears to me that the suggested reason for the rule has no existence in fact. Authorities were then resorted to to support the existence of the rule, and *In re Rees*, *Rees* v. *George*, in which the cases upon the subject are collected in the judgment of Sir George Jessel, was referred to. Neither the case itself, nor the cases therein cited are authorities for the proposition now contended for—viz., that interest is to be debited from the date of the advances made till the period of division of the residuary estate. It will be seen that the struggle in these cases has been to get interest allowed upon advances prior to the death of the tenant for life, which was the period of distribution, and that the attempt has been universally unsuccessful. How these cases can be said to show that there is the hard and fast rule in equity as now contended for I do not see, for the cases, when looked into, in my opinion, show nothing of the sort. In my judgment, whether you look to the suggested reason for the rule, or to the cases cited, the appellants fail to establish the existence of the rule. My brother Kekewich was quite right both on the construction of the will and upon the non-existence of the rule contended for; and this appeal must be dismissed.

RIGBY, L.J.—I regret that with one part of the judgments delivered—that is to say, as to the advances out of residue—I am unable so concur. [His lordship then stated the facts and continued:—] The case of Thomas, with regard to the value of the business, depends upon considerations different from those affecting the advances. By "advances" throughout my judgment are meant, not advances on loan, but gifts by way of advancement.

The Court of Chancery never assumed jurisdiction to correct any inequality between children where that inequality was brought about by the plain disposition of the parent made during lifetime or by will. It only interfered to prevent inequality, or a greater inequality, than the parent had plainly intended in cases where the parent, having had occasion for expressing his intentions, had done so by directing an equal division, or, as the case might be, a definite inequality. Thus, with reference to advances made to children by a parent during his lifetime, followed by a will taking no notice of the advances, the will was treated as precluding the taking of the earlier advances into consideration. But advances made after the date of the will were, as a general rule, treated, in the absence of express declaration to the contrary, as operating an ademption of the whole or part of the testamentary provision for the advanced child, according as the advances were equal to or greater than, or were less than the testamentary provision.

A will can have no effect except on property which the testator has at the time of making it or afterwards acquired. Advances made before the date of the will cannot come out of the property dealt with by the will, and the fact of such advances having been made does not, if they are mentioned in the will, affect the scheme of distribution which the testator intends to apply to the property.

But although, of course, the will can only operate on property which the testator has at the time of his death, that event may happen at any moment; and it has been thought a reasonable presumption that the scheme of distribution indicated by the will should not be disturbed by advances subsequently made.

The business and its assets form, in the event which has happened, no part of the residuary estate of the testator. No presumption of equality arises with reference to this gift, but the testator's intention must have effect given to it according to the terms of the will. He could, of course, impose any terms which appeared satisfactory to him. As in the case of the mansion and grounds of Sunnyfield, where three-quarters only of the value was to be paid by the sons exercising the right of pre-emption; he might make the terms as favourable as he pleased to the son succeeding without infringing any doctrine of a court of equity. What he really does is to direct a value to be placed on the assets which are to belong at once to the son, and that the son is to be debited with their value "in the division of my residuary estate"; if the son died before the division he never would be debited at all, and he would get the business for nothing. The only provisions for payment at all, arise in case the value should be in excess of the expectant share of the son, and then payment was to be made of the excess only and by such instalments as the trustees should think fit. There is no reason for departing from this scheme, and the son is only to be debited on the division, though, as from the date fixed for distribution, he will, of course, be debited with interest.

The advance to Sydney and the younger children stands on a wholly different footing. Clause 12, dealing with the residuary estate, divides the assets into equal shares, so that we get the testator's direction for equality as the governing rule in dealing with residue, a rule not to be departed from without plain reason to be derived from other parts of the will. It is important to observe that the real and substantial reason is how far an advanced child is to share in the accumulations arising from the residue as diminished by the advances made to him. He cannot be charged with any part either of a capital sum advanced or of interest thereon so as to be made liable to repay. The charging of interest in such a case is only an arithmetical device adopted for the purpose of ascertaining how much more he is to receive. The true principle applicable to advances out of a fund which, independently of the advances, is to be equally divided, is that the unadvanced are not to be in a better or worse position, except so far as is expressly provided by the settlor by reason of the

advance—in other words, the unadvanced children are to be placed as far as possible in the same position as if no advances had been made.

All the cases cited in *In re Rees, Rees* v. *George*, where the subject was discussed at length by the late Master of the Rolls (Sir George Jessel) recognize and profess to go upon this principle. In *Hilton* v. *Hilton* Malins, V.C., uses language which seems to me to be an enunciation of this principle. In *Field* v. *Seward*, Bacon, V.C., says it is necessary in order to carry out the testator's intention that there should be, as far as possible, equality. In *In re Rees, Rees* v. *George*, the testator had given his widow a life interest in his residue, and subject thereto had directed his trustees to divide his residue among children who being sons should attain the age of twenty-one, or being daughters should attain twenty-one or marry under that age, with a direction that advances, whether made in his lifetime or under a power in the will, should be brought into hotchpot. Sir George Jessel says, "He," the testator, "means that none of the children who have not been advanced or who have received less than others shall suffer"; and lower down, "therefore charging interest is only to be regarded as a mode of calculation by which, in order to place the children on an equality, the estate is put in the same position as if no advance had been made." True it is that in the case before him interest was charged on advances only from the widow's death, but that was expressly rested on the grounds that until her death she took the whole income; and so the children on whose account alone the hotchpot clause was introduced could take no benefit from interest charged before that date and would lose nothing by its being withheld.

Turning again to the will before us, we find three clauses of advancement: one in clause 6 to advance any son who has attained twenty-one either the whole or any part of his then expectant share of the legacy of £4,000; the second is in clause 11, dealing with yearly sums applied out of surplus income for the maintenance or education of any son or daughter who should have attained twenty-one years, which were to be taken in part satisfaction of the share to which he or she or his or her issue might respectively become entitled of the said trust premises. The third is clause 13, which authorizes advances out of capital to an extent not exceeding in the whole one half of the capital share, and directs that the sums advanced are to be taken in part satisfaction of the shares to which his sons or their issue might respectively become entitled of the said trust premises. The directions as to part satisfaction contained in clauses 11 and 13 are necessary to ensure that the advances shall be charged not only against the advanced children themselves, but also against their issue, and do not show any intention that advances under these powers are to be treated on a different footing from advances out of the legacy of £4,000. Any advances made to a son out of the £4,000 legacy would clearly disentitle the son advanced to subsequent interest in respect of the advance, so that if the whole £4,000 were advanced to a son he would get no subsequent interest. The distinction between clauses 11 and 13 as to advances out of income and capital respectively, seems intended only for the purpose of fixing the amount that may be advanced, since any income not advanced under clause 11 at once becomes capital. In clause 13, where the capital of the share is mentioned, "share" must mean expectant or presumptive share, since before the period for distribution there can be no vested share. What, then, is the meaning of the words "taken in part satisfaction" occurring in clauses 11 and 13? It would seem that they should have their literal meaning, and that the advances should be treated as satisfying *pro tanto* the expectant share in respect of which they are made at the time when they are taken. At any rate it is not right, unless there is a clear necessity, to say that they must be taken as meaning the same thing in effect as a direction that the advanced child or his issue shall be debited in the division of the residuary estate, which is the phrase used in clause 3 with reference to the value of the business. It would seem, therefore, and the equality which, as to residue, is the governing rule expressed in clause 12 requires (unless the unadvanced children are to be the worse for the advance), that the share to which an advanced child or his issue may be entitled in expectancy is to be treated as diminished by the amount of the advance as from the date when the advance is taken or made. The strict rights of the children on this view of the will would be worked out by a declaration that as between the children the accumulations from time to time of residue are to belong to them in the same proportions in which they are for the time being entitled in expectancy to the corpus, including past accumulations, with consequential directions. To give effect to this, rests would have to be taken at the end of each year as to the younger childrens' advances, and at the dates of the actual advance to Sydney with regard to his advance. The result would give to each child the exact part of the accumulations earned by his expectant share for the time being. After the period of distribution a charge of interest on the value of the business and on the advances would have to be made, and as the accumulations of residue have still continued 4 per cent. interest ought to be charged. Mr. Renshaw argued, and I think was logically bound to argue, that if the plan of charging interest against advances during the period of accumulation were adopted such interest should be compound interest, but the plan above suggested has the merit of carrying out exactly what could only be done approximately by the method of charging interest, and showing upon the face of the order made, the precise reason for the adjustment. It would readily be carried into effect by an accountant without involving more complicated account taking, than is involved in many orders of the court made in recent times.

Order appealed against varied by declaring that from the period of distribution, interest was chargeable at 4 per cent. Order in other respects affirmed.

Solicitors, *King, Wigg, & Co.*; *Steadman, Van Praagh, Sims, & Co.*; *Waddington & Cheeseman.*

High Court of Justice.

Chan. Div. } Jan. 28, 29, 30; March 3.
Chitty, J. }

ATTORNEY-GENERAL v. CHRIST'S HOSPITAL. (*a.*)

Charity — Endowed Schools Acts — Commissioners — Scheme—Excepted endowments—Compulsory application in aid of scheme — Cy-près — *Jurisdiction of court—The Endowed Schools Act*, 1869 (32 & 33 *Vict. c.* 56), *s.* 14 (1).

The effect of section 14 *of the Endowed Schools Act*, 1869, *is to leave the governing body of a charity in* statu quo *as to the endowments thereby excepted, and no scheme affecting those excepted endowments can be forced*

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

on such governing body unless it could have been forced on them before the Act.

Where a governing body incorporated with full powers of management by Royal Charter and Act of Parliament are deprived of the bulk of their endowments by a scheme under the Endowed Schools Act, 1869, *but nevertheless continue to apply the excepted endowments to proper legal objects, then, although those legal objects are only expressed in general terms in the Charter, the court cannot, under the guise of* cy-près *or otherwise, compel the governing body to apply the excepted endowments in aid of the scheme, however beneficial such application might be.*

In the year 1890 a scheme was settled under the powers of the Endowed Schools Act, 1869, for the administration of the educational endowments of Christ's Hospital. The scheme, which was opposed by the governing body, provided for the removal of the school to Horsham, the sale of the old site, and generally made great changes in the government and administration of the charity.

Owing to the opposition of the governing body all endowments given since the 2nd of August, 1819—*i.e.*, less than fifty years before the commencement of the Endowed Schools Act, 1869, were necessarily excepted by section 14 (set out at the beginning of the judgment), and these excepted endowments, together with the non-educational endowments, were still under the jurisdiction of the old governing body established by the Charter and Act of Parliament referred to in the judgment.

In 1894 Chitty, J., for the reasons stated in the present judgment, directed a scheme of these excepted endowments to be settled. The Attorney-General now brought in a scheme asking in effect that the excepted endowments should be placed under the control of the administrative body constituted by the scheme of 1890, and dealt with according to that scheme or in the alternative that the income should be temporarily applied in aid of the scheme. The income of the excepted endowments amounted to £3,364 per annum, and there was an accumulation of over £10,000 since 1890. The capital value was about £110,000.

The endowments taken by the scheme produced £45,734 per annum, and the old site, which was also taken, was expected to fetch £750,000.

The old governing body, who proposed to establish a day-school in London, objected to the Attorney-General's scheme, and had prepared a counter-scheme.

Sir Richard Webster, A.G., Warrington, Q.C., and *Dibdin*, in support of the scheme.—The intention of the donors was to benefit the old school. That school continues as the school under the new scheme, and the endowments should belong to it accordingly. The objects of the charity being expressed in general terms in the charter, the court can direct the governors how to act, although they are statutory governors: Tudor on Charities, p. 89. The old school being gone, it is really a case of *cy-près*: Schools Inquiry Commission Report, p. 448; *In re Shrewsbury Grammar School*, 1 Mac. & G. 324; *Attorney-General* v. *Wyggeston Hospital*, 12 Beav. 113; *The Berkhampstead School case*, L. R. 1 Eq. 102, 14 W. R. Ch. Dig. 23; *In re Campden Charities*, 30 W. R. 496, 31 W. R. 741, 18 Ch. D. 310, 24 Ch. D. 213; *Clephane* v. *Provost of Edinburgh*, L. R. 1 Sc. App. 417, 7 W. R. H. L. Dig. 3.

Byrne, Q.C., and *Vaughan Hawkins*, for the governing body.—Our day-school is a legal object clearly within the scope of the charity, and no case of *cy-près* arises. The severance of the funds has not destroyed the old charity, which continues as our proposed day-school. No scheme is necessary, but in accordance with the order of 1894 we have brought in a legal and not a *cy-près* scheme. *In re Shrewsbury Grammar School* was the case of a surplus, and the trustees were the applicants. *Attorney-General* v. *Wyggeston Hospital* was a case of gross mismanagement. In the *Berkhampstead School case* it does not appear under what jurisdiction the governors were appointed, or what their powers were. "Non constat" that they were statutory governors with powers like ours. *In re Campden Charities* was an ordinary case of *cy-près*. *Clephane* v. *Provost of Edinburgh* is in our favour. The jurisdiction of the court is limited: *Philpott* v. *St. George's Hospital*, 7 W. R. 659, 27 Beav. 107; *In re Ashton's Charity*, 7 W. R. 659, 27 Beav. 115; *In re Prison Charities*, 21 W. R. 213, L. R. 8 Ch. App. 199. As to change of governing body, see *Attorney-General* v. *Caius College*, 2 Keen 150. As to the effect of an agreement scheduled to an Act of Parliament, see *In re East and West India Dock Co.*, 36 W. R. 849, 38 Ch. D. 576.

Cur. adv. vult.

March 3.—CHITTY, J., stated the above facts and continued:—The educational endowments of this magnificent charity were split asunder by the Act of 1869. The severance was effected by section 14: That section enacts that nothing in the Act contained shall authorize the making of any scheme interfering with any endowment or part of an endowment (as the case may be) originally given to charitable uses less than fifty years before the commencement of the Act (the 2nd of August, 1869), unless the governing body of such endowment assent to the scheme. The endowments in question fall within the fifty years' limit. The governing body declined to assent to the scheme of 1890. The Commissioners were thus placed under the necessity of excluding these endowments from the operation of their scheme. This they did in express terms.

On the hearing of this action I was asked by the counsel for the Attorney-General to declare as a matter of law that these endowments necessarily and expressly excluded were included in the Commissioners' scheme. Obviously no such declaration could be made. I then directed that a scheme should be settled of the excepted endowments. The governing body were at first disposed not to object to the direction for a scheme, but ultimately they did oppose it. There was no appeal from my order, and it is now binding on all parties. In directing a scheme I left every question open, holding that all such points as were suggested at the hearing could be better dealt with when any scheme was brought in for consideration and after the parties had adduced their evidence. My reasons for directing a scheme were the altered circumstances arising out of the Act of 1869 and the Commissioners' scheme; the fact that the income of the excepted endowments had remained unapplied since the severance in 1890; and the hope, not unreasonably entertained, that with the assistance and advice of the Attorney-General, representing the Crown by virtue of his great office, some proper and reasonable arrangement might be come to between the Commissioners and the governing body. The Commissioners have power to alter their scheme, but only within the limits of the Act of 1869; and the governing body have been placed, by section 14 of the Act of 1869, in a position to bargain with the Commissioners. Since the order was made there has been much negotiation, but without result. The Commissioners, as they are entitled to do, decline to make the alterations in their scheme which the governors suggest. The governors decline to part

with the rights which they conceive themselves to be entitled to by virtue of section 14 and otherwise, unless the scheme of 1890 is modified in accordance with their suggestions. The operation of section 14 of the Act is an important element in this case. The object of the section was to give effect to the intentions of charitable donors within the fifty years' limit by preserving their endowments intact from any interference by the Commissioners in the exercise of the large powers conferred on them by the statute.

The effect of the Act is remarkable. Speaking generally, and without reference to any special form of gift, the intention of the donors within the fifty years' limit was that their gifts to the hospital should be added to and form part of the general mass of the educational funds of the hospital. But in the result, and as a necessary consequence of section 14 and of the refusal of their assent by the governors, those gifts are severed from the general funds and are left as a separate charity to be administered by the governing body as they existed at the passing of the Act and according to the then subsisting constitution of the charity. The result must be taken to have been foreseen by the Legislature. Two classes of cases presented themselves for consideration during the passing of the Act. First, ancient foundations to which additional endowments had been made within the fifty years' limit; and, secondly, entirely new foundations within the limit. Between these two classes a distinction might have, but has not, been drawn. The result is that foundations of the first class have been severed into two parts. The additional endowments in the first class might have been diverted to follow the destination of the old foundations, but it is not so. They stand by themselves, and constitute in law a separate endowment. One word more on section 14. It has left the jurisdiction of this court, such as it is, wholly untouched in regard to endowments within the fifty years' limit. It has neither diminished nor increased the jurisdiction. The utmost that can be said on the subject is that, while leaving the jurisdiction of the court unimpaired, it may form some guide or assistance to the court in the exercise of its discretion within the limits of its jurisdiction. The policy of the section seems to be that the excepted endowments are not to be interfered with unnecessarily.

In the argument the scheme of 1890 was fully discussed. For the purpose of this judgment a short statement of its leading provisions will suffice. It was framed substantially in accordance with the recommendations in the report of the Royal Commissioners referred to in the preamble of the Act of 1869. The preamble states that by their report the Commissioners recommended various changes in the government, management, and studies of endowed schools, and in the application of educational endowments, with the object of promoting their greater efficiency and of carrying into effect the main designs of the founders thereof, by putting a liberal education within the reach of children of all classes, and that such object could not be attained without the authority of Parliament. It is plain that the scheme of 1890 could not have been framed without statutory authority. Such a scheme could not have been decreed by this court. Under the statute several appeals were presented to the Privy Council against some of its provisions as drawn by the Commissioners: *In re Christ's Hospital*, 38 W. R. 758, 15 App. Cas. 172. But the scheme as it now stands was ultimately approved by Order in Council, and became binding on the 2nd of August, 1890. It has a statutory force. The scheme, so far as relates to property comprised in it, remodelled and reconstituted the body charged with the power and the duty of general management, and thereby in point of law created a new governing body. It contemplated and provided for the removal of the great boarding-school from London, the sale of the old site, and generally made great changes in the government and administration of the charity. The available income under the scheme has fallen off gradually from 1891 to 1894. The average deficiency of income to meet expenditure is about £3,000 a year. The income of the excepted endowments would supply the deficiency. To meet the deficiency, capital funds included in the scheme of 1890 have been sold. The decrease in income during the four years is more than the loss of income through the sales.

Relying on the existing circumstances and the financial condition of the main educational charity since the scheme of 1890, the Attorney-General strongly urged that it was fit and proper that the income of the excepted endowments should be applied in aid of the income of the great school as proposed by his scheme. The main objection of the governors is addressed to the jurisdiction of the court. I proceed now to consider this objection. The appeals before the Privy Council raised questions affecting the general character and objects of the foundation as well as its governing body, and in the judgment delivered by Lord Selborne the material parts of the instruments which determine these points were stated: *In re Christ's Hospital*, 38 W. R. 758, 15 App. Cas. 176 to 179. It is sufficient for me to refer to that statement, without repeating it at length, but supplementing it with a few additional statements relevant to the present question and drawing attention to some particular points.

The governing body were originally incorporated and constituted governors of the charity by the Royal Charter of Edward VI. By the charter power was conferred on the governors, or a majority of them, at all times thereafter when and as often as to them it should seem expedient or necessity should so require, to ordain, constitute, and make all such fit, wholesome, and honest ordinances, statutes, and rules for the right government of the charity as to them should seem good; and a like power was conferred on them from time to time to appoint, create, and ordain such and so many officers, ministers, or governors under them in the hospital who might from time to time provide for the poor therein that they might well and justly be ordered and taken care of, and also for the order and government of the same poor as to them should seem good and convenient. The objects of the charity in reference to the education of the poor are to be found expressed in general terms in the charter and in the deed of covenant between the King and the Corporation of London, which must be read in connection with the charter. But, although the charitable objects were expressed in general terms, ample power was conferred on the governors (as already shown) of making ordinances and of appointing officers and governors for the particular regulation and administration of the charity and its property. Certain arrangements with respect to the government of this and the other hospitals part of the same original foundation subsequently gave rise to disputes between the City of London as governors of all the hospitals on the one hand, and the officers and acting governors of the several hospitals on the other; and in the year 1782 the Act 22 Geo. 3, c. 77, was passed for the purpose of giving validity to a settlement agreed on by the disputing parties. The disputes, as recited in the Act, were touching their respective rights, powers, and privileges in the ordering, management, government, and disposition of the hospitals and the estates, possessions, and reversions, and revenues thereto. The

agreement settling the disputes was set out in full in the Act. The agreement contained a recital that great benefit had been derived to the charitable institutions from the mode of managing and conducting the same, and from the voluntary contributions, grants, bequests, and donations of the elected governors; and another recital showing that the agreement as to the actual ordinary management of the hospitals in accordance with the agreement, was intended to be perpetual. The Act confirmed and established the agreement according to its tenour. The effect of the Act was—in the language of the judgment in the Privy Council, 38 W. R. 760, 15 App. Cas., p. 179—"to establish a separate governing body for Christ's Hospital, with full powers of management over its possessions and affairs." This separate body has continued ever since to manage and administer the charity, subject only to such of its possessions and rights of administration as were expressly taken away by the scheme of 1890. No case of breach of trust or maladministration of any kind is suggested by the Attorney-General against the governing body. There is no case of failure of the trusts or of the charitable objects of the excepted endowments. No such point was raised by the Attorney-General, and rightly. It cannot be argued that any such failure has been caused by the operation of section 14 in severing the funds. The trusts remain and are capable of being executed.

These are the facts which give rise to the question of the jurisdiction of the court in settling a scheme for the regulation of this charity. The extent and the limits of this jurisdiction were fully discussed in the argument. Many authorities bearing more or less on the present case were cited, and reference was made to an able and useful dissertation on the subject contained in the report of the Royal Commissioners mentioned in the preamble of the Act of 1869, and in great measure founded on the opinion, given in evidence before the Commission, of eminent lawyers, such as Lord Westbury, Lord Hatherly, Sir Roundell Palmer, Mr. Wickens, and others. For the purposes of this decision, however, I think it unnecessary to examine critically the authorities cited or the opinions referred to. I prefer to state my opinion broadly. I hold that it is beyond the jurisdiction of the court to sanction the Attorney-General's scheme in the face of the opposition of the existing governing body. Their title is founded on Royal Charter and is established by Act of Parliament. To whatever lengths the court may have gone, it has never assumed legislative authority; it has never by a stroke of the pen at one and the same time revoked a Royal Charter and repealed an Act of Parliament. It has never ousted from their rights of administering the charitable trusts, such a body as the present governors against their will, and that, too, in a case where no breach of trust is charged. There is no authority in the books for any such proposition. Yet such is the proposition which underlies the Attorney-General's scheme. I consider that I am not at liberty to deprive the existing governing body of their right of control over the income of the funds vested in them, either permanently, as proposed by the scheme, or temporarily, as suggested by the Attorney-General in his reply. In a word I cannot, under guise of executing the trusts *cy-près*, upset the constitution of the present governing body, or, by transferring their powers and duties of administering the trusts to another body, reduce them to the position of being bare trustees of the funds vested in them. To establish such a scheme as that submitted by the Attorney-General nothing less than an Act of Parliament will suffice.

I now turn to the scheme brought in by the governors. As the Attorney-General has not had an opportunity of fully considering it, and as his views of such matters are always treated with respect by the court, the observations which I propose to make will be of a general nature only, and I shall avoid all matters of detail. [His lordship then discussed the scheme proposed by the governors, and held that they had substantially made out their case for establishing a day-school in or near London of the nature proposed, that being obviously within the scope of the charity. He referred the matter to chambers for further consideration, with liberty to the Attorney-General to bring in any further or other scheme not inconsistent with the principles of this judgment.]

Leave to appeal granted.

Solicitors, *J. M. Clabon; Beachcroft, Thompson, Hay, & Ledward.*

Chan. Div. }
North, J. } Dec. 14.

In re HOOD'S TRUSTS. (*a.*)

Administration—Intestacy—Will subsequently found—Grant of administration revoked — Will proved—Infant next of kin shares paid into court under the Trustee Relief Act—Petition by executors for payment out.

A sum of money paid into court under the Trustee Relief Act by the administrator of a supposed intestate to meet shares of infants under the intestacy, was ordered to be paid out to the executor of a subsequently found will, after revocation of the grant of administration.

Petition.

Eliza Hood Jacomb Hood died on the 27th of October, 1889, intestate, as it was then thought. Letters of administration of her estate were granted on the 31st of December, 1889.

In December, 1894, a will was discovered and application was made to the Court of Probate to revoke the grant of administration. The grant was revoked on the 12th of August, 1895, and the will was proved on the 28th of August, 1895. Money had been paid into court by the administrator under the Trustee Relief Act to meet the shares of certain infants who were next of kin. Some of these infants had attained twenty-one and their shares had been paid out to them, but there remained still a sum in court.

This was a petition by the administrator under the intestacy and by the executor of the will for payment out to the latter of that sum. Under the will the infants took legacies, but these were smaller than their shares as next of kin. The infants whose shares had already been paid over to them had, on the application of the executors of the will, refunded the same. The infants had been served with the petition.

E. C. Macnaghten, for the petition.—I know of no case in point, but I submit that on principle the petitioners are entitled to have this fund transferred to them.

Stanley Fisher, for the infants.

NORTH, J., made the order asked for subject to an affidavit being produced that the infants' legacies had been paid or secured to them.

Solicitors, *Dale, Newman, & Co.*

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

Chan. Div. }
North, J. } Dec. 10, 11.

In re ORFORD (COUNTESS).
CARTWRIGHT *v.* DEL BALZO. (*a.*)

Inland revenue — Estate duty — Settlement—Power of appointment—Appointment of specific portion to one—Residue of settled fund appointed to others—Apportionment of duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-section* (4); *s.* 8, *sub-section* (4); *s.* 14, *sub-section* (1).

By a settlement of 1841 *a fund was directed to be laid out in the purchase of lands to be held on trust for A. for life, with remainder as B. should by will appoint. B. died in* 1886 *in A.'s lifetime, having by by will directed the reconversion into money of the trust premises, and appointed a specific amount part thereof to C. absolutely, and the residue to others. The life tenant A. died after the Finance Act*, 1894, *came into operation. The fund had never been invested in the purchase of land.*

Held, (1) *that the fund must be treated as land*; (2) *that it was "property which passed" on the death of A., and was therefore liable to estate duty under section* 1 *of the Finance Act*; (3) *that the amount appointed to C. was a "sum charged on the property" within the meaning of section* 14, *sub-section* (1); *and* (4) *that the estate duty on the whole appointed fund should be borne rateably by C. and the appointees of the rest of the fund.*

Originating summons.

By a settlement made in 1841 in contemplation of the marriage of the Earl of Orford with the Countess of Orford, certain property belonging to the countess was assigned to trustees upon trust, as it fell into possession, to convert into money, and to invest the proceeds in the purchase of real estate in England and Wales to be settled to certain uses therein mentioned, with remainder to the use of the earl for life, with remainder to the use of the first and other sons of the marriage successively in tail male, with remainder to trustees upon trust to raise portions, and subject thereto it was declared that, in case the countess died in the lifetime of the earl (which event happened), the trustees should stand possessed of the hereditaments to be purchased upon such trusts as the countess should by will or codicil appoint.

There were no sons of the marriage, and only two daughters, one of whom was the Duchess del Balzo.

The countess, by her will made in 1877, appointed all the property which she had power to appoint under the settlement of 1841 to trustees upon trust to sell and convert, and to stand possessed of the proceeds upon trusts therein mentioned.

By a codicil, the countess, after reciting the appointment made by her will, directed that the trustees of the will should, out of the proceeds of the sale and conversion, pay to her daughter the Duchess del Balzo the sum of £35,000 absolutely free from all limitations and restrictions; and subject to such payment should stand possessed of the residue of the said moneys upon the trusts which would under her will have been applicable thereto if such residue had been the whole of the same trust moneys.

The Countess of Orford died on the 9th of November, 1886.

The Earl of Orford, the life tenant, died on the 7th of December, 1894.

The trust fund had never been invested in the purchase of lands.

Estate duty had been paid by the trustees of the settlement of 1841 on the whole of the appointed fund.

One of the questions raised by this summons was how the estate duty was to be borne as between the £35,000 appointed to the Duchess del Balzo and the residue, of which the duchess was, in the events which happened, tenant for life, and Viscount Exmouth had a contingent reversion.

Vernon Smith, Q.C., and *MacSwinney*, for the Duchess del Balzo.—Estate duty is now substituted for the duties imposed by the Customs and Inland Revenue Acts, 1881 and 1889, and Stirling, J., in *In re Bourne*, 41 W. R. 70, [1893] 1 Ch. 188, decided that the duties under those Acts were in the nature of probate duty, and must be borne by the testator's residuary estate. *In re Croft*, 40 W. R. 425, [1892] 1 Ch. 652, the question was said to depend on intention, and the intention here clearly was that the £35,000 should be free from all charges. *In re Shaw*, 43 W. R. 315, [1895] 1 Ch. 343, is also distinguishable.

Swinfen Eady, Q.C., and *Bryan Farrer*, for Viscount Exmouth.—The question depends on the Finance Act, and the Act alone must be looked at. Independently of the Act, we say that *In re Croft* and *In re Shaw* apply rather than *In re Bourne*.

Seward Brice, Q.C., and *Rowden*; *Gurdon*, and *A. Adams*, appeared for other parties.

The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, provides: "In the case of every person dying after the commencement of this part of this Act, there shall . . . be levied and paid, upon the principal value ascertained as hereinafter provided, of all property real or personal, settled or not settled, which passes on the death of such person, a duty called 'estate duty.' . . ." Section 6, sub-section (4), enacts, "Estate duty, so far as not paid by the executors, shall be collected upon an account, setting forth the particulars of the property, and delivered to the commissioners within six months after the death, by the person accountable for this duty. . . ." Section 8, sub-section (4), enacts: "Where property passes on the death of the deceased and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing, or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title, shall be accountable for the estate duty on the property, and shall within the time, &c., . . . deliver and verify an account of the property." Section 14, sub-section (1), enacts: "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who, being authorized or required to pay the estate duty in respect of any property, has paid such duty from the person entitled to any sum charged on the property (whether as capital or as an annuity or otherwise) under a disposition not containing any express provision to the contrary."

NORTH, J.—The first question is whether any duty is payable in respect of the appointed property. The Earl died after the Finance Act came into operation, and we have to look to that Act to see whether the duty is payable or not. [The learned judge read section 1 and continued:—] Among other duties which

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

were put an end to by that section was probate duty, so that probate duty, or its equivalent, is no longer payable in the cases to which this Act applies. [The learned judge then read section 6, sub-sections 1, 2, 4, and continued:—] The property we are dealing with is property which was set free by the death of the Earl. But it was not under his will that it was disposed of; it was not his property at all, and therefore his executor had not to pay duty upon it, because his executor was only bound to pay estate duty in respect of the personal property which the deceased was competent to dispose of at his death, and this is not property which the late Earl could dispose of. The case is therefore one in which sub-section 4, and not sub-section 2, of section 6 applies. [The learned judge then read section 8, sub-sections 3 and 4, and continued:—] So that by sub-section 3 two things are provided: the executor of the deceased has to specify in a proper account all the property in respect of which estate duty is payable on the death of the deceased, whether it is the deceased's property or not; but his liability to pay estate duty is limited to the personal property which the deceased was competent to dispose of at his death. [The learned judge read section 14, sub-section 1, and continued:—] Therefore the section contemplates that in all cases coming within it, if the executor or person who has to pay duty, the trustee or whoever he may be, has paid the duty before handing over a share or a sum of money, then he may charge against the person to whom he is handing over the money, or recover from him, if necessary, the amount required for the duty.

Now, it is said that, looking at those sections, it is clear from *In re Bourne* (a case relating to estate duties imposed by the Customs and Inland Revenue Acts, 1881 and 1889) that estate duty is analogous to probate duty, and that the incidence of estate duty must therefore be the same as that of probate duty, and that Stirling, J., so decided in respect of the estate of a testator who was dealing with his own estate. But the present case is quite different. It is not a case of dealing with a testator's own estate. It is a case of property passing under limitations with which the person dying has nothing to do, except that his death sets the property free, which passes under those limitations to persons who take what is at the present time, in equity, landed estate, with respect to which there is no probate duty existing and never was.

Now, that being so, I must look at the provisions of this Act itself, and say upon whom the estate duty payable in respect of this real estate is to fall; and it seems to me that, under the section I have read, it is intended it shall fall upon the beneficiary, and not upon anyone else; and on the beneficiary or beneficiaries, as the case may be, according to their respective interests.

Section 14, sub-section 2, shows that inasmuch as there may be difficulties at times in ascertaining what the duty is, or a dispute about it, such question may be determined by application to the court. Then sub-section (1) of that section provides that the person who has the estate may recover back any duty he has paid from a person entitled to a charge on the property; and if there is a dispute with respect to it, then it may be settled by the court. I think, therefare, that the Duchess, who takes £35,000, must bear the estate duty payable in respect of that amount. I say so independently of the 14th section of the Act, but I also think the 14th section applies, because I think that sum is, to use the language of that section a "sum charged on such property." There is a direction to sell the estate and pay that amount out of the proceeds thereof. That seems to me clearly to amount to a charge of this money upon the estate. The legatee is entitled to have the amount raised out of the estate; but if the legacy is paid off there is an end of the matter; the legatee has no further interest and cannot enforce any trust for sale. Therefore, if the person behind the legatee raise the money by mortgage and pay off the legatee, the legatee could not insist upon the property being sold. Even if a sale was necessary, the legatee could not insist on a sale of more than was necessary to pay off the amount to which the legatee was entitled. Therefore the legatee, as to the £35,000, has, in my opinion, under the 24th section a charge upon the estate. In such case "an amount equal to the proper rateable part of the whole estate duty may be recovered by the person who, being authorized or required to pay the estate duty in respect of any property, has paid such duty from the person entitled to any sum charged on such property." Now, the persons who under the settlement are liable in the first place to account for the duty are, I suppose, the trustees of the settlement. But if not, the persons to account for the duty in respect of this £35,000 would be the executors, to whom the money would have to be paid, and to whom the money is appointed; and if they have paid it themselves they clearly, in my opinion, would be entitled to charge it against the duchess in respect of this £35,000, or if it has been otherwise received by her, they might recover it back from her under this section.

As to costs, I think the rule is now established that, in the case of an appointed fund the costs must be paid rateably out of the appointed shares, and not out of the residue.

Solicitors, *Caprons, Dalton, Hitchins, & Brabant; Burch, Whitehead, & Davidson; Nicholl, Manisty, & Co.*

Q. B. Div.
(Wright and Kennedy, JJ.) Jan. 14.

NORWICH UNION FIRE INSURANCE (*Appellants*) *v.* MAGEE, SURVEYOR OF TAXES (*Respondent*). (*a.*)

Inland revenue—Income tax—Interest on foreign investments of English company—Profits invested abroad—Schedule D of 5 & 6 Vict. c. 35, s. 100.

An insurance company, having its head offices at Norwich, carried on business abroad by means of branches in New York, New Zealand, and elsewhere. In order to do so, it became necessary to have capital invested abroad, and from time to time to add to these foreign investments as the business of the company increased. For this purpose the interest accruing from these investments was set aside and invested abroad, and, although shown in the credit account of the annual balance-sheet of the company issued from the head office in England as profits, was never specifically remitted to or received in the United Kingdom.

Held, that these investments abroad were necessary for the profitable carrying on abroad of the company's business, and that the interest arising from such investments was taxable as profits.

Case stated by the Income Tax Commissioners.

At a meeting of the Commissioners, held at Norwich, the appellants, the Norwich Union Fire Insurance Co., appealed against an income tax assessment made upon them for the year ending the 5th of April, 1894, under schedule D.

The facts set out in the case were as follows:—The

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

appellants were an English company with their registered and head office at Norwich, where the directors and shareholders met, the dividends were declared, and all the affairs of the company were directed and controlled. The business carried on out of the United Kingdom was conducted by the managers of the various branches abroad who were appointed by and acted under power of attorney signed by nine directors of the company at Norwich, and such managers had the power to accept risks and issue policies without prior reference to the head office, whereas in the case of the agencies in England covenants only were given, and the directors in the head office determined whether to accept or decline risks. The annual income of the company was derived from premiums, interest on investments, fees and profits on sales earned at the head and branch offices, the whole being brought into one account and set of books, kept and entered up at the head office as set forth in the annual balance-sheets which were issued by the head office alone.

The assessment of £65,787 made upon the appellants was based on their own return, which included profits and losses made at all the branches. This sum included an item of £17,157 for untaxed interest, and an item of £12,841 for profits made at the New York and New Zealand branches. The appellants sought to have the assessment amended by having (*a*) £5,502 deducted from the item of untaxed interest, as being dividends upon various foreign securities payable out of and not specifically remitted to or received by them in the United Kingdom; and (*b*) £12,841 deducted, as being profits made at some of the foreign branches and not specifically remitted to or received by them in the United Kingdom.

The £5,502 represented part of the profits made abroad, and instead of being specifically remitted to this country was, with other funds of the appellants, reinvested in American securities, but the amount was accounted for at the head office here and included in the general account.

It was contended by the company (*a*) that the dividends upon the foreign securities ought to be assessed under the 4th case of section 100 of 5 & 6 Vict. c. 35, and that, therefore, the assessment should be restricted to the sums actually received in Great Britain, and that the sum of £5,502 not having been received in this country by the company, the assessment should be reduced by that sum: *Colquhoun* v. *Brooks*, 38 W. R. 289, 14 App. Cas. 493; (*b*) that, as to the £12,841 profits made by foreign branches, they fell to be assessed under case 5, and as they had not been remitted to or received in this country, they were not liable to assessment. For the Surveyor of Taxes it was contended first that, even if the dividends on the foreign securities fell to be assessed under case 4, those dividends had been constructively received here: *Scottish Mortgage Co. of New Mexico* v. *McKelvie*, 24 Sco. L. Rep. 87, 2 Tax Cas. 165; and secondly, that as the company was an English company the whole of the profits, wherever made, were assessable under the first case in schedule D, whether specifically remitted to this country or not.

The Commissioners dismissed the appeal by the company, and confirmed the assessment.

The company appealed.

Bigham, Q.C., and *Lochnis*, for the company.—The interest arising from these various foreign investments are not "profits" that are taxable under schedule D. The money so accruing is not received either really or constructively by the company. It is not "income." The balance-sheet shows that this interest has accrued, but not as income, for it has been at once invested to form part of the reserve capital. The case of the *Scottish Mortgage Co. of New Mexico* v. *McKelvie* is distinguishable from this case, and does not apply. The business of the Scottish Mortgage Co. was to lend money out—money which they borrowed expressly for the purpose of advancing again. It was held, and quite rightly, that the profits so made were taxable.

Sir R. Webster, A.G., and *Danckwerts*, were not called upon to argue for the Crown.

WRIGHT, J.—The real question we have to decide is whether these investments made abroad by the company are necessary to form the trading capital required to enable them to profitably carry on their business in America. There can be no doubt that the company could not carry on, or at any rate could not so conveniently or profitably carry on, their American business unless, as their business increased, they constantly augmented their reserves in America. If the money required to increase these funds there were not raised in that country then it would be compulsory on the company to send out capital from England. It follows, therefore, that these investments are not made simply for the purpose of capital investment, but are, in fact, part of the trading assets of the company, and the interest arising therefrom is liable as a trade profit. For these reasons I think the Commissioners were right in treating the interest accruing from such investments as part of the trading gains of the company liable to income tax.

KENNEDY, J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Nye & Moreton.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Court of Appeal.

From Chan. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) — Feb. 26.

In re SANDERS' SETTLEMENT. (*a*)

Solicitor—Costs—Taxation—Scale fee—Grant of easement — Conveyance — Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Schedule I., Part I.*

A deed creating an easement for the first time does not come within the scale of charges prescribed by Schedule I., Part I., of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881.

In re Stewart, 37 *W. R.* 484, 41 *Ch. D.* 494, *followed.*

In re Earnshaw-Wall, 42 *W. R.* 567, [1894] 3 *Ch.* 156, *distinguished.*

Decision of North, J., ante, *p.* 309, *affirmed.*

Appeal from the decision of North, J., reported *ante*, p. 309.

By an order of North, J., made on the 5th of August, 1893, the London County Council were ordered to pay the costs of the investment of certain moneys in court in the purchase of a right of way, and upon the taxation of these costs the question arose whether they were within the scale prescribed by Schedule I., Part I., of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881.

The facts relating to the investment in the right

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

of way were shortly as follows. In 1888 the Metropolitan Board of Works (the predecessors of the London County Council) bought some land at Denmark-hill, which formed part of a settled estate to which one R. A. Sanders was beneficially entitled subject to certain charges. It was subsequently desired to lay out the Sanders estate for building, for which purpose it was necessary to connect a road which it was proposed to make in the Sanders estate with a road called Fawnbrake-avenue on an adjoining settled estate belonging to certain persons named Gubbins. An agreement was, therefore, on the 21st of July, 1893, entered into whereby R. A. Sanders agreed to purchase for £516 the right to extend Fawnbrake-avenue over a strip of land, 40ft. long and 5ft. wide, belonging to the Gubbins estate. It was also agreed that R. A. Sanders should within two years complete the proposed road on the Sanders estate and dedicate it to the public; that he should have a right of way over the strip of land for the purpose of completing the extension, and, after completion and until dedication, for all purposes; and that the owners of the Gubbins estate should, until dedication, have a right of way over the proposed road on the Sanders estate. This agreement was carried into effect by an indenture of the 4th of September, 1894.

Rule 2 of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, provides as follows:—

"(*a*) In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in Part I. of Schedule I. to this order, and to be subject to the regulations therein contained."

"(*c*) In respect of business not hereinbefore provided for, connected with any transaction, the remuneration for which, if completed, is hereinbefore or in Schedule I. hereto prescribed, but which is not, in fact, completed, and in respect of settlements, mining leases or licences or agreements therefor, reconveyances, transfers of mortgage or further charges, not provided for hereinbefore or in Schedule I. hereto, assignments of leases not by way of purchase or mortgage, and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore or in Schedule I. hereto prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto."

The taxing master held that the scale did not apply, inasmuch as this was the creation of an easement for the first time, and came within the decision of Kay, J., in *In re Stewart*, 37 W. R. 484, 41 Ch. D. 494. North, J., being of the same opinion, dismissed a summons to review the taxation.

The London County Council appealed.

W. Baker, for the appellants.—This was a purchase of property to which the scale applies. *In re Stewart* is distinguishable, for there the vendors merely gave a licence to lay pipes. Here the vendors parted with the whole surface of the strip. The purchase money, too, in *In re Stewart* was small. Here it could hardly have been larger if the freehold of the strip had been sold. The case comes within *In re Earnshaw-Wall*, 42 W. R. 567, [1894] 3 Ch. 156, where Chitty, J., held that the scale applied to the sale of an advowson. He referred also to *Coverdale* v. *Charlton*, 27 W. R. 357, 4 Q. B. D. 104, and *In re Merchant Taylors' Company*, 33 W. R. 542, 693; 30 Ch. D. 28.

Channell, Q.C., and *J. Gent*, for the respondent.—The case falls within *In re Stewart*, which was rightly decided. Moreover, this is something more than a mere sale for £516. Mutual obligations were imposed by the agreement.

W. Baker, in reply.—The only consideration expressed in the conveyance itself is the £516. The word "conveyance" is applicable to the creation just as much as to the transfer of an easement.

LINDLEY, L.J.—When you look at this agreement it is obvious that it is not merely an agreement for the purchase of a right of way across the strip. It includes that, and the £516 is the only money consideration expressed in the agreement; but each set of trustees is accommodating the other, and the Gubbins trustees stipulate not only for the £516, but for the construction of this road across Gubbins' property, and for the right to use it before it comes upon the highway, and it is agreed that when the whole thing is done it shall be a public road. That agreement, therefore, is not a mere agreement for purchase and sale. It was carried out by the deed of the 4th of September, 1894, which, again, is not a mere conveyance of this right of way for £516; but it is that, and more. On approaching the question we have to decide, it is important to observe that whether the solicitor is to be paid according to the scale of fees or not does not depend upon any abstract question of law as to whether an easement is property—in one sense it is obvious an easement is property—nor does it depend upon whether the grant of an easement can be called the conveyance of an easement. What we have to consider is the scale for the payment of solicitors. The gentleman who drew the conveyance of September, 1894, did not take up the position that the scale would apply, but considered that he might charge as he could before the scale was invented, according to the ordinary course. Relying upon a decision of *In re Stewart*, he took it for granted that the scale would not apply. The costs have been taken in for taxation, and the taxing master has taken the view that the scale, so far as regards what I may call shortly the purchase of that easement, the right of way, is not applicable; and, North, J., having taken the same view, the County Council have appealed to us, and the object of their appeal is to satisfy us, if they can, that the costs ought to be taxed according to the scale, in which case those costs will amount to about £12 10s., whereas unless the scale applies the costs will be about £95. The question is of a little importance in this case; but it is perhaps of more importance from a general point of view.

Now, let us look at the orders which relate to this mode of payment. There is no doubt that the language of the Solicitors' Remuneration Act of 1881, by section 2, is large enough to cover these rules and any other rules which may be made relating to the remuneration of solicitors for the work there referred to, which may be called conveyancing work and non-contentious work. Rules have been made accordingly; and the rules, which will be found at p. 345 of the 2nd volume of the Annual Practice, are so worded that it is necessary to see into which clause any particular work comes. [His lordship referred to rule 2 of the General Order.] If you look at that (clause (*a*)) alone, I am not prepared to say that such an agreement or conveyance as this would not fall within that clause. It is in some sense, or may be considered in some sense, as a sale and purchase of this right of way; but at the same time it is obvious, when you look at the deed, that that is not a full description of it. If you look at it as a sale of a right of way, you must add this, that it is a good deal more than that. That is important when you look at the other clauses.

I do not think (*b*) is material; (*c*) is important. [His lordship read clause (*c*).] Now, that takes us to the schedule, and when you come to the schedule you find this. Schedule I., Part I., is the scale schedule: "Scale of charges on sales, purchases, and mortgages, and rules applicable thereto." Then, looking down, you find the vendor's solicitor "for negotiating a sale," "for conducting a sale of property by public auction," and so on, may charge so much. Then there is "when the property is sold" and when it is not sold; then "deducing title"; then "purchaser's solicitor," which I suppose this would be, "for negotiating a purchase of property by private contract" so much, "for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any) so much. When you come to look at the scale you see it is a percentage on the amount of money consideration. Then, when you look a little further, you find that that is expanded in Part II., and then you come to the second schedule. The second schedule, I think, is the old scale. It is Part I. of Schedule I. as altered by Schedule II. Schedule II. is for business not otherwise provided for.

Now, let us see what this is. It appears to me that the language is somewhat obscure; it is not very clear whether this is within the schedule or scale rule, or whether it is within the other rule. I think, when you look at the language, when you talk about a conveyance of property and sale of property, *primâ facie* the language is adapted to existing property and to the transfer of it. I do not say it could not possibly be extended so as to include what is popularly called a conveyance, although the conveyance creates the thing conveyed—perhaps it might, but that is a little converting the thing; but when you look at the substance of the thing and bear in mind that, as a rule, the consideration is small, whereas the trouble may be very great, it seems to me, in a simple case, the conveyance would fall under "business not otherwise provided for." I think that would be the business point of view. That has been the view adopted already in *In re Stewart*, and I do not understand *In re Stewart* to be based upon the theory that an easement is not property; it is based upon the theory that such a deed as creates an easement for the first time is not a sale or conveyance of property within the first part of the rule, but is business otherwise provided for under the last. That, I think, is right, and it is quite consistent with that to say that the sale of an advowson is within the scale. Such a transaction as this does not strike me as coming within the rule applicable to the scale, and in this particular case I have no doubt whatever about it. I cannot conceive that such a deed as we have to deal with is a mere sale, and that the business connected with it should be paid for upon the basis of it being a mere sale. There are arrangements made between the two adjoining owners, and the mere fact that one of them gives £516 for the right to cross a piece of land, plus what the other gets out of it in other respects, does not make it a conveyance and sale in the ordinary view of business men. In this particular case I have no doubt that North, J., was right; but I am not prepared to throw any doubt upon the rule, which had better be settled once for all, that a deed creating an easement for the first time does not come within the scale rule, but comes within the other.

KAY, L.J.—I will add a few words upon the meaning of this Act. Under the Solicitors' Remuneration Act of 1881 undoubtedly there is an authority which has power to make an order prescribing and regulating the remuneration of solicitors for certain work, including the case of the creation of an easement. The words are as large as may be: This authority "may from time to time make any such general order as to them seems fit for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action or transacted in any court or in the chambers of any judge or master, and not being otherwise contentious business, and may revoke or alter any such order." Therefore clearly the authority may make orders for any business which is practically non-contentious—any conveyancing or other business which is not contentious business. Therefore undoubtedly they had power to make the orders which would include the scale fee for the creation of an easement. That an easement is property nobody would think of denying, and it comes plainly, to my mind, within those words.

Then the next thing to be observed is this, that the orders which have been made, on the face of them, show they did not include every case, because by sub-section (*c*), to which Lindley, L.J., has referred, of order 2, it is expressly provided that in respect of business not provided for by the two former sub-sections in that order the ordinary fee shall be paid as altered by Schedule II.; so that they did not intend to make the scale to be applied to all business that was not contentious business. The authority who made the order were perfectly well aware that the orders which they did make were not so large as that.

Now, then, we have to see whether, under Schedule I., the scale can be applied to a case of this kind. This is not a transfer of any property in the ordinary sense of a transfer. It was not an existing subject of property which was conveyed from one owner to another; it was a grant out of the owner's property of a certain easement. Take other instances which were referred to during the argument. Supposing the grant had been of the passage of light over the property of A. to a window of B., that would be an easement; or supposing it had been of the right to let the smoke from B.'s chimney or from B.'s brick-kiln pass over the land of A., and a consideration paid for that, that would be the grant for the first time of an easement, and not a transfer, in the ordinary sense of that word, of any existing property. The easement never existed as an easement until it was created by the particular grant.

Now, does this Schedule I. to Part I. apply to a case of that kind? I confess that it does not seem to me to be the *primâ facie* meaning of the word. I take the case of the purchaser's solicitor: purchaser's solicitor "for negotiating a purchase of property"—this is a purchase of property in one sense—"for investigating title to freehold, copyhold, or leasehold property, and preparing and completing conveyance (including perusal and completing of contract, if any)." No doubt that means a conveyance of that property the title to which he investigates. *Primâ facie*, the word "conveyance" is not at all an apt word to describe a deed by which an easement over somebody's property is created for the first time. If the easement had existed in A. B. and was by him transferred to another person, it would come within these words plainly enough, and that would be a transfer of property. That is what *primâ facie* this schedule contemplates—a transfer of some existing property, and not a creation of a mere right, whether it be an easement or right—a mere right which is for the first time created by a deed which may in one sense be called a conveyance, but which is not a conveyance in the sense of being a transfer of existing things. I say this because there seems to have been

some question about the words which were used by me in the case of *In re Stewart*. I there seem to have said: "Obviously the schedule contemplates *primâ facie* conveyances of land held as freehold, copyhold, or leasehold property, and the scale is fixed upon the purchase money which is paid when such property changes hands. When a mere easement is granted there is no change of property in that sense, and the purchase money is comparatively trifling in amount; but it might well be that a difficult and expensive investigation of the grantor's title might in many cases be necessary, for which a scale charge calculated on the purchase money of the easement would be a very inadequate compensation."

Now, that case came before Chitty, J., in the case of *In re Earnshaw-Wall*, and he, referring to the decision, quotes the words which I have read, and adds: "His words had reference to the particular circumstances of the case before him; he was not dealing with the general question, nor with the question of property passing by conveyance; he did not express any decided opinion on the point before me. I should feel bound to follow him if I thought he intended to lay down the proposition that the term 'property' did not include incorporeal hereditaments; but as I consider he did not so intend, I am free to decide as I do." That it could be imagined for a moment that my words were meant not to include incorporeal hereditaments I cannot understand. The language I used was used in a case in which the particular easement, which was a licence to lay down pipes on somebody else's land, was created by deed, and I used the word "grant" to express unmistakably, as I thought, the difference between the transfer of a thing which existed, and the creation of it by grant for the first time. I never for a moment suggested that an existing easement or an existing incorporeal hereditament of any kind, being transferred from a vendor to a purchaser, would not come within Schedule I. I most distinctly think it would; but I still remain of opinion that if the deed in question be the mere creation for the first time of an easement over land, the words of Schedule I. are not very apt to meet that case, and I do not think they are intended to meet it.

I have pointed out that it appears most distinctly upon the face of this order that Schedule I. was not intended to include them, and in fact a good many cases are left to be dealt with under Schedule II.—that is to say, according to the ordinary rules as to costs, somewhat modified by that section; and I cannot help thinking that if it had occurred to the minds of those who drew these orders, they would not have included the mere creation of an easement by deed in Schedule I., but would have left it to be dealt with by Schedule II. I think that is the right construction of these rules. Therefore I should think, in this case, that if the £516 were the purchase money for the grant of an easement created for the first time, it would not come within Schedule I. But, as has been pointed out, there is more in this case than that, because the deed by which this right or easement was created is a deed which contains a sort of give-and-take arrangement. There were advantages given to the vendor besides the purchase money, and therefore to say that the scale fee on the purchase money was the only fee that could be charged seems to me again not consistent with Schedule I. For these reasons I think that the decision of North, J., was quite right. It is obvious that it is possible that if the authority who has the power to make a rule thinks it right to make a rule which includes this case, they can do so; but I think the rule should be much more explicitly expressed than is Schedule I. of the General Orders at present.

A. L. SMITH, L.J.—I am of the same opinion. Having heard this case argued, I think that Chitty, J.'s judgment in *In re Earnshaw-Wall* was right, and that the judgment of Kay, J. (as he then was), in *In re Stewart* was right. The main distinction between the cases is this, that in the case before Chitty, J., there was a transfer of existing property brought about by conveyance, and in *In re Stewart* and in this case there has been no transfer of existing property, or of prior existing property at all, and, as has been pointed out by Mr. Channell, the conveyance itself creates a right which had no existence before. It seems to me, therefore, that this case does not fall within the phraseology of Schedule I., Part I., to which we have been referred, and which the Lords Justices have called attention to; and for these reasons I think this case follows the case before Kay, J., of *In re Stewart*, that that case was rightly decided, and that North, J., was quite right in following it.

Appeal dismissed.

Solicitors, *W. A. Blaxland; Withall, Trotter, & Patteson.*

From Chan. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) — Jan. 21, 22, 23; Feb. 20.

CHILLINGWORTH *v.* CHAMBERS. (*a.*)

Trustee — Breach of trust — Trustee beneficiary—Indemnity—Right to contribution from co-trustee.

If one of two trustees who have been guilty of a breach of trust is also a beneficiary, he is liable to make good out of his share and to the extent of it the whole of the loss that has accrued to the trust fund, and can claim no contribution from his co-trustee when the breach of trust was committed for his benefit.

Appeal from North, J. (*ante*, p. 32).

The facts are fully stated in the report in the court below, and it is only necessary to state here that part of the trust estate, a sum of £8,650, was invested on mortgage of certain leasehold houses to a builder named Hughes, part before and part after May, 1881.

The chief clerk found by his certificate that the whole of the loss to the trust funds, £1,580, should be borne and paid by the plaintiff. North, J., affirmed this decision, following *Evans* v. *Benyon*, 37 Ch. D. 329, 36 W. R. Dig. 208.

The plaintiff appealed.

Warmington, Q.C., and *Arnold Statham*, for the appellant.—Where trustees are fighting amongst themselves, the doctrine of acquiescence has never been held to be an estoppel. An innocent trustee who becomes a beneficiary after the breach of trust ought not to be put in the same position as a trustee who is *particeps criminis*. The true principle is that so far as he stood to make or did make a profit, he must make good that loss to the extent of his profit.

They referred to *Raby* v. *Ridehalgh*, 3 W. R. 344, 7 D. M. & G. 104; *Baynard* v. *Woolley*, 20 Beav. 583, 4 W. R. Dig. 99.

Swinfen Eady, Q.C., and *Tebbutt*, for the respondent.—A *cestui que trust* who concurs in a breach of trust cannot turn round and take proceedings against the trustee: *Trafford* v. *Boehm*, 3 Atk. 440; *Lord Montfort* v. *Lord Cadogan*, 17 Ves. 485. Where a trustee assents to a breach of trust by his co-trustee

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

who is also a *cestui que trust*, the deficiency must be made good first out of the estate of the one who benefited by it.

They referred to *Walker* v. *Symonds*, 3 Swans. 1; *Booth* v. *Booth*, 1 Beav. 125; *Fyler* v. *Fyler*, 3 Beav. 550; *Lincoln* v. *Wright*, 4 Beav. 427; *Raby* v. *Ridehalgh*; *Evans* v. *Benyon*; *Sawyer* v. *Sawyer*, 33 W. R. 403, 28 Ch. D. 595; *Bahin* v. *Hughes*, 34 W. R. 311, 31 Ch. D. 390.

Warmington replied.

Cur. adv. vult.

Feb. 20.—LINDLEY, L.J., stated the facts, and continued:—The circumstances under which the trustees made the loans on mortgage were as follow. The borrower was a person named Hughes, a builder, and he was employed by the trustees to erect houses on the testator's property. Hughes also had other property on which he was building, and as the houses on this property were erected the trustees advanced him money on mortgages of them. The plaintiff favoured these loans both when his wife was alive and after her death, because Hughes was willing to pay and did pay 5 per cent. On the other hand, it is proved that the defendant was mixed up with Hughes in building operations, and was interested in them, and that after the trustees had agreed to make an advance to Hughes, the defendant frequently made him a temporary loan, intending that it should be repaid by Hughes as soon as he got money from the trustees; and it is proved, and in truth admitted by the defendant, that these temporary loans were so repaid. The amounts, however, of these temporary loans and repayments cannot be accurately ascertained. They probably amounted to considerably more than £1,500. The plaintiff asserts that he knew nothing about these loans and repayments until quite lately, and his counsel contended that the defendant ought to be treated as having received the trust money himself to the extent of at least £1,580, and that the defendant was in strictness liable to make good the whole of the loss sustained by the trust estate, but that the plaintiff was content with one-half and did not ask for more. On the evidence, however, I am not satisfied that the plaintiff was so ignorant of these loans and repayments as he now says he was. No hidden scheme on the part of the defendant to get the moneys ostensibly for Hughes, but really for himself, is made out. Under these circumstances the repayments of the defendant's advances cannot be regarded as breaches of trust. Hughes was a mere borrower of trust money. His liability as regards the trust money lent to him was simply to repay it with interest. This was settled in *Stroud* v. *Gwyer*, 28 Beav. 130, 8 W. R. Dig. 85, and *Vyse* v. *Foster*, 21 W. R. 207, L. R. 8 Ch. App. 309. He therefore could pay the trust money away after he had borrowed it to anyone, and no one taking it from him, even with notice of the source from which he obtained it, would incur any liability to the trustees who lent it or to their *cestui que trust*. See *Butler* v. *Butler*, 26 W. R. 85, 7 Ch. D. 116, 119, where the liability of persons dealing with borrowers of trust property is discussed. It is impossible, therefore, to treat the defendant as liable to make good the whole or even half of the loss on any such theory as that to which I am now referring. But, although the defendant is not bound to indemnify the plaintiff against the whole loss, it has to be considered whether the plaintiff is not bound to indemnify the defendant. I am not now alluding to the plaintiff as a *cestui que trust*. I will consider his position in that character presently. I am regarding him simply as a co-trustee. It sometimes occurs, though not often, that one co-trustee is bound to indemnify the other against all loss. Whether he is or is not depends on what is just as between the two, and this depends on what they have respectively done (see *Bahin* v. *Hughes*, 34 W. R. 311, 31 Ch. D. 390, and the cases there cited).

Now, in the present case the improper investment which led to the loss was made, so far as the plaintiff was concerned, in order to obtain a high rate of interest for the benefit of his own wife so long as she lived, and for the benefit of the plaintiff himself after her death. If, then, the defendant had not been interested in procuring advances for Hughes, it would require consideration before holding it to be just as between the plaintiff and the defendant to throw any part of the loss upon the defendant. In the case supposed the defendant would have strong grounds for contending that he was entitled to be indemnified against all loss by the plaintiff. It is, however, unnecessary to decide how this would have been; because, although no such scheme on the part of the defendant as I have before alluded to is proved, yet it is proved that the defendant was interested in keeping Hughes afloat and in facilitating borrowing by him, and I cannot avoid the conclusion that the plaintiff and the defendant, for personal reasons of their own, although for different ends, were both ready to run risks which as trustees they ought not to have run, and were too lax in seeing after the sufficiency of the securities they took. As between the plaintiff and the defendant, therefore, if the plaintiff had no beneficial interest in the estate, the ordinary right of one trustee to contribution from his co-trustee would exist.

Having arrived at this conclusion, it is necessary to consider what the effect is of the circumstance that the plaintiff became entitled to his wife's one-fifth share in the trust estate when she died. The plaintiff contends that if two trustees are jointly and severally liable to make good a breach of trust, and as between themselves *in pari delicto*, they are as between themselves entitled to contribution so as to equalize the loss to which both are equally liable. The plaintiff further contends that the fact that on the death of his wife he became beneficially entitled to a share of the trust property does not deprive him of his right to contribution from his co-trustee. On the other hand, it is contended by the defendant that a *cestui que trust* who concurs or acquiesces in a breach of trust cannot obtain any relief against his co-trustee. The defendant further contends that this principle applies not only when the *cestui que trust* is not himself a trustee, but also when he is; and that the same principle applies even although the person filling both characters does not become a *cestui que trust* until after the breach of trust has been committed. North, J., in his judgment, first pointed out that as between the beneficiaries the plaintiff's share was primarily applicable and had properly been applied to make good the loss arising from the breach of trust; and then he held, on the authority of *Evans* v. *Benyon*, that the plaintiff was precluded from throwing any part of that loss on the defendant. *Evans* v. *Benyon*, however, was not a case of co-trustees at all. The court did decide that a person who instigated a breach of trust could not, when he himself became a beneficiary, compel the trustees to make good the loss occasioned by such breach. It is therefore an authority for saying that if the plaintiff had not been himself a trustee, his conduct before he became a *cestui que trust* would have precluded him from obtaining relief against the defendant in respect of the breach of trust which the plaintiff concurred in, as above stated. In order to determine the rights of the parties it is necessary to consider, first, the plain-

tiff's right in his character of trustee against the defendant; and, secondly, the defendant's right against the plaintiff in his character of *cestui que trust*. To the extent to which the plaintiff's right as trustee is neutralized by his obligation as *cestui que trust* he will have no right to contribution. But, except so far as it is thus neutralized, his right to contribution will remain. In other words, if the plaintiff as trustee is entitled to throw half the loss on the defendant, and if, on the other hand, the defendant is protected against any claim of the plaintiff in respect of his share of the trust estate, then, as that share exceeds half the loss, the plaintiff will not be entitled to anything from the defendant, and must bear the whole loss which he has sustained. On the other hand, if the plaintiff as *cestui que trust* is not precluded from recovering from the defendant so much as one-half the loss, the plaintiff's right as co-trustee to contribution from the defendant will still be enforceable for the excess. This, in my opinion, is how the conflicting rights of the two parties have to be adjusted, and it only remains to work them out. The plaintiff and the defendant being *in pari delicto*, the plaintiff's right as trustee to contribution from the defendant as co-trustee to the extent of one-half the loss is established by a long series of authorities, of which it is only necessary to mention *Lingard* v. *Bromley*, 1 V. & B. 114, and *Bahin* v. *Hughes*. On the other hand, the right of the defendant as trustee to be indemnified out of the share of the plaintiff as *cestui que trust* against the consequences of a breach of trust committed at his request and for his benefit is equally indisputable. It was treated by Lord Eldon as clear law in his day that a *cestui que trust* who concurs in a breach of trust is not entitled to relief against his co-trustee in respect of it: see *Walker* v. *Symonds*. In Mr. Lewin's work (8th edition, p. 918) many other authorities will be found to the same effect, and Lord Eldon's statement of the law was distinctly approved and followed in *Farrant* v. *Blanchford*, 11 W. R. 294, 1 De G. J. & Sm. 107. Moreover, as already pointed out, it was decided in *Evans* v. *Benyon* that this doctrine applies to a person who becomes a *cestui que trust* after his concurrence. Further, in *Butler* v. *Carter*, 16 W. R. 388, L. R. 5 Eq. 276, Lord Romilly stated distinctly that where one of two trustees was himself a *cestui que trust* he could not call upon his co-trustee to replace stock which they had both permitted to be misapplied (see p. 281). These cases are all based on obvious good sense; for if I request a person to deal with my property in a particular way and loss ensues, I cannot justly throw that loss on him. Whatever our liabilities may be to other people, still, as between him and me, the loss clearly ought to fall on me. Whether I am solely entitled to the property or have only a share or a limited interest, still the loss which I sustain in respect of my share or interest must clearly be borne by me, not by him. This rule is eminently just in such a case as this, in which the plaintiff who seeks relief has concurred in a long series of breaches of trust, and has since he became a *cestui que trust* confirmed all the breaches of trust which he and the defendant committed at an earlier period. The plaintiff contended, on the authority of *Raby* v. *Ridehalgh*, that the plaintiff's liability as *cestui que trust* to indemnify the defendant, and the extent of the plaintiff's inability to obtain relief against the defendant, was limited, not by the amount of the plaintiff's share in the trust estate, but by the benefit derived by the plaintiff from the breach of trust. But I do not understand *Raby* v. *Ridehalgh* to go as far as this. The question there was to what extent two tenants for life were bound to indemnify their trustees in respect of certain breaches of trust. The master found that the tenants for life had benefited by these breaches, and had requested the trustees to invest the trust money on mortgage, but that the two tenants for life had, not instigated or authorized the particular investments which led to the loss which the trustees were ordered to make good. The Vice-Chancellor held each of the tenants for life personally liable for the whole loss. The Court of Appeal corrected this, and decided, first, that the liability of the tenants for life was not a personal liability to indemnify the trustees, but was confined to the beneficial interests of the tenants for life; and the court decided, secondly, that the liability of the tenants for life was limited to the amounts they had respectively received, and did not extend to what other tenants for life had received nor to what the trustees had not paid over to anyone. This, under the circumstances of that case, was quite right. The whole of the life interests of the tenants for life were, however, charged with the repayment of what they were held liable for. In varying the order appealed from, the Court of Appeal treated the corrections which it made as formal rather than substantial, and I do not understand the decision to go further than I have stated; nor is there any reason to suppose that the doctrine laid down by Lord Eldon was in any way considered incorrect. Suppose a *cestui que trust* in remainder to induce his trustees to commit a breach of trust for the benefit of the tenant for life—perhaps his own father or mother—can such remainderman compel the trustees to make good the loss or resist their claim to have it made good out of his interest when it falls in, if some other *cestui que trust* compels them to make the loss good? I apprehend not; and yet in the case supposed the *cestui que trust* in remainder might not himself have derived any benefit at all from the breach of trust. The 6th section of the Trustee Act, 1888 (51 & 52 Vict. c. 59), appears to be based on this view of the law, and under that section (if it applied) it would, in my opinion, be just to impound the whole of the plaintiff's beneficial interest to indemnify the defendant. On these grounds I am of opinion that the decision appealed from is right, and that the appeal must be dismissed with costs.

KAY, L.J.—A claim is made by the plaintiff, one of two trustees, against the defendant, his co-trustee, for contribution of one-half the loss occasioned by a breach of trust committed by both by investing part of the trust money on insufficient security. Where trustees are equally to blame for a breach of trust, and are made jointly and severally liable to the *cestuis que trust*, if one of them pays the whole, his right to enforce contribution from his co-trustee is clear.

In *Lingard* v. *Bromley*, 1 V. & B. 114, at p. 117, Sir W. Grant, M.R., distinguished such a case from an ordinary tort, and had no doubt about the right to contribution. He then said: "There are, no doubt, many cases in which persons may be all liable severally, as well as jointly, to indemnify a third party, and yet ought not in equity to bear the burthen equally among themselves." The plaintiff and defendants in that case were assignees in bankruptcy, and the Master of the Rolls points out that the plaintiff, who had filed the bill to obtain contribution, had not derived any extensive benefit from the breach of trust, and that the defendants were not excused because they had left the matter in the plaintiff's hands, and did what he desired without examining into the matter. This was followed by the Court of Appeal in *Bahin* v. *Hughes*. The care with which the court, in administering equity between the trustees, looks into all the circumstances, is illustrated by *Lockhart*

v. Reilly, 1 De G. & J. 464, 6 W. R. Ch. Dig. 90, where a loss was occasioned by an improper investment on mortgage made by two trustees, one of whom was a solicitor, and acted as solicitor in the matter, and negotiated the mortgage in favour of a mortgagor with whom he was connected. Lord Cranworth, L.C., held him to be primarily liable as between himself and his co-trustee, and said that the fact of his acting as solicitor would alone be sufficient to justify this result. The same thing was held in *Thompson* v. *Finch*, 8 De G. M. & G. 560, 5 W. R. Ch. Dig. 100.

It seems to be essential to this claim for equal contribution that the trustees should be equally to blame for the breach of trust, and that neither of them should have derived an exclusive benefit from the breach of trust. [His lordship stated the facts, and continued:] In *Butler* v. *Butler*, 5 Ch. D. 554, 25 W. R. Dig. 296; on app., 26 W. R. 85, 7 Ch. D. 116, one trustee filed a bill against another, claiming to make him pecuniarily liable for a deficiency of mortgages made to a builder who repaid the defendant trustee a large part of such moneys for debts due from him to such trustee for the purchase money of the land and on account of advances made by him to the mortgagor. The plaintiff was aware that some payments were so made, but he did not know the amount. Fry, J., before whom the case first came, asked if there was any case in which such an indirect benefit had been held to make the trustee who received it primarily liable, and refused to do so; and this was supported in the Court of Appeal, James, L.J., saying that in the absence of fraud such a claim was too remote.

Suppose, then, that the plaintiff was thus directly or indirectly interested in lending the trust money to Hughes, and must be treated as being exclusively benefited by the breach of trust, the question is whether he is primarily liable to the extent of his one-fifth share of the estate.

It was argued that all the estate recovered must, first, be applied to pay the other four-fifth shares, and that the plaintiff has no right to contribution for the deficiency to pay his share.

In *Trafford* v. *Boehm* trust funds were settled by a marriage settlement (p. 442) on the husband for life, the wife for life, children, and, if none, to the husband. With the concurrence or subsequent consent of the husband an improper investment was made of the trust fund, which resulted in a loss, and after the death of the husband his widow filed a bill against the trustee of the settlement to recover the trust fund. The surviving trustee of the settlement filed a cross bill to be indemnified against the loss. Lord Hardwicke held that the estate of the husband was primarily liable. He said: "The rule of the court in all cases is that if a trustee errs in the management of the trust and is guilty of a breach, yet, if he goes out of the trust with the approbation of the *cestui que trust*, it must be made good first out of the estate of the person who consented to it." That this is the rule in the case of a person, *cestui que trust* at the time, assenting to a breach of trust is established, by *dicta* at least, in many cases. I take as an example Lord Langdale's words in *Lincoln* v. *Wright*: "Nothing can be more clear than the rule which is adopted by the court in these cases—that if a party having a partial interest in the trust fund induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted personally to enjoy the benefit of the trust whilst the trustees are subjected to a serious liability which he has brought upon them. What the court does in such a case is to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees who, by his request or desire or acquiescence, or by any other mode of concurrence, have been induced to do the improper act." In *Walker* v. *Symonds*, 3 Swans. 64, Lord Eldon said: "It is established by all the cases that, if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go further, and agree that either concurrence in the act or acquiescence without original concurrence will release the trustee; but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence, recollecting, in the conduct of that inquiry, how important it is, on the one hand, to secure the property of the *cestui que trust*, and, on the other, not to deter men from undertaking trusts from the performance of which they seldom obtain either satisfaction or gratitude." This refers only to an attempt by the *cestui que trust* to make the trustee liable for any loss which the *cestui que trust* may suffer by reason of a breach of trust which he instigated or concurred in. Such a claimant is estopped by his concurrence in the breach of trust. But, as I have shown, this estoppel does not exist where the claim is for contribution by one trustee against another. The fact of the claimant being equally to blame for the breach of trust does not bar such a claim. Then what difference does it make that the trustee so claiming is also interested in the trust estate? If he takes no benefit directly or indirectly by the breach of trust, can his interest be laid hold of to indemnify his co-trustee? If he does benefit, is the whole of his interest liable, or only to the extent of the benefit received? The decisions and *dicta* on this question are not easy to reconcile.

In *Booth* v. *Booth*, where the testator's widow, who was entitled to the income of the residue till his youngest child should attain twenty-one, concurred in a breach of trust by the trustees carrying on the business of the testator whereby his capital in that business was ultimately lost, Lord Langdale said: "That the widow concurred seemed to be quite clear, and any interest to which she may be entitled is the proper fund to resort to in the first instance. If she has obtained any benefit from the breach of trust, the trustee ought to be compensated in respect of it." That seems to indicate a limitation of the liability to the amount of the benefit derived by the beneficiary.

The question came before the Court of Appeal, and seems to have been carefully considered in *Raby* v. *Ridehalgh*, where tenants for life of equal half-shares in the trust estate induced the trustee to lend the trust money on mortgage so as to secure a higher rate of interest than the public funds in which the trustees desired to invest. There were no powers of investment in the will creating the trust. The tenants for life did not request the trustees to invest on the particular mortgages which turned out deficient. The trustees were held liable for the loss, and it was declared by the original order that the life interests of the tenants for life were liable to recoup the trustees in terms which would make each life interest liable to its full extent, and each also liable for the whole deficiency. On appeal Turner, L.J., intimating that the court did not go the length of ordering the *cestui que trust* personally to recoup the trustees, and doubting whether the trustees had any power to invest on mortgage, and holding the trustees liable, continued thus: "The next question is, What is the extent of liability which attaches upon the *cestuis que trust* for life in consequence of their having induced the trustees to commit the breach of

trust?" He then points out that they had received the income of the improper investments, and that the trustees were entitled to stand in the place of the remaindermen for the purpose of recovering against the *cestui que trust* for life who instigated the breach of trust, or their estate the benefit actually received by them in consequence of such breach of trust. One tenant for life, John Spenser Raby, was living; the other, William Raby, had died since the institution of the suit. The decree was altered, and as altered declared that J. S. Raby and the estate of W. Raby were respectively liable to the extent of the interest on the mortgages received by them respectively to make good to the trustees the amount they had to pay, and that the life estate of J. S. Raby and what was due in respect of the life estate of W. Raby were respectively liable to pay the amount for which each of them was respectively so liable. Turner, L.J., expressly treats the tenants for life as having instigated the breach of trust, and particularly pointed out that the life interest of each *cestui que trust* ought not to be made liable for the whole, but each estate only for so much of the income of the improper investments as each tenant for life had respectively received. If these receipts were not sufficient to recoup the trustees in full, it would seem that the court considered that the rest of the loss must be borne by them, and this was the effect of the decree as altered.

Here we have a plaintiff who was trustee and also *cestui que trust* as to one-fifth of the property; and, if the case of *Raby* v. *Ridehalgh* applies, it follows that he is not estopped by his concurrence in the breach of trust from claiming contribution. But as *cestui que trust* he is prevented from requiring the co-trustee to make good any loss sustained by him in that character. The loss he seeks to make his co-trustee share is not the loss of his one-fifth share as *cestui que trust*, but the amount he has had to pay as trustee to recoup the deficiency of the trust estate. If he is primarily liable to the extent of his one-fifth share, this claim must fail. If liable only to the amount of the benefit received from the improper investment, the balance of the loss after deducting that amount must be shared by himself and his co-trustee. On the whole I think that the weight of authority is in favour of holding that a trustee who, being also *cestui que trust*, has derived as between himself and his co-trustee an exclusive benefit by the breach of trust must indemnify his co-trustee to the extent of his interest in the trust fund, and not merely to the extent of the benefit which he has received. I think that the plaintiff must be treated as having received such an exclusive benefit. I am of opinion, for these reasons, that the plaintiff's action fails, and that the appeal must be dismissed. It is said that section 6 of the Trustee Act, 1888, does not apply to this case—I suppose because this proceeding was pending at the passing of that Act. The statute does not define the extent of the liability of a concurring beneficiary; the 6th section is rather addressed to describe the case in which the court may, if it shall think fit, impound all or any part of the interest of the beneficiary by way of indemnity to the trustee, and also to provide that consent of a beneficiary for this purpose must be given in writing.

A. L. SMITH, L.J.—This is an application by a trustee who is also a *cestui que trust* of trust property, against his co-trustee, to have him held liable to contribute towards a loss which had been occasioned by their breaches of trust, and which loss has been made good to the trust estate out of the applicants' share therein. The facts are these. [His lordship stated the facts, and continued:—] There appear to be three rules which have application to a case like the present, and may be shortly stated as follows: (1) That a *cestui que trust* cannot make a trustee liable for losses occasioned to him by a breach of trust which the *cestui que trust* has authorized and consented to; (2) that in such a case a trustee is entitled to be recouped out of the interest of the *cestui que trust* in the trust funds any loss he may sustain by reason of his having to make good such breach of trust; and (3) that as between two trustees who are *in pari delicto*, the one who has made good a loss occasioned by a breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other. The question is how these rules are to be applied in the present case.

As to the existence of the first rule, Lord Eldon, as long ago as the year 1818, in *Walker* v. *Symonds*, 3 Sw. at p. 64, states: "It is established by all the cases that if the *cestui que trust* joins with a trustee in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* could never complain of such a breach of trust." And in 1841 Lord Langdale in *Fyler* v. *Fyler*, 3 Beav. at p. 560, states the rule as follows: "If all this has taken place—*i.e.*, the breach of trust—with the consent of the parties now complaining, it certainly appears to me that they would not have any right to maintain this suit for *volenti non fit injuria*. If they have authorized this course of dealing with their own fund, it would be in the highest degree unjust to permit them to establish a claim against those who have acted under their authority." As to the second rule, this was held by Lord Hardwicke in the year 1746, in *Trafford* v. *Boehm*, 3 Atk. at p. 444: "The rule of the court in all cases is that if a trustee errs in the management of the trust and is guilty of a breach, yet if he goes out of the trust with the approbation of the *cestui que trust* it must be made good first out of the estate of the person who consented to it." And Lord Langdale, in *Lincoln* v. *Wright*, 4 Beav. at p. 432, states the rule thus: "Now, nothing can be more clear than the rule which is adopted by this court in these cases, that if one party, having a partial interest in the trust fund, induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted personally to enjoy the benefit of the trust whilst the trustees are subjected to a serious liability which he has brought upon them. What the court does in such a case is to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees who by her request and desire, or acquiescence, or by any other mode of concurrence, have been induced to do the improper act." The judgment of Turner, L.J., in *Raby* v. *Ridehalgh*, appears to me to proceed upon the same principle, for he held *cestui que trust* who had been privy to and instigated a breach of trust liable out of the trust shares to recoup the trustees. A question has arisen under this judgment as to what amount of the *cestui que trust's* interest the trustee is entitled to impound. For the reasons given by Lindley, L.J., I am of opinion that Turner, L.J., did not intend to cut down the rule which had theretofore in my opinion existed—viz., that a trustee may be entitled to impound the *cestui que trust's* interest in so far as it will go to recoup him for the losses he has had to make good. It is not stated whether the amount impounded in this case was not sufficient to indemnify the trustee. I do not doubt, had the plaintiff in the present case not been a co-trustee with the defendant, but only a *cestui que trust* of the estate of which the defendant was trustee, that, inasmuch as the plaintiff had authorized and consented to the breach of trust which is now complained of, he could not claim

contribution from the defendant to make good the loss he had sustained; and, what is more, that the defendant would have been entitled to impound the plaintiff's interest in his one-fifth share to exonerate him from any loss he might have been called upon to make good by reason of the breach of trust. It was argued by Mr. Warmington for the plaintiff before us that the facts showed that the plaintiff did not authorize or consent to the breach of trust which was committed knowing the circumstances of the case, for he had been induced into agreeing to advance the trust moneys to the builder Hughes by the defendant concealing from the plaintiff the fact that he wanted Hughes to have the trust moneys advanced to him in order that he, Hughes, might thereout pay to the defendant debts which Hughes might owe to him.

I am of opinion that no concealment has been established against the defendant. The foundation upon which the charge was based was that there was evidence that some of the trust moneys, after they had been advanced by the plaintiff and the defendant to Hughes upon mortgage, had been paid by him to the defendant. I think there was such evidence; but what was there necessarily wrong in this? It is very far from establishing the charge of concealment. I am of opinion upon the evidence that the plaintiff knew far more of these loans to, and the repayment thereof by, Hughes than suggested at the bar. Mr. Swinfen Eady, for the defendant, showed us that the plaintiff in his affidavit before this point was taken by his counsel had therein stated that he knew the following: "Some of the moneys so borrowed by the said James Hughes as aforesaid were paid by him direct to the defendant." That allegation fails, and it is not true to say that the plaintiff did not authorize or consent to the breach of trust, for he did so well knowing the facts relating thereto. It appears to me that the truth as to the motives of the plaintiff and the defendant is that the plaintiff was desirous of obtaining a higher rate of interest for his wife, and afterwards for himself, than he otherwise would have obtained had the trust funds not been lent to Hughes upon mortgage; and that the defendant was desirous that Hughes should have the trust money advanced to him upon mortgage, for it bettered his chance of being paid by Hughes that which Hughes might owe to him. I now come to the third rule, which is that where two trustees concur in committing a breach of trust and are *in pari delicto*, the one, if he has made good the loss occasioned thereby to the trust estate, can obtain contribution from the other. The existence of this rule is not disputed at the bar: see *Lingard* v. *Bromley*. The real question is how is this rule to be applied in the present case, which arises not between two trustees who are merely trustees, but between a trustee who is also a *cestui que trust* and his co-trustee who is not. In my judgment the true view is that the plaintiff in this case can only bring into play the third rule (*i.e.*, the rule as to contribution between co-trustees) if and when he had made good to the *cestui que trust* any loss they had sustained by reason of the breach of trust complained of over and above his share in the trust property; but this he has not done. As before stated, if he had not made good this loss and the defendant had, the plaintiff's share could have been impounded for that purpose by the defendant until he had been recouped what he had paid, and the plaintiff therefore was not in a position to ask for contribution from the defendant until the plaintiff had paid more than the amount of his share. When he had done so, then it seems to me he would have been entitled to ask for contribution towards what he had paid over and above his interest in the trust funds. But there yet remains to the plaintiff of his share in the trust funds the sum of £150, and consequently, in my judgment, there is nothing upon which the plaintiff can bring into play the operation of rule 3. For these reasons I think that North, J., was quite right in deciding as he did, that the plaintiff was entitled to no contribution from the defendant. This appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Brown, Son, & Vardy.*

Solicitors for the respondent, *Bramall, White, & Sanders.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) Feb. 6, 7.

DRAX *v.* FFOOKS. (*a.*)

Election law — Parochial elector—Local government - Woman—Qualification—Ownership — Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 2, *sub-section* 1; *s.* 43.

A woman is not entitled to be on the parochial electors' register by reason of her ownership of property within the parish.

Decision of the Queen's Bench Division, ante, *p.* 78, [1896] 1 *Q. B.* 1, *affirmed.*

This was an appeal from the decision of the Divisional Court (reported *ante*, p. 78, [1896] 1 Q. B. 1) which had dismissed an appeal from the decision of a revising barrister who had disallowed a claim by a married woman to be placed on the parochial electors' list for a certain parish in respect of the ownership of property within the parish.

The facts of the case are as follows.

The appellant, a married woman, was the owner of freehold property in the parish of Milborne St. Andrews, but was not an occupier in that parish, as she lived more than three miles therefrom. She claimed to have her name entered on the parochial electors' register of the said parish in respect of her property there. The property was of sufficient value to sustain an ordinary ownership claim, and her husband had no interest, nor was he qualified to be on the register in respect of it. The revising barrister disallowed the claim, on the ground that, as by section 2, sub-section 1 of the Local Government Act, 1894, it was provided that the parish meeting for a rural parish should consist of parochial electors, namely, persons registered in such portion either of the local government register of electors or of the Parliamentary register of electors as relates to the parish, and that, as the appellant was neither entitled to be on the local government register—ownership of property being no qualification in that respect—nor entitled to be on the Parliamentary register, being disqualified by her sex, she could not be placed on the parochial electors' register. From this decision she appealed to the Divisional Court (Lord Russell of Killowen, C.J., and Grantham and Vaughan Williams, JJ.) who affirmed the decision of the revising barrister: see *ante*, p. 78.

Section 43 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), provides that: "For the purposes of this Act a woman shall not be disqualified by marriage for being on any local government register of electors or for being an elector of any local authority, provided that a husband and wife shall not both be qualified in respect of the same property."

C. Dodd, Q.C. (*Macmorran* with him), for the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

appellant.—Prior to the Local Government Act of 1894 unmarried women were, if owners of property, qualified to vote for boards of guardians and urban sanitary authorities, and it was not the intention of the Legislature to take away this franchise because they are not entitled to be on the Parliamentary electors' register. The Legislature intended that a woman should be entitled to be on the register in respect of ownership in the same way that a man is entitled to be on the Parliamentary register, and section 43 provides that a woman shall not be disqualified from being on the register owing to her being married. A woman is qualified to vote at a municipal election by section 63 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). This qualification was extended to the rural parishes by the County Electors Act, 1888 (51 & 52 Vict. c. 10), ss. 2-4.

Boydell Houghton, for the respondent.—A woman is entitled to be on the local government register if she is an occupier; but ownership is not a sufficient qualification. Section 43 does not confer any further qualification upon her; it merely says that a woman who is otherwise qualified is not to be disqualified by reason of her marriage.

LORD ESHER, M.R.—In this case the appellant, a married woman, was the owner of freehold property in the parish of Milborne St. Andrews, in the county of Dorset, but was not an occupier in that parish. She claimed to have her name placed on the parochial electors' list for that parish in respect of her ownership of such property. Whether she has a right to have her name placed on such register depends entirely upon the provisions of the Local Government Act, 1894. It has been contended on her behalf that section 43 of that Act confers upon her a right to have her name put upon the parochial electors' register. That section, however, does not say she shall be so qualified; it merely provides that if she is otherwise qualified she shall not be disqualified by the fact that she is married. That section does not imply that a woman shall be qualified by reason of ownership. Qualification to be on the parochial electors' list depends upon section 2, sub-section 1 of which defines parochial electors as being "persons registered in such portion either of the local government register of electors or of the Parliamentary register of electors as relates to the parish."

Now, the persons who are qualified to be on the local government register are occupiers. Therefore, if a woman is an occupier, she may be qualified to be on that register, and section 43 expressly provides that if she is qualified, the fact of her being a married woman shall not be a disqualification. But the appellant in this case is not an occupier; therefore she is not entitled to be placed on the local government register. As regards the Parliamentary register, the appellant, being a woman, is, of course, disqualified from being on that register.

Then, by section 44, sub-section 1, it is provided that "the local government register of electors and the Parliamentary register of electors, so far as they relate to a parish, shall together form the register of the parochial electors of the parish; and any person whose name is not on that register shall not be entitled to attend a meeting or vote as a parochial elector."

For these reasons I am of opinion that this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. In this case the appellant claims to have her name placed on the parochial electors' list for the parish in which she owns some property, but in which she is not an occupier. Now, how is the parochial electors' list drawn up? By the Local Government Act, 1894, parochial councils are established, and section 2 of that Act defines parochial electors as being persons registered in such portion either of the local government or of the Parliamentary register of electors as relates to the parish. Then by section 44 it is provided that those two registers, so far as they relate to a parish, shall together form the register of the parochial electors, and that no person whose name is not in that register shall be entitled to vote. Then section 43 provides that no woman shall be disqualified by marriage from being on any local government register. That section does no more than remove any disqualification arising from marriage, provided the woman is otherwise qualified. In my opinion the word "property" in that section merely means the land or house in respect of which the woman may be qualified, and does not import an ownership qualification. I do not think that section 3, sub-section 2, on which counsel for the appellant relies, has anything to do with the qualification of electors. I am of opinion that the appellant is not entitled to be on the parochical electors' list, for as she is not an occupier she cannot be on the local government register, and being a woman cannot be on the Parliamentary register. We must construe the words of the Act of Parliament as we find them, and it is not for us to consider whether this construction of the Act may in certain cases disfranchise some women who formerly were qualified by ownership to vote for local boards and boards of guardians.

RIGBY, L.J.—In my opinion this is a very plain case. Before the Act of 1894 was passed there was the local government register of electors for the county council or town council, the qualification for which was occupation, and not ownership. As regards, however, the election of poor law guardians and local boards this register did not apply, and ownership of property constituted a qualification in those cases. The Act of 1894 abolished that qualification, giving the right of electing in those cases to the parochial electors, but it was provided that those who were on the Parliamentary register should be entitled to vote as parochial electors. No one, therefore, now is entitled to be upon the local government register in respect of ownership, and no woman can be upon the Parliamentary register. A woman is not disqualified by this Act from being on the parochial electors' register by reason of her sex, but merely from getting on that register by means of the Parliamentary register; she has still the right to get on the local government register by being an occupier. For these reasons I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors, *Bell, Brodrick, & Gray*, for *Parker*, Blandford; *Robins, Hay, & Co.*, for *E. Archdall Ffooks*, Sherborne.

From Prob. Div. & Adm. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Jan. 27.

THE "GERMANIC." (*a*.)

Admiralty—Practice—Parties—Action in rem—*Addition of defendant to claim* in personam—*Convenience.*

Where an action in rem *has been commenced against*

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

a ship and her owners for damage by collision, and the plaintiffs apply for an order to join the pilot as a defendant to the action, the judge ought to exercise his discretion by refusing to make such order on the ground of inconvenience.

Appeal from an order of Sir Francis Jeune.

This was an action *in rem* brought by the owners of the steamship *Cumbræ* against the owners of the steamship *Germanic* for damage by collision in the River Mersey.

The defendants having put in a defence of compulsory pilotage, the plaintiffs applied for leave to add Robert Llewellyn Roberts, who had been the pilot in charge of *The Germanic* at the time of the collision, as defendant to the action.

Sir Francis Jeune granted the application.

The owners of *The Germanic* and the pilot appealed.

Sir Walter Phillimore and *Butler Aspinall*, for the appellants.—The case of *The Bowesfield*, 5 Asp. Mar. Law Cas., shows that there is no power in an action *in rem* to add a party as a defendant to a claim *in personam*. Even if there is power, such a course is embarrassing. If the case against the ship and the case against the pilot are tried together, the Admiralty rule as to division of damages where both vessels are to blame will apply as regards the ship, but will not apply as regards the pilot. Again, the pilot may claim the right to be tried by a jury, while the action *in rem* would be tried by a judge with assessors, so that there might be different findings as to the same facts.

They cited *Reg.* v. *Judge of City of London Court*, 40 W. R. 215, [1892] 1 Q. B. 273.

Joseph Walton, *Q.C.*, *Pickford*, *Q.C.*, and *A. D. Bateson*, for the respondents.—The learned judge had jurisdiction to join the pilot as defendant under ord. 16, r. 4, and no injustice will result from the order.

They cited *The Zeta*, [1893] A. C. 468; *The Native Pearl*, 3 Asp. Mar. Law Cas. N. S. 515, 26 W. R. Dig. 219; *The Annandale*, 2 P. D. 179, note, 25 W. R. Dig. 263.

Lord ESHER, M.R.—I am of opinion that the appeal must be allowed. The plaintiffs originally brought their action against the ship and the owners and other persons interested in her. They now want to join somebody else as defendant—viz., the pilot, and they ask for the assistance of the court to enable them to do so. It is unnecessary to determine whether the court has jurisdiction to join the pilot. I will assume that the court has jurisdiction, and the question then arises, How ought the jurisdiction to be exercised? There can be no doubt that if we should be of opinion that the learned judge has exercised jurisdiction unadvisedly, we have the power, and it is our duty, to alter his order. Now, if it should appear to the judge on such an application that one course which was open to him would lead to great inconvenience, while another course would not lead to any inconvenience, the proper exercise of his discretion would be to avoid the risk of great inconvenience, and to choose the other course. He was asked to join the pilot as defendant, and it is clear that if he made such an order, it would in all probability lead to great inconvenience. The pilot would have a right to be tried by a jury, and there can be no doubt that he would be advised to claim that right. So the case between the two ships and their owners would be tried by a judge sitting with assessors, while the case between the ship to which the pilot did not belong and the pilot would be tried by a judge with a jury. Such a course would manifestly be unseemly and inconvenient. There would also be a difficulty as to drawing up the judgments. If, on the other hand, the case were allowed to remain as it is, there would be no such inconvenience. It is true that the plaintiffs have a legal right, after the present action has been tried, to sue the pilot, and to have their case against him tried before a jury. But I do not think they are likely to avail themselves of that right, whether they succeed or fail in this action. I am, therefore, of opinion that the learned judge ought to have exercised his discretion by refusing the application.

LOPES and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitors for the appellants, *Hill, Dickinson, & Co.*

Solicitors for the respondents, *Batesons, Warr, & Wimshurst.*

High Court of Justice.

Chan. Div. Stirling, J. — Nov. 27, 28, 29, 30; Jan. 29.

ATTORNEY-GENERAL *v.* TRUSTEES OF THE LONDON PAROCHIAL CHARITIES. (*a.*)

Metropolis—Land set apart for the purposes of interment—Sold under the authority of an Act of Parliament—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. cxxix.*)—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *ss.* 3, 5.

Land formerly used as a burial ground, situate in the City of London, was purchased by the Commissioners of Sewers under the provisions of Michael Angelo Taylor's Act, and was in part used by them for public purposes. The Commissioners sold the residue, and the purchasers proposed to erect buildings thereon. An action was brought to restrain this building.

Held, that the land in question had been sold or disposed of under the authority of an Act of Parliament within the meaning of section 5 of the Disused Burial Grounds Act, 1884, and might therefore be built upon.

This was an action by her Majesty's Attorney-General at the relation of the Vicar and Churchwardens of the parish church of St. Botolph Without, Aldersgate, in the City of London, and by the Vicar and Churchwardens as plaintiffs, in which an injunction was sought to restrain the defendants from erecting buildings on a piece of land in the immediate neighbourhood of that church, contrary to the provisions of the Disused Burial Grounds Act, 1884, and the Metropolitan Open Spaces Acts, 1881 and 1887.

The land in question lies between a street called Little Britain on the north and the site of a wall on the south dividing it from what was formerly the churchyard of St. Botolph, though now converted into a public garden.

This land (along with an additional strip now thrown into Little Britain) was acquired by virtue of the powers conferred by Michael Angelo Taylor's Act, 57 Geo. 3, c. cxxix., by the Commissioners of Sewers for the City of London in the years 1884 and 1885, for the purpose of widening Little Britain, and was purchased by them in part from the Ecclesiastical Commissioners (whose title was derived from the Dean and Chapter of Westminster), and as regards

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

the residue from a body of charity trustees who held it upon trust to permit the churchwardens of the parish of St. Botolph to erect, for such purposes as the parishioners in Vestry assembled should direct.

At the time when the Commissioners of Sewers bought the land acquired by them, it was to a large extent covered by old houses, known as Nos. 77, 77½, 77A, 78, 79, 81, and 81A, Little Britain. All these houses, except No. 77½, abutted on Little Britain, but No. 77½ lay behind the others, abutting on the south side of the tower of St. Botolph's, and was approached by a passage-way bounded on the south by the wall above mentioned, and which was surrounded by a rail. The soil of this passage-way was included in the purchase. No. 79 had a small yard abutting on this passage; the other houses (except No. 81) actually abutted on it.

In the passage were two set of gates, one set at the entrance from Little Britain, the other about the middle. Near the end of this passage, close to No. 77½, were some steps which led to a gate in the railing through which the churchyard might be entered.

The Commissioners of Sewers pulled down all these houses and widened the street, and they, in 1887, resold the surplus lands which they did not require, being the piece of land as to which this dispute has arisen, to the same charitable trustees above mentioned, and from whom part of the lands had been bought.

This land was for some time used as a public garden. In 1891 the estates of the parish trustees became vested in the defendant trustees, and they, with the sanction of the Charity Commissioners, agreed to let the land for building purposes, and the defendants Heather and Bailey proceeded to excavate for the purpose of laying the foundations.

The writ in the action was issued on the 23rd of October, 1894.

By section 3 of the Disused Burial Grounds Act, 1884, the erection of buildings on any "disused burial ground" is prohibited. By section 4 of the Open Spaces Act, 1887 (50 & 51 Vict. c. 96), it is enacted that in the Disused Burial Grounds Act, 1884, the expression "burial ground" shall have the same meaning as in the Metropolitan Open Spaces Act, 1881, as amended by the Act of 1887, and that the expression "disused burial ground" shall mean any burial ground which is no longer used for interments, whether or not such ground shall have been partially or wholly closed for burials under the provisions of any statute or Order in Council.

By section 1 of the Metropolitan Open Spaces Act, 1881, the expression "burial ground" includes any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment.

Graham Hastings, Q.C., and *Stokes*, for the plaintiffs, argued that on the evidence the land in question had been set apart for burials, and that even if not set apart, yet it had been used as a burial ground; and, further, that section 5 of the Act of 1884 did not apply to any sale subsequent to the coming into force of that Act, and that there had not been, within the meaning of that section, a sale under the authority of any Act of Parliament.

Buckley, Q.C., *Sir W. Phillimore*, Q.C., and *R. N. Neville*, for the defendants the charity trustees.

R. J. Parker, for the defendants Heather and Bailey.

Hastings, Q.C., replied.

The following cases were cited:—*Re Poneford and Newport District School Board*, 42 W. R. 358, [1894] 1 Ch. 454; *Re Ecclesiastical Commissioners and New City of London Brewery Co.*, 43 W. R. 457, [1895] 1 Ch. 702; *Trustees of St. Saviour's Rectory* v. *Oyler*, 34 W. R. 224, 31 Ch. D. 412; *Thomas* v. *Daw*, 15 W. R. 113, L. R. 2 Ch. App. 1; *Gurd* v. *Commissioners of Sewers*, 28 Ch. D. 486, 33 W. R. Dig. 106; *Foster* v. *Dodd*, 14 W. R. 607, L. R. 1 Q. B. 477; *Reg.* v. *Twist*, 17 W. R. 765, L. R. 4 Q. B. 407; *Philipps* v. *Halliday*, [1891] A. C. 228, 39 W. R. Dig. 81.

STIRLING, J., stated the facts as above set forth, and referred to the statutes, and continued:—The first question to be inquired into, therefore, is whether any part of the land as to which the dispute has arisen is shown to have been "at any time set apart for the purposes of interment." Now, the meaning of these words has been the subject of judicial decision.

It has been determined by North, J., and the Court of Appeal in *In re Poneford and Newport District School Board*, that they do not necessarily involve actual use for the purposes of interment; land, therefore, which has been set apart, though it may never have been actually used for the purposes of interment is within the definition. On the other hand, it has been determined by North, J., in *In re Ecclesiastical Commissioners and City of London Brewery Co.*, that land actually used for the purpose of interment need not necessarily have been set apart for these purposes. In that case the land in question was the site of a church in which burials had taken place; but it was held that the site had not been set apart within the meaning of this definition, and might consequently be built upon.

In the light of these decisions, I have to consider the documentary and other evidence adduced as to the title to and nature of the land in question. [His lordship then referred to the evidence, and in the result found that, except as to the site of the passage-way, no part of the land in question had been set apart for burials; but his lordship found that the site of the passage-way had once formed part of the churchyard, and consequently was at one time set apart for the purposes of interment, and continued:—]

It was, however, contended on the part of the defendants that even then no order ought to be made, because the case fell within an exception from the operation of the Act of 1884 under section 5, which runs: "Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament." The language of this section, notwithstanding its apparent simplicity, presents difficulties of interpretation when applied to the facts of the present case. It was said on behalf of the plaintiffs (1) that this section did not apply to a sale subsequently to the 14th of August, 1884, the date of the passing of the Act; and (2) that the site of the passage-way had not been sold or disposed of under the authority of any Act of Parliament within the meaning of the section. The first of these points has already been considered in two cases—viz., *Trustees of St. Saviour's Rectory* v. *Oyler*, before Bacon, V.C., and *In re Ecclesiastical Commissioners and New City of London Brewery Co.*, before North, J. These two learned judges appear to have arrived at different conclusions, and, having carefully considered their judgments, I think that the construction placed on the enactment by North, J., is, for the reasons given by him, to be preferred; and I therefore hold that section 5 may apply to the sale to the Commissioners of Sewers of the City of London, notwithstanding that that sale did not take place until 1885.

The second question appears to arise for the first time. The sale in 1885 was made under the provisions of sections 80 and 81 of the Statute 57 Geo. 3, c. cxxix., commonly known as Michael Angelo Taylor's

Act. The effect of these provisions has been repeatedly considered by the courts particularly, *Thomas* v. *Daw*, and *Gard* v. *Commissioners of Sewers of the City of London*. The effect of them may be thus stated. Certain public bodies within the limits of the bills of mortality and the parishes of St. Pancras and St. Marylebone (among which bodies are included the Commissioners of Sewers of the City of London) are thereby empowered, for the purpose of improving the the streets within their jurisdiction, to adjudge that "any houses, walls, buildings, lands, tenements, and hereditaments" (words of the widest import and amply sufficient to include a burial-ground, whether used or disused) or any part thereof prevent them executing a proposed improvement. Such an adjudication has been held a necessary preliminary to the taking of any further steps: see *Thomas* v. *Daw*. The adjudication being made (of course good faith is requisite, but as to this no question has been raised), the bodies in question have power (section 80) to treat, contract, and agree with the several owner or owners, occupier or occupiers, of all such houses, walls, buildings, lands, and hereditaments of whatsoever nature, tenure, kind, or quality for the purpose of the improvements, and to pay for the same such price as might be agreed upon; and (section 81) all persons, including particularly trustees and feoffees in trust for charities, are empowered to treat and agree with the public body for the absolute sale of the property and sell and convey it accordingly. Section 82 confers compulsory powers for the acquisition of such lands; and section 84 requires the purchase money in the case of sales by incapacitated persons to be paid into this court, and dealt with according to its orders.

It appears from the documents in evidence that this course was strictly pursued. There was an adjudication by the Commissioners of Sewers, a treaty or negotiation between them and the charity trustees, resulting in the ascertainment of the price by an arbitrator, payment of the purchase money into court, and a conveyance. The Commissioners derived their power to purchase, and the charity trustees their power to sell, from the statute.

Each step was taken under and in accordance with the authority conferred by the statute, and from that authority alone the sale derives its validity. I can come to no other conclusion than that the passage way (which was included in the lands taken by the Commissioners) was sold under the authority of an Act of Parliament—viz., 57 Geo. 3, c. cxxix. Why, then, does not the case fall within section 5 of the Act of 1884? It is said that some limitations must be put on the words of the enactment, otherwise a sale by a tenant for life under the power conferred by the Settled Land Acts would fall within it, with the result that a disused burial ground if sold by a tenant for life might be built upon, while if sold by an absolute owner could not. I should be very slow to arrive at any such conclusion, and if to escape from it some limitation must be put on the language of the Act, that will have to be considered when the case arises.

It is enough on the present occasion to say that whatever limitation is to be imposed it ought not, in my judgment, to exclude from the operation of section 5 a sale effected under such circumstances as that of 1885.

The result is that the action must be dismissed.

Solicitors, *Webb & Sons; Clarke & Blundell; R. Pearce.*

Chan. Div.
Vaughan Williams, J. } Nov. 27, 28; Feb. 19.

In re HEMP, YARN, AND CORDAGE CO. (LIMITED). (*a*.)

Company — Winding up—Contributory—Underwriting contract — Termination of authority to apply for shares—Register of members.

An underwriting letter containing an offer (to be binding for two months) by the underwriter, in consideration of a premium, to take up such shares in a company as the public should not take up in answer to an invitation for public subscription, was addressed to the promoters of the company. The capital was offered to the public a few days after the date of the underwriting letter, but the underwriting letter was not accepted until a date at which the subscription list had been closed, the invitation to the public having proved an almost total failure. The promoters afterwards applied for shares in the underwriter's name, and the shares were allotted to him and his name placed on the register of members of the company. The company afterwards went into liquidation, and the underwriter's name still being on the register the liquidator sought to make him liable for calls.

Held, that the underwriter was not liable as a contributory, for when the underwriting letter was produced to the company it showed on the face of it that the offer had been accepted out of time, and there had never been a ratification with knowledge of the facts so as to enable the liquidator to rely on an estoppel.

This was a summons by the liquidator in the winding up under supervision of the above-named company for payment of calls by certain persons, among whom was a Mr. W. H. Hindley, who had signed an underwriting letter, dated the 17th of June, 1892, and addressed to the Northern Assets Corporation (who were promoters of the above-named company), and accepted on the 1st of July, 1892.

The material part of the underwriting letter was as follows:—

"Gentlemen,—I agree for the consideration below stated, upon the public issue, to subscribe for 400 ordinary shares of £5 each, £1 5s. paid, of the above issue, on the terms of the company's prospectus about to be issued . . . and to pay the instalments on the dates to be specified in the said prospectus as above, in consideration of which you are to pay me a commission of 1 per cent. on the . . . ordinary shares, and I hereby authorize you, in the event of my not applying for shares . . . as above mentioned, to apply for shares . . . in my name, and the directors of the company to allot the same to me thereon. But if on the public issue of the prospectus the whole of the above issue is *bonâ fide* subscribed by the public, then no allotment is to be made to me; but should the said issue be only partially subscribed by the public, then I am only to be allotted my proportion of the deficiency *pro rata* with the other persons or firms who shall have signed or entered into agreements with or underwriting letters to you similar, *mutatis mutandis*, to the arrangements hereby made. In either case it is agreed that the said commission upon the total sum guaranteed by me—viz., £2,000—is to be paid out of the moneys received by you from the vendors. This engagement is binding on me for two months from this date."

The letter was addressed to the Assets Corporation, and stated at its head the share and debenture capital of the company.

(*a*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

The capital had been offered to the public on the 20th, 21st, and 22nd of June, 1892, with the result that the shares were not taken up by the public, there having only been nine applications in all, and in consequence by the 1st of July the public subscription list had been closed.

Afterwards the underwriting letter with an application for shares was produced to the board of the company, who allotted the shares in question to Hindley without his knowledge, and his name was placed on the register of members, where it remained at the date of the winding up.

Hindley knew that his name had been placed upon the register, but he disputed his liability as a contributory on the ground that he was not aware of the real state of the facts regarding the acceptance of the offer in the underwriting letter, and also on the ground that he had in no way ratified the application by the Assets Corporation.

Buckley, Q.C., and *W. F. Hamilton*, for the liquidator.

Astbury, Q.C., and *Macnaghten*, for Hindley, raised the objection that in the circumstances he was not liable as a contributory. The application was sent in after the authority given by the contract had expired. Therefore there was in fact no application. There cannot be ratification without knowledge of the facts. The Assets Corporation ought not to have applied as they did, but an opportunity ought to have been given to us to apply before the application was made. A reasonable time should be given to the person signing the contract to apply himself before an application is made in his name.

They referred to *Harvey's Oyster Co., Ormerod's case*, 42 W. R. 701, [1894] 2 Ch. 475; *Re Henry Bentley & Co.*, 69 L. T. Rep. N. S. 204; *Brussels Palace of Varieties* v. *Prockter*, 10 T. L. R. 72.

Hamilton.—There was a contract to take shares, which cannot be repudiated after there has been a winding up. Hindley is estopped from disputing his liability to pay calls by reason of the lapse of time.

He cited *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 16 W. R. H. L. Dig. 15, and *Kent* v. *Freehold Land Co.*, 16 W. R. 990, L. R. 3 Ch. App. 493.

Astbury, in reply, cited *Pellatt's case*, 15 W. R. 726, L. R. 2 Ch. 527; *Black & Co.'s case*, 21 W. R. 249, L. R. 8 Ch. App. 254; *Dowgan's case*, 21 W. R. 495, L. R. 8 Ch. App. 540.

Cur. adv. vult.

Feb. 19.—Vaughan Williams, J.—I have come to the conclusion that Mr. Hindley ought not to be placed upon the list of contributories. It is true that his name appears upon the register of shareholders, and that it was placed there in respect of shares allotted to him in pursuance of an application signed in his name, under a power contained in an underwriting letter which he himself signed, and which is addressed to the London and Northern Assets Corporation, who seem to have been intimately connected with the promotion of the Hemp, Yarn, and Cordage Co. But it seems to me that, notwithstanding these facts, Mr. Hindley ought not to be placed on the list of contributories, because the Northern Assets Corporation had no right to use the powers under the underwriting letter at the time when they actually did use them. The underwriting letter, which is, in substance, an offer, is dated the 17th of June, 1892. The capital of the company was offered to the public on the 20th, 21st, and 22nd, and the offer contained in the letter was not accepted until the 1st of July, 1892, as appears upon the face of the letter, which has the acceptance and date of acceptance written on it. On the 1st of July the subscription list had been closed, the invitation to the public proving an almost total failure, only nine applications having been made.

Now, it seems clear that as the offer in the underwriting letter is an offer, in consideration of a premium, to take up such shares as the public should not take up in answer to the invitation for public subscription, the Northern Assets Corporation, to whom it was addressed, could not wait to see the result of the invitation to the public, and then accept Mr. Hindley's offer to underwrite after the invitation to the public had proved a failure. If there was no authority to sign the application for shares at the time when it was signed, then it seems to me that there was no contract between Mr. Hindley and the company in pursuance of which shares could be allotted to him; and the mere fact of his name being on the register, even though with his knowledge, will not make him a member.

But then it may be said that Mr. Hindley ratified the act of his assumed agent by not taking steps to get his name removed from the register, and that he cannot after liquidation get his name removed from the register. The answer to this seems to be that the underwriting letter was produced to the board before the allotment, and on the face of it showed that the offer had been accepted out of time. This is not a case in which there was a voidable contract by Mr. Hindley with the company to take shares, or a voidable authority to apply. In such a case, liquidation having intervened, it would be too late to avoid; but it is a case where there never was an authority to sign, or a contract by Hindley with the company, and where there never has been ratification with knowledge of the facts, the company cannot rely upon an estoppel, because they were wrong in allotting shares in pursuance of the authority produced to them, which on the face of it was out of time.

As against Mr. Hindley, therefore, the application must be dismissed, with costs.

Solicitors, *Baker, Blaker, & Hawes; Nunn & Popham.*

Q. B. Div.
(Lindley and Kay, L.JJ.) Feb. 11, 12.

Strickland (*Appellant*) *v.* Hayes (*Respondent*). (*a.*)

Local government—County council—Bye-law for good rule and government—Use of profane or obscene language—Reasonableness—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 16.

A bye-law for the good rule and government of a county made by a county council under section 23 *of the Municipal Corporations Act and section* 16 *of the Local Government Act*, 1888, *prohibited any person from singing profane or obscene songs or using profane or obscene language "in any street or public place, or on land adjacent thereto."*

Held, that the bye-law was unreasonable and invalid, not only because it extended the prohibition to land adjacent to a street or public place, but because it did not restrict the offence to cases where the song was sung or the language used to the annoyance of any person or of the public.

A bye-law for good rule and government made under section 23 *of the Municipal Corporations Act*, 1882,

(*a.*) Reported by T. R. Colquhoun Dill, Esq., Barrister-at-Law.

does not require confirmation by the Local Government Board.

Case stated by justices of the county of Worcester.

An information was preferred by the respondent against the appellant charging him with having unlawfully used obscene language in a public place in the county contrary to the bye-laws of the county council.

It was proved that the appellant had used the language complained of when standing on a public footpath in the presence of a number of persons.

The bye-law in question was No. 3 of a set of bye-laws "for the good rule and government of the county" made by the county council under the powers conferred on them by section 16 of the Local Government Act, 1888, and section 23 of the Municipal Corporations Act, 1882; the bye-laws were duly sent to the Secretary of State, and had not been disallowed by the Queen in Council under section 23 (4) of the last-mentioned Act.

Bye-law No. 3 provided that "no person shall in any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language.

The justices convicted the appellant and imposed a fine of ten shillings under the provisions of the bye-laws as to penalties.

The question was whether the conviction was good.

Crump, Q.C., for the appellant.—The conviction is bad. This bye-law is unreasonable, because it purports to create a new offence, and is repugnant to the general law of the land. Bye-laws for good rule and government under section 23 of the Municipal Corporations Act, 1882, can only prohibit the doing of things which are contrary to law or are done to the annoyance or injury of the inhabitants. The mere use of objectionable language cannot be made an offence unless the public or some members of it are annoyed thereby; and, further, to make punishable the use of such language on any land adjacent to a public place is clearly unreasonable. The general law on this subject appears from section 28 of the Towns Police Clauses Act, 1847, which provides for the punishment of persons who use profane or obscene language "in any street" and "to the annoyance of the residents or passengers"; and the bye-laws of a local authority cannot go beyond the statutory provisions relating to the same subject-matter. These bye-laws required to be confirmed by the Local Government Board under section 187 of the Public Health Act, 1875, and this has not been done: they are therefore wholly invalid.

He cited *Johnson* v. *Mayor of Croydon*, 16 Q. B. D. 708, and *Everitt* v. *Grapes*, 3 L. T. N. S. 669.

Channell, Q.C., and *Brooke-Little*, for the respondent.—The bye-law is reasonable if it be reasonably construed. The words relating to land adjacent to a public place must be construed to refer to the use of objectionable language on land so near to a public place that the language is audible in the public place: *Edmonds* v. *Company of Watermen*, 1 Jur. N. S. 727. Under section 28 of the Towns Police Clauses Act it is not necessary that the offender himself should be in the street: *Reg.* v. *Thallman*, 12 W. R. 88, 33 L. J. M. C. 58. But even if the words as to adjacent land are too wide, the rest of the bye-law is not invalidated by them; it is severable. The use of obscene language must be presumed to annoy the inhabitants, and it is unnecessary to specify this in the bye-law.

Crump, Q.C., replied.

LINDLEY, L.J.—The question is whether this bye-law is valid or invalid. If it is valid there is no reason why we should disturb the conviction. Several points have been raised to induce us to think that the bye-law is bad. First, as to the objection that these bye-laws have not been confirmed by the Local Government Board: this is disposed of by looking at the section under which they are made. These are bye-laws for "good rule and government," and they come into force if they have been duly sent to the Secretary of State, and have not been disallowed by the Queen in Council within the prescribed period: the Local Government Board have nothing to do with them.

The serious point is whether this bye-law is bad as being unreasonable. It is said that it goes a great deal too far; and that is a formidable objection. The court has no sympathy with persons who sing obscene songs or use obscene language, but it is important to see that bye-laws such as these do not go beyond the powers of those who make them. They were made under section 23 of the Municipal Corporations Act, 1882, which is incorporated in section 16 of the Local Government Act, 1888. I do not see that that section gives any power to make a new criminal offence. I do not mean that such bye-laws can do no more than reiterate the provisions of an Act of Parliament. If that were so they would be of very little use. But they must be within the authority under which they are made, and I have no hesitation in saying that this bye-law goes too far. The effect of the words "or on land adjacent thereto" is to make an extremely wide prohibition—far beyond what is necessary for good government. It would cover the case of a man using profane language in his own stable or in his house. Such a wide prohibition is tyranny, and I have no doubt that it is bad.

It does not, however, follow that the rest of the bye-law is bad. There is plenty of authority to show that a bye-law may be severed, and that one part may be bad and the rest good. This bye-law is severable. We may strike out the words "or on land adjacent thereto" and the bye-law will read, "No person shall in any street or public place sing or recite any profane or obscene song," &c. But, reading it in that way, there is not a word to show that it is to be construed so as to import the words "to the annoyance of the public." If we turn to public statutes dealing with the same subject-matter, such as the Towns Police Clauses Act, 1847, we find that the offence lies in using the objectionable language "to the annoyance of the residents or passengers." But under this bye-law it seems to me that a person might be convicted if he sang a bawdy song, although no one was near or could have been annoyed. I cannot agree with the argument that such words as "to the annoyance of the public" are to be implied. Such a bye-law as this goes far beyond what is reasonable for securing the good government of the county. It is unreasonable, and we must hold that the conviction was bad.

KAY, L.J.—I am of the same opinion. I have the strongest desire to uphold this conviction, for what the respondent did was to use obscene language on a public footpath in the presence of a number of people. But if we hold this bye-law to be good, it will form a precedent of a bye-law for good government all over the country, and it would be dangerous to have bye-laws so unrestricted as this. In Acts of Parliament dealing with such matters restrictions always accompany a provision of this kind. In places to which the Towns Police Clauses Act, 1847, applies there is no infringement of the Act of Parliament

unless the language used is shown to be to the annoyance of the residents or passengers. Can it be right that a local authority to whom power is given to make bye-laws for good government should reject those restrictions and make a bye-law in such terms as those which we are considering? Under this bye-law a man would be guilty of an offence if he admitted having used profane language although no human being heard him. It is said that such words as "to the annoyance of the public" must be imported into this bye-law; but it seems to me, on the contrary, that anyone who was arguing to obtain a conviction under it would be entitled to say that it was clear, upon contrasting it with the language of the Act as to streets in towns, that the omission of words as to the annoyance of the public showed that the bye-law was intended to have a wider application than the statute. The restricting words are absent, and if the bye-law is to be read as if it applied only where members of the public are annoyed, it ought to say so, for a person charged is entitled to have the offence clearly stated in the bye-law under which he is charged.

I am impressed with the view that this bye-law ought not to be allowed to form a precedent, and I am brought to the conclusion that it is bad, not only because of the words "or on land adjacent thereto," but because it is not restricted to cases where the public is annoyed.

Appeal allowed.

Solicitor for the appellant, *Tree*, Worcester.

Solicitors for the respondent, *Clarke & Blundell*, for *Thornely*, Worcester.

Prob. Div. & Adm. Div. } Nov. 11.
Divorce. }

CARTER v. CARTER. (*a.*)

Divorce—Judicial separation—Alimony pendente lite—*Application for injunction.*

Where in a suit for judicial separation the wife obtained an order for alimony pendente lite, *the court refused to grant an injunction restraining the husband from parting with his property.*

Motion on behalf of the petitioner in a suit for judicial separation for an injunction restraining the respondent, the husband, from further dealing with certain leasehold property which he had sold, and for the appointment of a receiver of the proceeds of the sale.

On the 22nd of August the respondent entered an appearance to the suit. On the 22nd of October he filed his answer, and on the 26th of October an order was made on the respondent for the payment by him of alimony *pendente lite* at the rate of about £31 a year, with liberty to the petitioner to apply for an increase. Directly the order was made the respondent put up his leasehold property for sale, and the contract for sale was made on the 30th of October.

It was alleged by the petitioner that the respondent intended to leave the country. This he denied. The alimony had been paid up to date.

Rooth, for the petitioner, in support of the motion.—The court would make this order in such a case, where permanent alimony has been allowed: *Sidney* v. *Sidney*, 17 L. T. N. S. 9. Unless the injunction is granted now, the husband may dissipate his property, and the court will not be able to enforce any order it may make as to alimony, as in this case this is the only property the husband has: *Noakes* v. *Noakes*, 26 W. R. 284, 4 P. D. 60. In *Newton* v. *Newton*, 34 W. R. 123, 11 P. D. 11, no order had been made for alimony at all when the injunction was asked for; that distinguishes that case from this.

Barnard, for the respondent.—This being a suit for judicial separation, even if an order for permanent alimony had been made, this court could not order the husband to secure it. Certainly no security can be required for alimony *pendente lite*, and therefore the ground of the application for an injunction fails. This court follows the rules of the ecclesiastical court: *Hyde* v. *Hyde*, 13 W. R. 545, 4 Sw. & Tr. 80.

BARNES, J., refused the motion.

Motion refused.

Solicitor for the petitioner, *Romain.*

Solicitor for the respondent, *A. J. Evans.*

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. } Nov. 11.
Probate. }

In the Goods of HENRY TEECE.
In the Goods of HANNAH TEECE. (*a.*)

Administration—Small estate—Creditor's application—Citation of next of kin dispensed with—Court of Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

On the application of a creditor for administration of a small estate, the court made the grant, under section 73 *of the Court of Probate Act*, 1857, *on notice of motion to the next of kin, without requiring them to be cited.*

Two motions for grants of administration of the respective estates of Henry Teece, who died in 1893, and of Hannah Teece, his widow, who died in January, 1894, both intestate, to Beaumont, the clerk of the Guardians of the Wakefield Union.

The estate of Henry Teece, of the value of about £50, passed to his widow under the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), s. 1, as he left no issue. The Guardians claimed £5 10s. for maintenance.

Hannah Teece was a pauper lunatic, and against her estate the Guardians' claim was £25 6s.

Bargrave Deane, for the applicant.—I apply under section 73 of the Court of Probate Act, 1857. The next of kin, who are all brothers and sisters, have not been cited, but they have had notice of this motion, and it has been fully explained to them.

GORELL BARNES, J.—I think this has been done on motion without citation. You may take the grant.

Motion allowed.

Solicitors for the applicant, *Clarke & Blundell*, for *Harrison, Beaumont, & Smith*, Wakefield.

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) March 4.

HENDERSON BROTHERS *v.* SHANKLAND & Co. (*a.*)

Ship — General average — Prior particular average damage—Constructive total loss—Amount of general average contribution—Deduction of one-third new for old.

A ship, after receiving a particular average damage, incurred a general average loss, and on arrival in port was condemned as a constructive total loss, and sold.

Held, that, in order to ascertain the amount to be contributed to by ship and cargo in general average, the value of the ship must be taken just before the general average sacrifice was made; that such value was to be arrived at by deducting the estimated cost of repairing the particular average damage from the value of the ship before that damage; and that from the value so ascertained the amount realized by the sale of the ship must be deducted, the balance being the amount to be contributed to in general average.

Held also, that, in estimating the cost of repairing the particular average damage in such a case, a deduction of one-third new for old could not be made.

Appeal from the judgment of Mathew, J., in favour of the plaintiffs at the trial of the action without a jury, reported in 1 Com. Cas. 252.

The action was for an order in regard to a sum of money paid by the plaintiffs into a bank in the joint names of the plaintiffs and defendants in respect of general average contribution.

The plaintiffs were the owners of cargo on board *The Woodburn*, a sailing ship belonging to the defendants.

The Woodburn, while on a voyage from Chittagong to Dundee with a cargo of jute, encountered a heavy storm, and suffered considerable damage, and, the ship being laid on her beam ends, in order to save both ship and cargo, her masts were cut away, and other general average sacrifices made.

The ship then put into Calcutta, when, upon examination, it was found that it would cost more to repair her than she would be worth when repaired. She was accordingly condemned as a constructive total loss, and sold for £883.

The question in the action was what was the amount to be contributed to in general average.

The value of the ship before the storm was £6,000. The estimated cost of repairing the general average sacrifice was £5,797, and the estimated cost of repairing the particular average damage by the storm was £3.429, making a total estimated cost of £9,226. The estimated cost of repairing the general average sacrifice was thus 63 per cent. of the total estimated cost.

The plaintiffs contended that the amount to be contributed to by ship and cargo in general average should be ascertained as follows:—Deduct £3,429, the estimated cost of repairing the particular average damage, from £6,000, the value of the ship, and the balance, £2,571, was the value of the ship which was in peril at the time the general average sacrifice was made. From this sum £883, the amount realized by the sale of the ship, must be deducted, leaving £1,688 as the amount to be contributed to by ship and cargo in general average.

The defendants contended that the proper method was to deduct the £883 from the £6,000, which left £5,117 as the total loss sustained by the ship. Of this sum 63 per cent. was attributable to the general average sacrifice, and the sum so ascertained was the amount to be contributed to in general average.

They also contended that, upon the plaintiffs' calculation, a deduction of one-third new for old should be made from the estimated cost of repairing the particular average damage.

Mathew, J., held that the plaintiffs' contention was correct, and directed the adjustment to be made on that principle.

The defendants appealed.

Bigham, Q.C., and *Leck*, for the defendants.—The true mode of ascertaining the amount to be replaced in general average is to take the difference between the sound value of the ship and the amount for which she sold, which gives the total loss to the shipowners, and 63 per cent. of that sum is attributable to the general average sacrifice. There was a conjoint loss caused partly by the storm and partly by the general average sacrifice, and 63 per cent. of that conjoint loss was caused by the voluntary sacrifice, and must be made good in general average. That was the value of the ship at the time she was saved by the general average sacrifice. If the plaintiffs' contention is correct, the estimated cost of repairing the particular average damage may be equal to or more than the original value of the ship, and then the ship must be taken to be of no value when the general average sacrifice was made, though she may sell for a considerable sum. Such a result shows that that contention cannot be correct.

They referred to Lowndes on General Average, 4th ed., p. 303.

T. E. Scrutton (*Joseph Walton, Q.C.*, with him) for the plaintiffs.—To ascertain the amount to be made good in general average, the value of the ship must be taken just before the general average sacrifice. The practical way of settling that value is to deduct the cost of repairing the previous particular average damage from the sound value of the ship. That is the rule as stated in Arnould on Marine Insurance, 6th ed., p. 904. That is the practical working rule, which, though not mathematically accurate, has always been adopted. If the repairs were equal to or exceeded the value of the ship, then the ship would be of no value as a ship when the general average sacrifice was made, but would only be of value as a wreck. He referred on this point to *Shepherd* v. *Kottgen*, 26 W. R. 120, 2 C. P. D. 585. Next, a deduction of one-third new for old is never made when the repairs are not effected. Arnould on Marine Insurance, 1048, and Phillips on Insurance, 3rd ed., s. 1543, show that in estimating the repairs to see if the ship is a constructive total loss such a deduction is not made. That principle applies here.

Lord ESHER, M.R.—There has in this case been a general average sacrifice, and the question is, How is that general average sacrifice to be dealt with as between ship and cargo? I desire to abjure all figures, and to deal with the case, as the learned judge has done, apart from the figures. At the time when the ship sailed she was worth a certain sum. She encountered a severe storm, and sustained considerable damage therefrom. After she had sustained that damage the storm continued, and there was danger that the ship and cargo would be lost, the ship being on her beam ends, and the captain did something to save both ship and cargo. What he did was a general average sacrifice, and in respect of that general average sacrifice the shipowners were entitled to general average contribution.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The learned judge was asked to state what was the proper rule for adjusting the amount to be contributed to in general average. First of all the value of the ship has to be ascertained. At what time has that value to be ascertained? Is it the value of the ship at the commencement of the voyage, or at the beginning of the storm which caused the two sets of damage, or just before the general average sacrifice was made? It cannot be the value at the commencement of the voyage, because the ship might be damaged by two or three storms before the storm which gave rise to the general average sacrifice; she might have had to put into port to have the particular average damage repaired, and might thus have been considerably reduced in value. Nor, for somewhat similar reasons, can it be her value at the beginning of the particular storm. The true time for calculating her value is just before the general average sacrifice is made. That is what the learned judge held, and I therefore agree with him. Then comes the next question, How is the value of the ship at that time to be ascertained? The ship had sustained a particular average damage before that time. What is the practical mode of ascertaining her value? The ship on arrival at port may be repaired, or the repairs may not be made but merely estimated. Neither from the repairs actually done nor from the estimated cost of the repairs can the true theoretical value of the ship be ascertained. But to avoid a conflict of evidence on the question, to avoid calling surveyors on both sides as to her value, a practical working rule, which has been adopted and universally accepted, is to take the difference between the value of the ship before the storm and the estimated cost of the repairs necessary to restore her to her condition before that damage, and the difference between those two sums will be the value of the ship at the time when the general average sacrifice was made. That is the rule stated in Lowndes on General Average, 4th ed., 303, and was adopted by the learned judge in this case. It has been always used in general average adjustment cases, and is the general practice of merchants, and is therefore embodied in the law of England. It is then said that a deduction of one-third new for old must be made from the estimated cost of repairing the particular average damage. But in estimating the cost of the repairs as between shipowners and underwriters, so as to see if the ship is a constructive total loss, it seems that such a deduction should not be made. The reason for this, as stated by Phillips on Insurance, 3rd ed., s. 1543, rests upon the benefit derived from the repairs. But it is never allowed where the repairs have not been made. That rule is applicable to this case. The learned judge was therefore right in saying that such a deduction is not allowed where the repairs have not been made. There is a passage in Arnould on Marine Insurance, 6th ed., p. 1048, fortified by Phillips on Insurance, 3rd ed., s. 1543, and the judgment of Story, J., in *Peele* v. *Merchants' Insurance Co.*, 3 Mason's Rep. 27, which, speaking of a constructive total loss, supports the view that in estimating the probable cost of repairs a deduction of one-third new for old should not be made.

The judgment of Mathew, J., was right upon both points, and the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The question, in popular language, is, What did the shipowner lose by the general average sacrifice? To determine that, we must find out what he had at risk, what was the value of the ship at the time when that sacrifice was made. If the ship has been previously damaged by perils of the sea, her value would be her value before the particular average damage, less the sum necessary to repair that damage. To ascertain what the shipowner has lost by his general average sacrifice we must then deduct from the value so ascertained the amount for which the ship subsequently sold. That will give the amount to be made good by general average contribution. That is the principle upon which Mathew, J., stated that the adjustment must take place. It is said, however, that a deduction of one-third new for old must be made from the estimated cost of repairing the particular average damage. In my opinion that deduction cannot be made. The passage from Arnoulds on Marine Insurance, 6th ed., p. 1048, and Phillips on Insurance, s. 1543, seem to me to be authority against making such a deduction where the repairs have not been done. The appeal must therefore be dismissed.

RIGBY, L.J.—I am of the same opinion. In dealing with a general average sacrifice we must take the value of the ship at the time when the general average sacrifice is made. The main difficulty I have felt is how to ascertain the value of the ship at that time. It is impossible to ascertain it accurately. It must be estimated, and it involves a good deal of conjecture. Mathew, J., adopted this rule: Deduct the estimated cost of repairing the previous particular average damage caused by perils of the sea from the value of the ship before being so damaged, and that will give the value at the time when the general average sacrifice was made. I do not think that any general rule will do complete justice. It has been said that injustice might be done if we adopted such a rule. If, for instance, the particular average loss has swallowed up the whole value of the ship as a ship, the value at risk when the general average sacrifice was made might be reduced to nothing. But we must not be led away by such extreme cases from applying the practical working rule, otherwise expert witnesses would have to be called in each case to speak as to the value of the ship at that time. Then, as regards the deduction of one-third new for old from the cost of repairing the particular average damage, such a deduction is not allowed, as between shipowners and underwriters, in estimating the repairs so as to see if there has been a constructive total loss. In laying down a general rule we may as well follow the rule that is applicable to a constructive total loss. The general rule, even though it may in extreme cases reduce the value of the ship to nothing, seems to me to be a good general working rule.

Appeal dismissed.

Solicitors for the plaintiffs, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, *Lowless & Co.*

From Q. B. Div.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) **Feb. 27.**

SHEARS *v.* GODDARD. (*a.*)

Bankruptcy—Protected transaction—Bona fide *dealing with bankrupt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.

The protection afforded by section 49 *of the Bankruptcy Act*, 1883, *to a* bona fide *transaction with a bankrupt entered into before the date of the receiving*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

order extends to the case where the transaction in question constitutes the act of bankruptcy on which the receiving order was made.

Appeal from a judgment of Wright, J.

This was an interpleader issue. The plaintiff Shears was a cab proprietor, and on the 25th of May, 1895, he purchased for £300 the cabs and horses which formed the stock of a Mrs. Sills, who was also a cab proprietor. On the same day Mrs. Sills absconded. On the 27th of May the plaintiff removed the cabs and horses to a repository, where they were sold for £377. On the 20th of June a receiving order was made against Mrs. Sills, in which it was stated, as the acts of bankruptcy committed by the debtor, that she on the 25th of May, 1895, with intent to defeat or delay her creditors, departed from her dwelling-house, and on the same day made a fraudulent delivery or transfer of her property, or some part thereof, to the plaintiff. Mrs. Sills having been adjudicated bankrupt, the defendant, the trustee in bankruptcy, claimed the sum of £377, which the owner of the repository had retained. The owner of the repository interpleaded, and an interpleader issue was ordered to be tried. At the trial before Wright, J., without a jury, the learned judge found that the plaintiff had purchased the goods *bona fide* without knowledge that the bankrupt had any intention to defraud her creditors, and he gave judgment for the plaintiff, holding that the transaction was protected by section 49 of the Bankruptcy Act, 1883.

The defendant appealed.

J. G. Witt, Q.C., and *Muir Mackenzie*, for the defendant.—Assuming that the plaintiff acted *bona fide* in this transaction, the transaction is not protected by section 49 of the Bankruptcy Act. That section does not protect an act which is void in itself, it merely protects an act which is valid in itself from the effects of a foregoing act of bankruptcy. It therefore does not apply to an act which is itself an act of bankruptcy. Under the Bankruptcy Act of 1849 and the earlier Bankruptcy Acts it was expressly held that the corresponding sections did not protect an act which was void in itself as being an act of bankruptcy: *Hall* v. *Wallace*, 7 M. & W. 353; *Smith* v. *Canman*, 2 E. & B. 35. The only protection is from the effects of a foregoing act of bankruptcy. [RIGBY, L.J.—In the Act of 1849, s. 133, it is said that *bona fide* transactions are to be deemed valid, "notwithstanding any prior act of bankruptcy by such bankrupt committed." But there are no such words in the present Act.] The effect is the same. Section 49 speaks of "any available act of bankruptcy committed by the bankrupt before that time."

Herbert Reed, Q.C., and *Duke*, for the plaintiff, were not called upon to argue.

LORD ESHER, M.R.—It has been argued that in deciding this case we ought to have regard to what was held to be the law before the present Act was passed and to the general law of bankruptcy. But the law of bankruptcy is purely statutory, and it was after the decisions which are now relied on that the Legislature passed the present Act. It seems to me that if they had heard of those cases, they took care to prevent them from having any further effect; and the only question which we have to consider is—What is the law under the present statute, the Bankruptcy Act, 1883? Section 49 of that statute protects from the consequences of their acts persons who have innocently parted with their money in payment for an assignment of a bankrupt's goods, or who have innocently entered into any transaction with a bankrupt for valuable consideration. "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—(*c*) any conveyance or assignment by the bankrupt for valuable consideration; (*d*) any contract, dealing, or transaction by or with the bankrupt for valuable consideration, provided that both the following conditions are complied with, namely: (1) the conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and (2) the person (other than the debtor) to, by, or with whom the conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not, at the time of the conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time." Is the present case within those words? The argument for the appellant seeks to insert a whole clause—"unless such dealing or transaction itself constitutes the act of bankruptcy." But we have no right to add such words; we must read the section as it stands. Here, according to the finding of the learned judge, Mr. Shears entered into a dealing with the bankrupt, Mrs. Sills, before the date of the receiving order, and at that time he had no notice or knowledge of any act of bankruptcy committed before that time. As a matter of fact no act of bankruptcy had been committed before that time. He therefore acted innocently, and he is within the words of the section, and it follows that he is protected by the section. I think that the Legislature in the present Act meant to include such a case as this, and I pay no regard to what may have been held under other Acts. The appeal must be dismissed.

LOPES, L.J.—With regard to the facts, the learned judge held that Mr. Shears had no knowledge of any intention on the part of Mrs. Sills to defeat her creditors. I think that he was justified in coming to that conclusion. It is, however, said that the case does not come within section 49. The argument is that the transaction, being itself the act of bankruptcy, is not protected. But, looking at the section, it seems to me clear that all its requirements were complied with in this case. It was a transaction for valuable consideration, it was before the date of the receiving order, and Mr. Shears had no notice of any act of bankruptcy committed previously. The transaction is therefore protected. Our attention was called to a case decided under the Act of 1849. But the words of that Act, "notwithstanding any prior act of bankruptcy," are different from those of the present Act, under which we must decide this case. It may well be that different language was used intentionally. I therefore think that the appeal fails.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *B. Burton.*

Solicitors for the defendant, *G. Reader & Co.*

High Court of Justice.

Chan. Div. }
Chitty, J. } March 10, 11, 18.

In re BAYLIS. (*a*.)

Solicitor — Costs — Taxation — Agreement—Retainer of costs—Settled account—Payment—Order for delivery of untaxable bill—Jurisdiction—The Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37, 41—*The Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 8.

A settled account, though coupled with the retainer of agreed costs, is not payment as between solicitor and client unless a proper bill is delivered.

In re Thompson, 42 *W. R.* 462, [1894] 1 *Q. B.* 462, *explained and corrected.*

The court can order delivery of a bill whether or not it has jurisdiction to refer it for taxation when delivered.

The decision of the Privy Council in Duffett *v.* McEvoy, 10 *App. Cas.* 300, 33 *W. R. Dig.* 238, *approved and followed.*

Summons by a client against his solicitor for the delivery of bills of costs, and to have the same referred for taxation.

From 1883, when the client was an undergraduate at Oxford, down to 1894 the solicitor had been engaged in procuring him money loans.

It was verbally agreed that the solicitor's remuneration should be a percentage on the sums advanced in lieu of the usual scale charges, on account of the solicitor's special facilities for obtaining loans.

The solicitor retained such percentage out of the sums from time to time advanced, merely furnishing his client with cash accounts containing items of lump sums expressed to be for "costs," "agreed costs," or "on account of costs."

Such accounts were approved and signed by the client, and no proper bill of costs was ever delivered.

The loans were made at a reasonable rate of interest, and no charge of fraud or improper conduct was made against the solicitor.

Farwell, Q.C., and *Sington*, for the client.—We are *primâ facie* entitled to a bill.

Scrutton, for the solicitor.—No order can be made, and for the following reasons. First, retainer of costs coupled with the cash accounts which are settled accounts is payment within the Solicitors Act, 1843, s. 41, though no formal bill was delivered: *In re Bignold*, 9 Beav. 269; *Turner* v. *Hand*, 27 Beav. 561; *In re David*, 30 Beav. 278; *Ex parte Hemming*, 28 L. T. O. S. 144, 5 W. R. Dig. 141; *In re Thompson*, 42 W. R. 462, [1894] 1 Q. B. 462. The decision in *In re Street*, L. R. 10 Eq. 165, 18 W. R. Ch. Dig. 130, *contra*, was commented on in *In re Hall and Barker*, 26 W. R. 501, 9 Ch. D. 538. Secondly, the cash accounts are agreements within the Solicitors' Remuneration Act, 1881, s. 8: *In re Frape*, 41 W. R. 417, [1893] 2 Ch. 284; *In re Thompson*. Thirdly, a bill now delivered would be discharged by the previous payments: *Hitchcock* v. *Stretton*, 40 W. R. 555, [1892] 2 Ch. 343—that is to say, discharged more than a year ago. It could not, therefore, be referred for taxation under the Solicitors Act, 1843, s. 41, and by section 37 power to order delivery is limited to cases in which there is power to tax.

Farwell, Q.C., in reply.—First, retainer is not payment unless a bill has been delivered: *In re Street; In re Stogdon*, 56 L. J. Ch. 420, 35 W. R. Dig. 60; *In re West, King, and Adams*, 40 W. R. 644, [1892] 2 Q. B. 102. The report of *In re Thompson* in the Law Reports is wrong. The *Law Journal* report, 63 L. J. Q. B. 187, shows that a proper bill was delivered. Secondly, the alleged agreements must be taxed to see that they are reasonable: *In re Frape*. Thirdly, the power to order delivery is not merely ancillary to or limited by the power to tax: *Duffett* v. *McEvoy*, 10 App. Cas. 300, 33 W. R. Dig. 238; *In re West, King, and Adams*.

CHITTY, J.—This is an application by a client for the delivery of formal bills of costs by his solicitor, and for taxation of those bills. The solicitor acted for the client from 1883 to 1894, a period of ten or eleven years. The application was made in January, 1895. It cannot be questioned on the facts that no bill of costs was ever delivered. By bill of costs I mean what the Solicitors Act, 1843, says—viz., a bill of fees, charges, and disbursements. I entirely dissent from the argument that there are two kinds of solicitors' bills. There is only one, as is shown by numerous authorities. In the present case accounts have from time to time been made out by the solicitor and delivered to the client. If these accounts had been between a tradesman and his customer, they might, as to many of them, be properly taken to be settled accounts. I need hardly go into the question of what a settled account is. The common law called it an account stated. An account may be stated between ordinary persons, and where items on both sides are shown the statement may, and generally does, result in a payment at law. I mean that it results not only in payment of the balance actually paid, but in payment of the whole account.

It is argued that the same principle applies as between solicitor and client—viz., that a settled account amounts to payment of a bill. I decline to travel over the cases for the third or fourth time. I followed *In re Street* in *In re Stogdon*. Counsel for the solicitor has pointed out that Jessel, M.R., made some observations on *In re Street* in *In re Hall and Barker*, but those observations were addressed to another part of the case—viz., whether the bills were to be treated as one bill or separate bills. I have already, in *In re Stogdon*, expressed my opinion as to the true explanation of *Ex parte Hemming*, and Stirling, J., has adopted my explanation in *Hitchcock* v. *Stretton*. I am sorry to have to refer to it again, but the explanation is that in *Ex parte Hemming* a proper bill was substantially delivered. There is no authority for the proposition that a mere settled account, where no proper bill has been delivered, is payment within the statute of 1843. Perhaps it may be useful to observe that since the recent Act of 1881 on the subject there may be a true bill delivered in particular cases, as, for instance, where the scale applies, the bill merely stating one scale item. There may also be a bill within the Act of 1881 referring to costs as agreed. In considering that statute I am brought face to face with the enactment in section 8, that the bill delivered is not conclusive against the client. The agreement is one of which the fairness and reasonableness may be questioned. In *In re Frape* the Court of Appeal took that view, and Lindley, L.J., observed that it was impossible to decide whether the agreement was unfair or unreasonable without taxation. I add that it is impossible to say anything at all on the subject until a proper bill for fees, charges, and disbursements has been delivered to the client. Till then the court is not in a position to say whether the agreement is fair or the charges reasonable. There is, of course, nothing to prevent a person *sui juris* settling an account if he likes *after a proper bill* has been delivered.

(*a*.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

Counsel for the solicitor argued that I had no jurisdiction to order a bill to be delivered unless I could also order taxation. He said there could be no taxation where there had been payment. I reply, there has been no payment of any *bill*. Many of the so-called accounts merely contain the words "costs," "agreed costs," or "on account of costs." The question of jurisdiction falls to the ground, and cannot be maintained as a general proposition. There is a case in the Privy Council which I consider to have been well decided, and follow without reluctance. I refer to *Duffett* v. *McEvoy*. The judgment turned on a colonial statute, but it was founded on an examination of the meaning of section 37 of the Solicitors Act, 1843, and it consists in showing that the colonial Act was the same as the English Act, the lengthy section 37 being split up into several sections. With regard to the Solicitors Act, 1843, Lord Blackburn says that the provision in section 37, authorizing courts and judges to order bills to be delivered in the same cases where they are authorized to refer bills, does not mean that no bill shall be ordered to be delivered until it is ascertained to be taxable. He also says, if there has never been a bill at all, a bill can be ordered to be delivered without an order for taxation necessarily following. The result of that case is that the court can order delivery of a bill whether or not it has jurisdiction to refer it for taxation.

Now, the solicitor in this case sets up an oral agreement—viz., that in regard to the raising of loans for the client there should be a uniform charge of 5 per cent. on the amount. An oral agreement, however, is not within the statute of 1881. But here and there in the fourteen documents called "settled accounts" there are references to agreed costs, and counsel for the solicitor argued that by examining the amounts charged for costs I could ascertain that the charge was 5 per cent. on the loan business. I am not sure that that is made out. I do not propose to prejudice that question. There is a notable difference between the total amount charged and the scale charges. I have a tabular statement showing that the total amount deducted for costs was £3,178, whereas the scale fee was £589. The difference is £2,600. But the tabular statement does not exhaust the matter. The solicitor transacted other business besides loans, as to which no oral agreement is alleged. I do not intend to express any final opinion, but I must observe that the 5 per cent., having regard to the sums raised, is largely in excess of the scale fee. Perhaps it can be justified, but *primâ facie* a case of serious overcharge appears on the loan transactions. They were loans to raise money for a young man at Oxford just after attaining twenty-one. The loans went on as he grew older. Though he began without a consummate knowledge of the law of costs, knowledge which is hardly to be expected in an Oxford undergraduate, he gained experience later on. The later loans were made for the purpose of repaying the former loans.

On the question of fairness it is to be noted that the young man was in a position to give, and did give, security. The solicitor got him out of financial troubles. No charge of fraud is or can be made against the solicitor.

I must mention one authority which at first sight seems to support the argument that there can be payment of a bill where no proper bill has been delivered, but only a cash account. In *In re Thompson*, the judgments speak of the delivery of a bill of costs. From the report of the facts in the Law Reports, it is not easy to make out what document the judges are referring to as a bill of costs. It is evident that there is something omitted in the Law Reports, for it appears by the *Law Journal* report (63 L. J. Q. B. 187) that there was an order for the delivery of a bill of costs, and delivery of a bill in pursuance of such order. By some slip that bill is not mentioned in the Law Reports, and counsel was enabled to argue that the cash account delivered in that case was a sufficient bill. Counsel urged the lapse of time as a bar to this application, but rightly admitted that no statute of limitations applied. He appealed to the court to exercise its discretion by refusing to make the order. If the matter is one of discretion, the court looks at the circumstances. But, on the correspondence, the solicitor says he is quite ready to deliver a bill, so I am not putting on him a task too hard of performance. I order a bill to be delivered and taxed. I hold there has been no payment, so that section 41 of the Solicitors Act, 1843, preventing taxation after a year, does not apply. Though the solicitor may show before the taxing master that some of the agreements were fair and reasonable, I send it to the taxing master to inquire.

Usual order for delivery of bills of fees, charges, and disbursements and for taxation thereof, with a direction to the taxing master to certify whether any and what agreements within the Act of 1881 *have been entered into between the solicitor and his client, and, if so, whether any and which of such agreements are or are not fair and reasonable. Costs reserved. Solicitor to have two months for delivery of his bills.*

Leave to appeal was asked for and refused, but it was subsequently granted by the Court of Appeal.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *A. & G. W. Fox*, Manchester; *Peard & Son*.

Chan. Div.
Chitty, J. } March 13.

HASSELL *v.* STANLEY. (*a*.)

Practice—Set-off—Costs—Solicitor's lien—Independent proceedings—Action in county court—Application to Chancery Division—R. S. C., ord. 65, *rr.* 14, 27, *reg.* 21.

Costs incurred in the High Court cannot be set off against costs incurred in a county court in the same matter.

Construction of ord. 65, *r.* 14, *adopted by the Divisional Court in* Edwards *v.* Hope, 33 *W. R.* 672, 14 *Q. B. D.* 922, *approved and applied.*

A motion in the High Court to set off the costs of an application to the High Court, which had been dismissed with costs without any direction to stay execution, against costs to which the applicants became subsequently entitled by an order of a county court in the same matter, was dismissed with costs by the court in the exercise of its discretion. The applicants thereupon asked to be allowed to set off the costs of their unsuccessful motion against the costs due to them under the order of the county court.

Held, on the principle of Edwards *v.* Hope, *that there was no jurisdiction to allow a set-off in such a case.*

Motion.

A plaint was instituted in the county court at Liverpool in September, 1895. The defendants having applied to remove the plaint into the Chancery Division, Chitty, J., on the 15th of November, 1895, dismissed the application with costs, which were taxed at £22. On the 9th of December, 1895, the

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

county court action was dismissed with costs. The costs in the county court were taxed at the sum of £48. This was a motion on behalf of the defendants for a stay of execution under the order made by Chitty, J., on the 15th of November, 1895, until the plaintiff had paid the county court costs to the applicants or until further order, but the object was to obtain a set-off of the costs of the unsuccessful application before Chitty, J., and the costs of the county court proceedings under ord. 65, r. 14, and r. 27, reg. 21. See Annual Practice, 1896, pp. 1149, 1166.

The court having refused this motion, was thereupon asked to allow a set-off of the costs of the motion and the costs of the county court action.

Russell Roberts, for the applicants.—A set-off may be allowed, under ord. 65, r. 14, and r. 27, reg. 21, of the costs of the application for a *certiorari* which we were ordered by your lordship to pay to the plaintiff against the costs of the county court action, which the plaintiff was ordered to pay to us, notwithstanding his solicitor's lien on the costs recovered by him. It is a question for the court's discretion, and, unless the discretion is exercised in our favour, we shall not get the costs awarded to us by the county court. He cited *Robarts* v. *Buée*, 26 W. R. 393, 8 Ch. D. 198; *Knapman* v. *Wreford*, 18 Ch. 300, 29 W. R. Dig. 3; *In re Glanvill, Ellis* v. *Johnson*, 34 W. R. 309, 31 Ch. D. 532; *In re Crawshay, Dennis* v. *Crawshay*, 45 Ch. D. 318, 39 W. R. Dig. 160.

Badcock, for the plaintiff.—*Barker* v. *Hemming*, 28 W. R. 764, 5 Q. B. D. 609, decided under the practice before 1883, shows that ord. 65, r. 27, reg. 21 will not apply where the set-off is of the costs of different proceedings. The application is out of time. It should have been made when the application for a *certiorari* was dismissed with costs: *Automatic Weighing Machine Co.* v. *Combined Weighing, &c., Co.*, 37 W. R. 636. Moreover, the case of distinct and different proceedings does not come within ord. 65, r. 14, as was decided by the Divisional Court in *Edwards* v. *Hope*, 33 W. R. 672, 14 Q. B. D. 922, followed in *Blakey* v. *Latham*, 37 W. R. 569, 41 Ch. D. 518, and compare the bankruptcy cases of *Ex parte Griffin, Re Adams* (No. 2), 28 W. R. 714, 14 Ch. D. 37, and *In re Bassett, Ex parte Lewis*, *ante*, p. 240, [1896] 1 Q. B. 219. But if the court has a discretion here under this rule, the solicitor's lien ought to prevail.

Russell Roberts replied.

CHITTY, J.—The defendants did not ask at the hearing that the payment of the costs, which they were ordered to pay, of their unsuccessful application for a *certiorari* might be delayed till after the trial of the county court action, and the order stands as an order to pay the amount of the taxed costs. On that order the plaintiff had a present right to those costs, and his solicitor had a lien on them for his costs of the county court action. The lien was for an amount exceeding the costs recovered in the High Court. The costs in the High Court would be taxed by the taxing master, those in the county court by the registrar of the county court. The costs would be taxable under different jurisdictions and different allocaturs, and, I think, that being so, that ord. 65, r. 27, reg. 21, does not apply.

Ord 65, r. 14, on the authorities gives the court a discretion of allowing a set-off notwithstanding the solicitor's lien. Now, does that rule apply to distinct and different proceedings? The Divisional Court have held that it does not, and also exercised their discretion in favour of the solicitor, and the Court of Appeal did not interfere with the decision, and approved the court's exercise of its discretion: see *Edwards* v. *Hope*, which was followed by Kay, L.J. (then Kay, J.), in *Blakey* v. *Latham*. I am not bound to say whether costs in the High Court can be set off against costs in the county court under the rule, the proceedings being entirely distinct. If the Divisional Court was right in *Edwards* v. *Hope*, I think that the rule does not apply in such a case, but I am not deciding the point. There is some connection between the different proceedings here, and I assume that the case is within ord. 65, r. 14, and I have to exercise my discretion. I ask why I should exercise it against the solicitor, as I see no grounds for so doing. He has fairly earned the money in respect of which the lien arose. I accordingly dismiss the motion.

Russell Roberts.—Will your lordship order a set-off of the costs of this motion and the costs of the county court action?

CHITTY, J.—I must must not shelter myself behind the discretion conferred by the rule from deciding the point of principle which is now clearly raised. I hold that the principle adopted by the Divisional Court and Kay, L.J., applies to this case, and that it is not within ord. 65, r. 14. I therefore refuse to make any order for a set-off.

Application dismissed.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Bremner, Sons, & Corlett*, Liverpool; *Crowders & Vizard*, for *Clarke & Davis*, Liverpool.

Chan. Div. / North, J. — March 12.

In re GRAY.
GRAY *v.* GRAY. (*a*.)

Inland revenue — Estate duty — Voluntary covenant to pay money on death of covenantor—Liability of estate of covenantor—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 6, 7, 8, 9.

A testator who died after the Finance Act, 1894, *came into operation had covenanted to pay, within six months of his decease, a sum of money to the trustees of his son's marriage settlement.*

Held, that under the Finance Act, 1894, *estate duty was payable upon the sum covenanted to be paid, and that such duty should be borne, not by the covenantees, but by the testator's residuary estate; for the covenant, although a debt for all other purposes, was not a debt which, under section 7 of the Finance Act, could be deducted in ascertaining the estate duty; and the covenantees being creditors were not persons taking under the will within the meaning of section* 9.

Adjourned summons.

Upon the marriage of his son, in 1891, the testator covenanted with the trustees of the son's settlement that his executors or administrators would, within six months after his decease, pay to the trustees of the settlement the sum of £25,000.

The testator died in February, 1895, and estate duty was paid upon the £25,000 by the executors.

This summons was taken out to determine whether the trustees of the settlement were liable to repay to the executors the amount of estate duty so paid.

Vernon Smith, Q.C., and *Marcy*, for the executors.—Succession duty would have been payable before 1894, and it is only fair and reasonable that the trustees of the settlement should pay estate duty.

[NORTH, J.—I have nothing to do with what is fair

(*a*.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

and reasonable, but am only concerned with the provisions of the Act.] *Attorney-General* v. *Montefiore*, 37 W. R. 237, 21 Q. B. D. 461, and *In re Higgins*, 34 W. R. 81, 31 Ch. D. 142, show that succession duty would have been payable. *In re Croft*, *Deane* v. *Croft*, 40 W. R. 425, [1892] 1 Ch. 652, and *In re Orford*, *ante*, p. 383, [1896] 1 Ch. 257, show that the whole of the estate duty should not be borne by the estate of the covenantor.

Swinfen Eady, Q.C., *B. Farrer*, and *A. R. Kirby*, for other parties.

NORTH, J.—The trustees are entitled to £25,000, and to have it paid without deduction. The Crown is entitled to receive duty, and has received it from the executors. Here the trustees of the settlement are creditors in respect of the covenant, and they are in the fortunate and unusual position of escaping payment of duty under the Succession Duty Act. The Finance Act, 1894, imposes new duties similar in some respects to those previously existing. Under section 1 the duties are to be levied and paid on all property passing on death. Section 2 defines property passing on death, and section 6 provides for the collection and recovery of estate duty, which is to be paid by the executors by sub-section 2. The duty is levied on the estate after payment of funeral and testamentary expenses and debts. This £25,000 is a debt. By section 7, however, allowance is only to be made for a debt or incumbrance created by the deceased for full consideration in money or money's worth for his own benefit; so this £25,000 cannot be deducted. Section 8, sub-sections 3 and 4, provides for the executor's affidavit and accounts. Section 9 does not apply, for it provides for the way in which duty is to be borne by persons taking under the will, and not by persons taking as creditors of the estate. This is a debt which cannot be excluded in ascertaining the estate duty payable to the Crown, but is a debt for all other purposes. The trustees are creditors for the £25,000, and cannot be charged with duty.

Solicitors, *Tucker, Lake, & Lyon; Gosling & Co.*

Chan. Div.
Kekewich, J. } Nov. 12.

EDWARDS *v.* JENKINS. (*a.*)

Custom—Games—Claim for inhabitants of adjoining parishes.

The inhabitants of more than one parish cannot claim by custom a right of recreation on land situate in one of the parishes.

This was an action brought by the plaintiff, who was in possession of a piece of land in the parish of Beddington, Surrey, against the defendants, inhabitants of the parish, to restrain a trespass on the said land.

The defendants claimed, on behalf of themselves and all the inhabitants for the time being of the said parish and of two adjoining parishes, that the land had from time immemorial been an open piece of common land, and that there had been and still was an ancient custom in the said parish of Beddington for all the inhabitants for the time being of the said parish and of two adjoining parishes to use the same for recreation and for exercising and playing all lawful games, sports, and pastimes upon the said piece of land, and that for such purposes the said inhabitants were entitled to access to the said piece of land.

Warmington, Q.C., and *W. Clode*, for the plaintiff. —A custom for the inhabitants of several parishes to exercise the right of recreation on land in one of the parishes is bad in law: *Gateward's case*, 6 Rep. 59*b*; *Hammerton* v. *Honey*, 24 W. R. 603.

Johnston Edwards and *W. P. Baildon*, for the defendants.—The custom is good: *Hall* v. *Nottingham*, 24 W. R. 58, 1 Ex. D. 1; *Fitch* v. *Rawling*, 2 H. Bl. 393; *Bourke* v. *Davis*, 38 W. R. 167, 44 Ch. D. 110; *Earl of Coventry* v. *Wilkes*, 12 W. R. 127, 9 L. T. N. S. 384.

KEKEWICH, J.—I assume that the right alleged is in itself good in law. But is it properly claimed for all the inhabitants for the time being of the parish and of the adjoining or contiguous parishes of Carshalton and Mitcham? Though there is no authority exactly deciding it, all the cases directly point to such an allegation being bad, and I think I ought to consider the point settled. The defendants rely on *Fitch* v. *Rawling*, where the court held that an ancient and laudable custom that all the inhabitants for the time being of a parish used and were accustomed to have and still ought to have of playing lawful games upon a close every year was good, but the court also held that a claim for all persons for the time being in the parish was bad. It is therefore clear that a custom beyond all the inhabitants of the parish may be bad. But it is suggested that the custom is good if confined to inhabitants of a particular district, which term may be taken as meaning two or three adjoining parishes in addition to the parish in which the land is situate. I cannot assent to that view. I cannot find in any of the cases anything which would justify me in saying that the use of the word "district" means more than the particular division known to the law in which the particular property is situate. It might be situate in a parish or a manor or some other division. But I am unable to see how a number of parishes can, without specific evidence, be said to be situated in a particular district so that land in one of the parishes is land in a particular district. There must, therefore, be judgment for the plaintiff.

Solicitors, *Crouch, Edwards, & Heron; J. D. B. Lewis.*

Q. B. Div.
(Wills and Wright, JJ.) } March 3.

NOEL *v.* THE REDRUTH FOUNDRY CO. (LIMITED). (*a.*)

Employers and workmen — Apprentice — Compensation for injuries — "Estimated earnings" — Mode of calculating in case of apprentice — Employers' Liability Act, 1880 (43 & 44 *Vict.* c. 42), *s.* 3.

An apprentice, when suing his employer under the Employers' Liability Act, 1880, *for personal injuries, cannot recover, under section* 3 *of the Act, more than for three years of the wages he is receiving as an apprentice, and in such case the value of the tuition he receives ought not to be included as part of his "earnings" within the meaning of that section for the purpose of increasing the compensation to which he would otherwise be entitled.*

Appeal by the defendant company from a judgment of his honour Judge Granger, sitting at the Redruth County Court, in the county of Cornwall.

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

(*a*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

The learned judge gave judgment for the plaintiff for a sum of £80, in an action brought by the plaintiff, through his next friend, under the Employers' Liability Act, 1880, for personal injuries caused by the negligence of the defendants, his employers.

The plaintiff was a boy about eighteen years of age at the time when the injuries were received. The boy was, when he was about fourteen years of age, apprenticed to the defendants at their foundry works at Redruth. There were no articles of apprenticeship, but the arrangement was a verbal one, and under this arrangement the boy was to be apprenticed according to the customary mode for the usual period of five years—from the age of fourteen to the age of nineteen years—and this apprenticeship began about April, 1891.

He was to receive 1s. a week for the first year, 2s. a week for the second year, 3s. a week for the third year, and so on, increasing by 1s. a week for each year.

At the time he received the injuries now sued for he had entered upon the fifth year of his apprenticeship, and was receiving 5s. a week as his wages; but he was still in a state of pupilage.

On the 29th of May, 1895, the plaintiff was working in the fitting shop where he was generally employed; he was boring holes in a bar of iron with a drill, and while so engaged his fingers were caught in the cog-wheels while he was putting the handle back to throw the machine out of gear. His fingers were greatly crushed, and parts of them had to be amputated.

He then brought this action to recover from his employers £107 for the injuries so received.

The judge found that there was a defect in the machine which had not been remedied, owing to the negligence of a person entrusted with the duty of seeing that the machinery in the fitting shop was in a proper condition, and he found in favour of the plaintiff.

As to the question of damages, the judge thought it an extremely difficult one; that by section 3 the compensation was to be estimated by the average of the plaintiff's earnings, but that it would be a farce to hold that the plaintiff in this case should only be compensated according to the nominal wages of 5s. a week which he was then getting. He therefore held that he must take into consideration the question of what a lad of his qualifications would earn if he were to get work in the district, and that the evidence showed that he would get about 14s. to 18s. a week, and he thought that for the serious injuries received he ought to award the plaintiff £80, which he accordingly did.

During the hearing of the case the engineer, in his evidence, stated that "after a young man like the plaintiff gets out of his pupilage he would get 14s. to 18s."

The defendants appealed.

Section 3 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), provides: "The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade, employed during those years in the like employment and in the district in which the workman is employed at the time of the injury."

Lawson Walton, Q.C. (*Ellis Hill* with him), for the appellants.—The point raised on this appeal upon the construction of section 3 of the Employers' Liability Act is not covered by any authority. The sole question now raised is as to the proper measure of damages which an apprentice can recover under section 3. There is a fixed standard of damages laid down by the section; but the county court judge has rejected that standard, and in awarding damages here he has awarded them on a different scale from that laid down in the Act. By the section the compensation is not to exceed the equivalent of the estimated earnings during the three years preceding the injury of a person in the same grade, employed in the same employment in the district. Applying that to this case, the plaintiff at the time of the accident was receiving 5s. a week, and we say that the very utmost he would have been entitled to would have been at the rate of 5s. a week for three years, or 156 weeks—that is, in all, £39. He would only be entitled to that £39 on the assumption that, upon the true construction of the section, he would be entitled to have this 5s. a week taken as his estimated earnings for the three preceding years. But in the year preceding the injury he was receiving only 4s. a week, and so on; so that if we take as his "estimated earnings" what he actually received during the three years, it would amount to much less than £39. However, for this case we are willing to concede that the plaintiff is entitled to this sum of £39; but the judge has given £80, which, we contend, he cannot do under the Act. Section 3 of the Act lays down the mode in which compensation is to be awarded, and that mode must be followed, and no other. This statute was intended to apply to workmen in the usual meaning. If the plaintiff in this case is a workman, he is a workman at low wages, and those wages must be taken to be the wages he is receiving, and to be the proper basis of compensation. If he is not a workman, then the Act does not apply at all.

(He was stopped.)

Bosanquet, Q.C. (*J. A. Hawke*, with him), for the respondent.—The question is not what the plaintiff or men in the position of the plaintiff might have been earning during the three years; we have to look at the grade of the plaintiff at the time of the accident and at his position then, and the evidence showed that after a young man like the plaintiff gets out of his apprenticeship he would get from 14s. to 18s. a week. By the section we have to take the estimated earnings of a person in the same grade in the like employment in that district; that means that we are to take as the basis the wages which represent the average earnings in that trade and in that district. The judge has simply taken that into account, and that is all he has taken into account. The apprentice here was still in his apprenticeship; he was therefore receiving, in addition to the 5s. a week in money, his training and tuition, and this training has to be taken into account in estimating what his wages were. He was receiving so much in money and so much money's worth in teaching, so that his salary was not confined to the 5s. a week, but included in addition a sum which would represent the value of the teaching he was receiving. If that be so, the judge had power to go beyond the 5s. a week, and to give judgment for the amount for which he did give judgment.

Lawson Walton, Q.C., in reply.

WILLS, J.—With regret I come to the conclusion that this judgment must be reduced. One is very sorry to cut down anything in the case of an accident so serious as this, but we are bound by the Act of Parliament. [The learned judge read section 3.] Now, the evidence here was that this boy at the time when this injury was received was earning 5s. a week, and he was earning it in a state which was described as one of pupilage. He was a pupil fitter,

and the inference from the facts is that 5s. a week is the normal wage of a pupil fitter. There was no evidence to qualify that, as the only evidence given which would go to increase that sum was the statement of the engineer that a young man when out of his pupilage could get from 14s. to 18s. a week. He would then be out of his pupilage, and he could not get that 14s. a week without going through this pupilage. It is clear that if he could get 14s. a week elsewhere, he would not stay at these works for 5s. Therefore he was in the "grade" of a pupil fitter, and he could not get more than 5s. a week. That being so, he cannot get beyond the £39, which Mr. Walton has now expressed his willingness to accede to.

But upon the question of the "estimated earnings" of the plaintiff, I cannot altogether accede to the view that Mr. Walton for the appellants was willing to accede to in this case. He said he was willing to take it that the "estimated earnings" might be calculated on the basis of the 5s. which the plaintiff was receiving at the time of the injury. But I think there is a great deal to be said in favour of the view that you are to take the average of the person's earnings, or rather the average of the earnings in the like employment in the district for the three years preceding the injury. It is, however, unnecessary to decide that point, as it has been conceded for the purposes of this case. Then it was argued by the counsel for the respondent that the word "earnings" includes tuition. I cannot think that anything so vague was intended by the Act to be taken into account. It is impossible to ascertain the pecuniary value of the tuition, and I cannot think that the word "earnings" was intended to include the money, and in addition the value of the tuition. It would, no doubt, include such things as food, clothing, lodging, or the like, but I think it would not include tuition.

WRIGHT, J.—I am of the same opinion. I think the limit which the plaintiff can recover here cannot exceed the three years, or 156 weeks' wages of a pupil fitter. I agree that "earnings" means money, or food, or clothes, or the like.

Judgment reduced to £39; leave to the plaintiff to appeal upon terms as to costs.

Solicitors for the appellants, *Watson, Sons, & Room*, for *Daniell & Thomas*, Camborne.

Solicitors for the respondent, *Robbins, Billing, & Co.*, for *Paige & Grylls*, Redruth.

Q. B. Div.
(Lindley and Kay, L.JJ.) Feb. 10.

COOK *v.* WHITE. (*a.*)

Adulteration — Food — False warranty — Summons — Time for serving summons—Purchase for test purposes —Food and Drugs Act, 1879 (42 & 43 *Vict. c.* 30), *s.* 10.

That part of section 10 *of the Food and Drugs Act*, 1879, *which provides that in the case of the sale of a perishable article the summons shall be served within twenty-eight days of the purchase for test purposes, does not apply where the purchase for test purposes was not made from the person charged with the offence.*

Case stated by a metropolitan police magistrate.

Section 25 of the Food and Drugs Act, 1875, provides that if any person charged under section 6 shall prove that he purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, &c., he shall be discharged from the prosecution; and section 27 provides for the punishment of persons giving a false warranty in writing.

Section 10 of the Food and Drugs Act, 1879, provides, *inter alia*, as follows: "In all prosecutions under the principal Act, and notwithstanding the provisions of section 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and, in the case of a perishable article, not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug for the sale of which in contravention to the principal Act the seller is rendered liable to prosecution."

On the 28th of April, 1895, milk was purchased from Lilley & Brown, trading as M. A. Brown & Sons, for the purpose of analysis. The certificate of the analyst stated that the milk contained 7 per cent. of added water, and a summons was issued.

At the hearing of the summons, on the 26th of May, Lilley & Brown proved to the satisfaction of the court that they bought the milk in the same state as they sold it, with a written warranty from White, and the summons was accordingly dismissed.

A summons under section 27 was then taken out against White for giving a false warranty. The summons was not served till the 27th of May.

The magistrate dismissed the second summons on the ground that, milk being a perishable article, the summons ought to have been served within twenty-eight days of the purchase for test purposes.

Macmorran, Q.C., for the appellant.—The latter part of the section does not apply where the purchase for test purposes is not made from the person charged with the offence.

LINDLEY, L.J.—The magistrate was wrong. The words "such person" in the latter part of the section refer to the person who is charged, that is to say, in the present case, to White.

There has been no sale by White for test purposes. It is difficult to see how that part of the section can apply to prosecutions of this kind. It might apply if the purchase from the original vendor were made for test purposes. But where that is not the case it cannot apply. There might be no sale by the second vendor for a considerable time after the sale by the original vendor.

Under the circumstances the summons seems to have been served within a reasonable time.

KAY, L.J., after stating the facts, proceeded:—The question is whether the summons against the warrantor, the respondent in this case, ought to have been served within twenty-eight days. The construction urged for the respondent before the magistrate would lead to an absurdity, because the warrantor might have sold the milk with the warranty more than twenty-eight days before the sale by the retail dealer, in which case it would be impossible to take out a summons against the warrantor within twenty-eight days. I do not think that is the meaning of the Act. The section means that, where a summons is taken out against the person from whom a perishable article of food was purchased for test purposes, it must be served within twenty-eight days. If such purchase for test purposes is made from the warrantor then the summons must be taken out and served on him within twenty-eight days. But if there is no

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

purchase for test purposes from him, then the summons must be served within a reasonable time.

In this case I think the summons was served within a reasonable time. Therefore the appeal must be allowed, and the case sent back to the magistrate to hear and determine.

Solicitor for the appellant, *Stanley Hoare.*

Q. B. Div.
(Wright and Kennedy, JJ.) Jan. 16, 17.

CLIFTON COLLEGE (*Appellants*) *v.* THOMPSON, SURVEYOR OF TAXES (*Respondent*), AND GOVERNING BODY OF CHARTERHOUSE SCHOOL (*Appellants*) *v.* GAYLER, SURVEYOR OF TAXES (*Respondent*). (*a.*)

*Inland revenue—Inhabited house duty—Public school—Head master's house—School buildings—Chapel, library, &c.—Mode of assessment—*43 *Geo.* 3, *c.* 55, *Schedule B*—14 *&* 15 *Vict. c.* 36.

In the Clifton College case an assessment was made of £1,978 *upon the college in respect of inhabited house duty. The buildings assessed comprised the school itself, the head master's house, the chapel, library, sanatorium, gymnasium, racquet courts, fives courts, swimming baths, carpenter's shops, museum, garden, and playground, all of which were within one boundary. The head master held his house under a lease subject to his continuing to hold that post; he resided there himself, together with sixty-seven boarders; he paid no rent. With the exception of the sanatorium, no one slept in any of the other buildings.*

Held, that the head master was the occupier of his dwelling-house, and was taxable in respect of such occupation with inhabited house duty. He did not, however, in any sense occupy the various other buildings; there was nothing to show that they belonged to or were occupied with his dwelling-house, and they could not be themselves treated as dwelling-houses.

In the Charterhouse case an assessment of £3,000 *for inhabited house duty was made upon the governing body of the school. The buildings assessed were the head master's house (the head master was bound by the school statutes to reside in the house, he paid no rent, and to okin sixty boys as boarders), two assistant masters' houses (these masters paid rent and took in boys as boarders), the chapel, hall, library, classrooms, laundry, science rooms, museum and theatre, carpenter's shop, drawing school, sanatoriums, swimming baths, racquet courts, lodges, and other buildings.*

Held, that the head master and assistant masters ought to be treated as the occupiers of their houses respectively. They occupied the houses for their own profit, and not merely as representatives of the school or the governors, and they were therefore assessable to the inhabited house duty. The governing body were not assessable for the other premises, as, with the exception of the sanatoriums, they were not inhabited dwelling-houses taken by themselves.

CLIFTON COLLEGE (Appellants) *v.* THOMPSON, SURVEYOR OF TAXES (Respondent).

Case stated for the opinion of the court pursuant to the Taxes Management Act, 1880 (43 & 44 Vict. c. 59).

This was an appeal by Clifton College from a decision of the Inland Revenue Commissioners confirming an assessment of £1,978 for the year ending the 5th of April, 1894, under inhabited house duty upon the said college. The description in the assessment of the property assessed was "college, sanatorium, land and buildings, house and stable."

The foundation of Clifton College, where some 600 boys are educated, consists of a charter bearing date the 16th of March, 1877.

The buildings assessed comprised the school itself, the head master's house and offices, in which the head master and his family resided and sixty-seven boys were boarded, a chapel, library, sanatorium, gymnasium, racquet courts, fives courts, swimming baths, carpenters' shops, museum, and other buildings, and eleven acres of garden and playground, all within one boundary.

The head master's house was not joined to the other buildings. With the exception of the head master's house and the sanatorium, no one slept or resided upon or otherwise used any of the school buildings during the night time, and they were used during the daytime alike by all the boys at the college, whether boarders or day boys.

The surveyor of taxes contended that the whole of these buildings, with the offices, yards, and one acre of the garden and playground, were chargeable with inhabited house duty under the Act 14 & 15 Vict. c. 36, as an inhabited dwelling-house.

The appellants contended that the school premises, except the head master's house, were exempt from the exemption in the Inhabited House Duty Act, 48 Geo. 3, c. 55, Schedule B, Case 4: "Any hospital, charity, school, or house provided for the reception or relief of poor persons"; and, further, that the last-named Act was an Act to charge dwelling-houses and buildings in connection therewith required for the purposes of the inhabitants of the dwelling-house, and did not include the buildings described as above forming part of the school premises; and, further, that no profit arising from the college was payable to any individual person, but any profit that was made was used for the improvement and advancement of the college and its interests.

The question for thhe opinion of the court was whether the aforesaid school buildings were liable to the inhabited house duty or not.

Cohen, Q.C. (*A. T. Lawrence* with him), for the appellants.—In the schedule to the assessment the college is distinguished from the head master's house, the description of property being in the one case "college, sanatorium, land, and buildings" occupiers "Clifton College," and in the other case "head master's house," the occupier being described as "the head master." A lease of this house for fourteen years was granted to the head master, provided he should so long continue head master. The master's house should be assessed separately, because he is described as the occupier. The college cannot be assessed in respect of the various buildings, and the head master's house under rule 1 of Schedule B of 48 Geo. 3, c. 55. The other buildings, do not come within rule 2. It cannot be said that they "belong to and are occupied with" the head master's dwelling-house. They are not dwelling-houses at all. *Cheape* v. *Kinmont*, 2 Tax Cas. 418, does not apply to this case. The head master is occupier for the time being, and has an exclusive right of possession. [The court here called on the other side.]

Sir R. Finlay, S.G. (*Danckwerts* and *Lord R. Cecil* with him), for the respondent.—The head master occupies the house *ex officio*, and his occupation comes under rule 1. Practically the master must reside there. The house is vested in the company, and is held for the general purposes of the college. The college is rightly assessed in respect of the master's house, and the whole premises are to be assessed,

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

because the boys who reside in the master's house use all the different parts of the establishment, and therefore the whole establishment must be regarded as one. These other buildings are assessable, if, in fact, they are used for purposes which entirely fall within the terms of the Act. There are two cases on this point—one, *The Corporation of Glasgow* v. *Inland Revenue*, 18 Sc. L. R., p. 1, in favour of the contention; the other, *Riley* v. *Read*, 27 W. R. 414, 4 Ex. D. 100, 1 Tax Cas. 217, against it. The principle laid down in the latter case by Kelly, C.B., cannot be sustained. Sections 1 and 2 of 57 Geo. 3, c. 25, show that houses used solely for purposes of trade were assessable as inhabited dwelling-houses under 48 Geo. 3, c. 55. The expression "inhabited dwelling-houses" is not confined to houses which are used otherwise than for the purposes of business. The Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), provides by section 13, sub-section 2, for the exemption of houses occupied solely for business, even though a caretaker should dwell therein. The Legislature therefore regarded such houses as being within the Act as inhabited dwelling-houses, but provided for their being taken out upon proof of certain things. [WRIGHT, J.—Is not the case of the *London Library* v. *Carter*, 2 Tax Cas. 594, against you?] In that case the building was merely for the purpose of recreation. In the present case we have various buildings which could not exist separately. The inhabitancy must be taken as a whole. *Riley* v. *Read* does not govern this case. These buildings come within rule 5. The head master's house and the other buildings are used for a common purpose: *Lambton* v. *Kerr*, 43 W. R. 541, [1895] 2 Q. B. 233, see judgment of Charles, J.

WRIGHT, J.—Before giving judgment we wish to hear the arguments in the *Charterhouse case*.

GOVERNING BODY OF CHARTERHOUSE SCHOOL (Appellants) *v.* GAYLER, SURVEYOR OF TAXES (Respondent).

This was a case stated by the Inland Revenue Commissioners on the application of the governing body of Charterhouse School to obtain the opinion of the court whether the assessment in respect of inhabited house duty had been properly made.

The assessment against which an appeal was heard before the general commissioners acting for the division of Godalming, in the county of Surrey, on the 21st of November, 1890, was in respect of a charge of £3,000 for the year 1890-91 for inhabited house duty made upon the governing body in respect of several of the buildings at Godalming known as Charterhouse School. Such buildings came into existence wholly or primarily for the purposes of the said school.

The buildings which formed the subject of the assessment were as follows:—

The head master's house, which comprised the private residence of the head master and his family and boarding accommodation for about sixty boys. The head master, who holds this house upon the terms of article 28 of the school statutes does not pay any rent, nor does he do repairs.

Two assistant masters' houses, for which rent is paid and in each of which boys are boarded; the chapel, large hall, library, classroom, laundry, science rooms, museum and theatre, carpenter's shop, drawing school, sanatoriums, swimming bath, racquet courts, lodges, and some other small buildings and stabling.

The appellants contended that the head master's and assistant masters' houses were separately inhabited dwelling-houses, and that they only, with their respective household offices, were separately and distinctly liable to the duty. They relied upon the 14th rule of Schedule B, 48 Geo. 3, c. 55, submitting that the masters' dwelling-houses were distinct properties, and that each of the masters was an occupier within the meaning of that rule, and of the Act 14 & 15 Vict. c. 36, and therefore the proper person to be charged. They also relied upon rule 2, claiming that if the dwelling-house was assessed to house duty, the other buildings were not liable for charge, except they were used as domestic offices such as are named in that rule. They also claimed that rule 3 showed that it was not the intention of the Act to charge buildings (even though they communicated) in cases where distinct and separate dwelling-houses existed which could be charged with the duty.

The surveyor of taxes submitted that for the purposes of the assessment the governors of the school were the occupiers, the three masters referred to being in the position of servants only, placed in the houses for the purpose of carrying on the business of the school; that the whole of the premises included in the charge were within one curtilage (rule 2) and used in conjunction with the residential portion; that rule 3 relied on by the appellants showed that all premises were liable to be included in the valuation of house duty, except the buildings specifically excepted.

The commissioners determined that the assessment was properly made in one sum upon the governing body as occupiers in respect of the whole of the buildings referred to, and confirmed the charge.

The questions for the opinion of the court were (1) whether the determination of the commissioners was correct, or whether the three masters' dwelling-houses were separately chargeable under 48 Geo. 3, c. 55, and 14 & 15 Vict. c. 36, or not; (2) whether any of the other aforesaid buildings ought to be included in the assessment.

Cohen, Q.C. (*Lewis Coward*, with him), for the appellants.—In this case the head master holds his house upon the terms of article 28 of the school statutes. It is kept in repair for him, and his rates and taxes are paid, but he is bound to reside in it. The assistant masters are appointed by the head master and occupy houses for which they pay rent, but the governing body keep them in repair and pay the rates and taxes. These houses, if they can be assessed at all, must be assessed separately. [KENNEDY, J.—We wish to know what is the Solicitor-General's argument as to that.]

Sir R. Finlay, S.G.—They are properly assessed as a whole, and fall within what Lord Shand called in the case of *Cheape* v. *Kinmont*, 2 Tax. Cas. 418, "one subject."

Cohen, Q.C.—The buildings assessed here do not come within rule 5. [KENNEDY, J.—Is there any authority which shows that as regards assessment there is any difference whether a person occupies a house *virtute officii* or otherwise?] In *Martin* v. *Assessment Committee of West Derby Union*, 31 W. R. 489, 11 Q. B. D. 145, which was the case of a police superintendent who had an official residence which was not part of the police station, it was held that he was rateable to the poor rate, as his occupation was a beneficial one. In *Bent* v. *Roberts*, 26 W. R. 128, 3 Ex. D. 66, a superintendent who lived within the boundary of a police station was held not to have such an occupation as to render him liable to pay inhabited house duty. The governing body ought not to be assessed in respect of the head master's house, for he has exclusive possession and does not occupy it as a servant; nor in respect of the under masters' houses because they are not the servants of

the governing body, but have to obey the head master. The other buildings are not occupied with and belonging to the masters' houses, they do not belong to one more than another, but are used by all the boys. The assessment cannot be upheld.

Sir R. Finlay, S.G. (*Danckwerts* and *Lord R. Cecil* with him), for the respondent.—The governing body are the occupiers of the houses, the masters only residing there *virtute officii*. The exclusive possession of the masters does not prevent the legal possession being in the governing body. *Tennant* v. *Smith*, 3 Tax. Cas. 158, see p. 166, where Lord Watson says the bank are the occupiers, and their agent resided there as a servant. See also *In re The Union Bank of Scotland*, 1 Tax. Cas. 195. It is established as a principle that if a resident is resident *ex officio*, or as a servant, the owner of the property is to be treated as the occupier. The governing body are in occupation of the classrooms, library, hall, and other buildings, and of the houses of the masters, who, in point of law, are servants of the governing body. *Hayman* v. *Governors of Rugby School*, 22 W. R. 587, L. R. 18 Eq. 28, see judgment of Malins, V.C., at p. 87. The whole of this establishment must be taken together and treated as being subject to the inhabited house duty.

CLIFTON COLLEGE.

WRIGHT, J.—In this case the head master is not bound to reside in the house which he does occupy, and there is nothing to show that his occupation is in any degree less than the occupation of any ordinary tenant, except in one respect, and that is that, under the lease which has been given to him, the lease will come to an end if he ceases to hold the office of head master; in all other respects he seems to us to be, in the fullest sense, in the occupation of the house. That being so, it seems to me that he is the person taxable for his house under these Acts; and if he is the person taxable for that dwelling-house, he is not, under rule 2 of Schedule B, assessable for anything that is not occupied with it. I do not think it can be said in any sense that he occupies the various buildings outside his own house as to which questions in the case arose—the chapel, library, sanatorium, gymnasium, racquet courts, fives courts, swimming baths, museums, and so forth. There is nothing in the case to show that those belong to and are occupied with the master's dwelling-house.

Then, that being so, the only ground upon which the Crown could succeed would be that the college is assessable for the remainder of the premises, as being a dwelling-house, or as including some other dwelling-house to which the rest is attached and occupied with that dwelling-house. But the matters I have just mentioned do not appear to me to be matters that can be treated as inhabited dwelling-houses at all.

Boys do not dwell in or inhabit any classroom or gymnasium or any of these other matters; they neither dwell there nor inhabit there; nor does anybody else as far as the case shows. Then, in addition to that, on the second point to which I have adverted, it seems to me that the weight of authority in this country is to the effect that nothing is inhabited as a dwelling-house for the purposes of these Acts unless somebody sleeps there. It is not necessary for us to express any opinion upon that point, but that seems to me on the whole to be the conclusion to which authority in this country, as distinguished from Scotland, leads. There is one other point. Even if the college were to be treated as in the occupation of the master's house in this case, I should hesitate long before I held that all the other matters enumerated in the case came within rule 2 of Schedule B, and were of the same nature as a coachhouse, stable, brewhouse, washhouse, laundry, bakehouse, dairy, and all the yards and courts and other premises within the curtilages. It is not necessary to decide that now, and it may arise, I understand, in the *Charterhouse case*. It does look at first sight as if the marginal note correctly represented for once what the sections refer to—namely, household offices.

Therefore, as regards this case, I think the appeal must be allowed.

KENNEDY, J.—I agree, and for the same reasons.

Appeal allowed with costs.

CHARTERHOUSE CASE.

Jan. 17.—WRIGHT, J.—This is a case of great difficulty and doubt, to my mind, as regards one part of it, that is, as regards the head master's house; but, after giving to it the fullest consideration that we can, we have both come to the conclusion that the head master ought to be treated as in the occupation of his house. It is true he has to reside there, and that is a very strong part in favour of the Crown. He pays no rent—that is not material except as evidence; he does not do the repairs, that is not material except as evidence; the governors have the right to come in and do the repairs, and that again is consistent with his being the occupier; but if he lives there as any other person lives there, what to us for the purpose of to-day seems to be the turning point is that he occupies the building for the purpose of keeping boarders there for his own profit. I do not think myself I can usefully add anything to that. It seems to me that we ought to consider him in his capacity, at any rate, as a boarding-house keeper. Whatever his position may be in other capacities, he does inhabit that dwelling-house as an occupier for his own purposes, and not merely as the representative either of the college, the statutory corporation who are the owners of the house, or of the governors who have the control of it. That being so, we think as regards his house that he is assessable to the inhabited house duty. The same thing applies more strongly to the other masters' houses, but I need not say anything about them.

Then, if so, it follows from our judgment (if it is a right judgment) in the *Clifton College case*, that the college are not assessable for the other parts of the premises, because the other parts of the premises, with the exception of the sanatorium and one or two other portions of the premises which have been mentioned, are not inhabited dwelling-houses taken by themselves. The boys may possibly in some sense inhabit portions of those premises, but they do not inhabit them as dwelling-houses. In this view of the case it does not become necessary to consider whether these schools and other premises could be regarded as being appurtenances to the masters' houses within the meaning of the second rule, and I do not myself think that the case has been stated with much reference to that point. When the masters come to be assessed, if they are assessed, it may be a very serious question to consider, but I do not think we ought to decide it now. The college has been assessed, I think, for the whole.

Cohen, Q.C.—Yes.

WRIGHT, J.—I think the appeal must be allowed.

KENNEDY, J.—I agree, and only wish to add one or two sentences. It seems to me impossible to say, looking at the real relation of the parties and the position of the head master to a place like the Charterhouse, although he is bound to occupy it as head master, and although he ceases to occupy it if

he ceases to be head master, that he is occupying as the agent or servant of the governing body so as to make his occupation simply their occupation; it is sufficient occupying and inhabiting for the purpose of being assessed for inhabited house duty for the purposes of this case. With regard to the other houses the masters apparently in each case hold their houses upon the terms of paying such a sum by way of rent as may be considered sufficient in each case. Therefore, as my brother said, it is an *a fortiori* case.

WRIGHT, J.--I ought to add as to the question whether the same buildings may be assessed under rule 5 as halls or offices, it does not appear to be raised in this case, and the assessment is not put upon that ground.

Judgment for the appellants with costs.

Clifton College case:—
Solicitors for the appellants, *Thomas White & Sons*, for *Stanley, Wasbroughs, & Doggett*, Bristol.

Solicitor for the respondent, *Solicitor of Inland Revenue.*

Charterhouse case:—
Solicitor for the appellants, *Lee, Bolton, & Lee.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

Q. B. Div.
(Wright and Kennedy, JJ.) Jan. 17.

THE ATTORNEY-GENERAL *v.* MANDER AND ANOTHER. (*a*.)

Inland revenue — Succession duty — Freehold premises devised subject to leases — Increased value at determination of leases — Liability of successor — Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 15, 20, 21, 42.

Joseph M., who died in 1873, *devised two freehold premises to George M. These houses were at the date of testator's death let on leases at rents not purporting to be rack-rents. In* 1877 *succession duty was paid in respect of both houses, based on the rents then reserved by the said leases. In* 1888 *both houses were sold to the defendants, who were the tenants of one of the houses. In* 1889 *the leases expired, and the defendants became entitled in possession to the full value of the houses, which value was greater than the rents reserved by the said leases. The Crown claimed that under sections* 20 *and* 21 *of* 16 & 17 *Vict. c.* 51 *duty became payable in* 1889 *by the defendants in respect of the increased value accruing to them upon the determination of the leases as an annuity during the residue of the lives of the defendants equal to the increase of annual value.*

Held, that the defendants were not "successors" at all; they had bought property to which George M. had already succeeded, and were not liable to pay duty as successors. They were only liable by virtue of section 42 *for what George M. would have been liable for—namely, duty on the increase of value by the falling in of the leases calculated as an annuity during the residue of George M.'s life equal to the increase of annual value.*

Information by the Attorney-General.

The following were the facts of the case as set out in the information:—

(1) Joseph Martin, who died on the 2nd of August, 1873, by his will dated the 5th of February, 1872, and proved on the 19th of September, 1873, devised two freehold messuages and premises, being No. 363, Oxford-street and No. 37, Poland-street, respectively, in the county of Middlesex, to his nephew, George Martin, in fee simple.

(2) At the testator's death the house and premises, No. 363, Oxford-street, were let on a lease (not purporting to be at rack-rent) dated the 17th of August, 1867, for a term of years expiring on the 25th of December, 1889, to the defendants, Charles Tertius Mander and Samuel Theodore Mander, in consideration of a premium of £350, and at the yearly rent of £165; and the house and premises, No. 37, Poland-street, were let on a lease (not purporting to be at rack-rent) dated the 7th of May, 1869, for a term of years also expiring on the 25th of December, 1889, to William H. Gregg, in consideration of a premium of £50, and at the yearly rent of £50.

(3) George Martin in 1877 passed the usual succession duty accounts under the will of Joseph Martin, and paid duty in respect of the two houses, which was assessed on the then present rental thereof as reserved by the said leases.

(4) In June, 1888, both the said houses were put up for sale by auction by George Martin, but were bought by private treaty before the sale by the defendants, the tenants of the house in Oxford-street, and conveyances (subject to the said leases) were executed to the defendants accordingly.

(5) The leases expired on the 25th of December, 1889, and the defendants then became entitled in possession to the full enjoyment or value of the said houses. The annual value of the houses was at the end of the leases considerably greater than the rents reserved by the said leases.

(6) Under the foregoing circumstances, and having regard to the sections 20 and 21 of the Succession Duty Act (16 & 17 Vict. c. 51) duty became payable on the 25th of December, 1889, by the defendants, in respect of the increased value accruing to them upon the determination of the leases as an annuity during the residue of the lives of the defendants equal to the increase of annual value.

(7) Application was duly made on behalf of the Commissioners of Inland Revenue to the defendants, for payment of such duty as aforesaid, but the defendants have refused and still refuse to pay the said further duty, and they contend that no such duty is payable.

It was asked by the information that it might "be declared that on the 25th of December, 1889, the date of the determination of the said leases of the messuages and premises, Nos. 363, Oxford-street, and 37, Poland-street, respectively, succession duty became payable in respect of the increased value of the said property accruing to the defendants on such determination, and that the interest of the defendants in such increased value is to be considered to be of the value of an annuity equal to the difference between the annual value of the said property on the 25th of December, 1889, and the rents reserved by the said leases, such annuity being payable from the 25th of December, 1889, during the residue of the lives of the defendants, and that the defendants were and are personally accountable to her Majesty for such duty accordingly."

The Succession Duty Act, 1853 (16 & 17 Vict. c. 51), provides as follows:—

Section 20.—"The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof; except that if there shall be any prior charge, estate, or interest, not created by

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

the successor himself, upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate, or interest, shall, if not previously paid, compounded for, or commuted, be paid at the time of such determination, &c."

Section 21.—"The interest of every successor, except as herein provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto, and every such annuity, for the purposes of this Act, shall be valued according to the tables in the schedule annexed to this Act, &c."

Section 15.—" . . . Where any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

Section 42.—"The duty imposed by this Act shall be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed . . . and the said duty shall be a debt due to the Crown from the successor, having, in the case of real property comprised in any succession, priority over all charges and interests created by him; but such duty shall not charge or affect any other real property of the successor than the property comprised in such succession," &c.

Sir R. Webster, A.G. (*Vaughan Hawkins* with him), for the Crown.—The defendants are the successors to the increased value caused by the falling in of the leases. There was thus a succession within 16 & 17 Vict. c. 51. Section 20 provides that the succession duty is to be paid on the successor becoming entitled in possession; but that in the case of outstanding interest it is to be paid on the determination of such interests. Section 21 provides that the interest of a successor in real property shall be considered as an annuity. Section 15 provides for the duties payable in respect of transferred interests, and treats an alienee as a successor. Therefore the defendants who take as alienees must be treated for the purposes of the Succession Duty Act as successors. An alienation has taken place here within the intention of section 20: *Solicitor-General* v. *The Law Reversionary Interest Society*, 21 W. R. 854, L. R. 8 Ex. 233.

Asquith, Q.C. (*Joseph Gatey* with him), for the defendants, was not called on to argue.

WRIGHT, J.—Whether we are right or wrong, this case seems to us free from doubt. In this case the defendants have not succeeded to anything at all; they bought a property to which George Martin had already succeeded. The full enjoyment of it was deferred for a time within the meaning of section 20, and as to the duty payable on the falling into possession of the reversionary estate, the payment of that duty would be postponed (unless George Martin or his friends had chosen to pay it sooner) until the leases fell in. Then what is the position of things? The Crown really rely on section 15—there is nothing else in the Act on which they can rely—as showing that the duty ought to be paid in relation to the estate in the Manders, the alienees, during their lifetime. But section 15, directly it is looked at, turns out not to apply at all, because it says: "Where any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation"; then, in consequence, the view which the Crown seeks to establish is established. But that is not this case. The succession had become entirely and fully vested in the reversioner George Martin, upon his taking possession of the estate in succession to Joseph Martin in 1873, subject only to postponement by reason of section 20 of the payment of the duty on the falling in of the leases until they should fall in. Therefore, the defendants are liable only by virtue of section 42, and in that case they are liable only for what George Martin would have been liable for.

If it is agreed that that is the case, the amount is fixed on the basis which has been agreed upon in letters which have passed between the parties; if it were not, we should have to ask what amount (if anything) George Martin remained liable for beyond what he had accounted for, which would mean what was the increase of value by the falling in of the leases on the basis of his own life; and that would be all. It is unnecessary to direct an account now.

It is needless to say we do not in the slightest degree differ from anything that has been said in the case of *Solicitor-General* v. *Law Reversionary Interest Society*, which was an entirely different case, for there the succession did not happen till the law society had become the alienee of the whole estate of William Dermer.

KENNEDY, J.—I agree entirely, and for the same reasons.

Judgment for the Crown.

Solicitors for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendants, *Ellis, Munday, & Clarke.*

Prob. Div. & Adm. Div. / Probate. } Nov. 25; Dec. 9; Jan. 16.

In the Goods of MURRAY. (*a.*)

Probate—Administration—Foreign and English wills—Independent—Probate of English will only.

If a testator makes two independent wills, one disposing of property in this country and the other disposing of property abroad, the former alone is admitted to probate.

A testator, a domiciled Englishman, made a will and four codicils relating exclusively to his property in America, in which he directed the executors thereof to realize his property there and remit the proceeds to his London bankers, to be placed to the account and credit of the executors of any will he might make dealing with his English property, or of his administrators if appointed in this country. Subsequently he made a will in England with totally different executors to those of the American will, and by it he directed the executors of that (the English will) to stand possessed of the moneys

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

remitted from America in the manner before mentioned on the same trusts as those declared by the will of the residue of his English property, with power to direct the American executors when they should realize.

The court held that these were independent wills, and refused to admit the American will to probate.

Motion on behalf of the three executors of an American will and codicils, and of an executor of an earlier English will and codicils, of the Right Honourable Sir Charles Augustus Murray, late Envoy Extraordinary and Minister Plenipotentiary to the King of Portugal, who died in Paris on the 3rd of June, 1895, a domiciled Englishman. The wills and facts are fully set out in the judgment.

Nov. 25 and Dec. 9.—*Bayford, Q.C.*, and *Bargrave Deane*, in support of the motion.—Difficulties have arisen about proving the American will, as the authorities there require the testimony of the surviving witnesses of the will and evidence of the death and handwriting of the others. Difficulties have arisen in tracing the witnesses; but if the American will is admitted here the American courts will follow the English probate, and dispense with the above formalities.

The facts and arguments are set out in the judgments, where the cases cited are referred to except *In the Goods of Bolton*, 36 W. R. 287, 12 P. D. 202.

Jan. 16.—BARNES, J.—In this case Mr. Bayford moved for an order that a certain will of the deceased and codicils thereto, dealing exclusively with his property in America, should be included in the probate which was about to be obtained of what I may term the English will and codicils thereto. The original American will and codicils are in America, but the case was for convenience argued on what I understand are copies thereof. From the copies of these documents it appears that on the 18th of August, 1870, the testator, then at Lisbon, executed a will there, by which he gave all his estate, real and personal, within the United States of America to his executors thereinafter named, upon trust to realize his said real and personal estate and apply the proceeds, after payment of his debts in the United States and a small bequest to his executors, in the following manner: To remit the residue of the said proceeds to his bankers in London, with instructions to have it placed to the credit of his wife and two other persons, or the executors of any will he might make according to the laws of England, or to any administrator of his effects in that country should he fail to name any executor or executors, or naming such and he or they declining to act, and he appointed certain persons at Boston and New York executors of his said will; and he expressly declared that his said will referred only to the estate, real or personal, of which he might be possessed at the time of his decease within the United States of America, and should not in any manner invalidate or interfere with any testamentary disposition theretofore or thereafter made by him of property belonging to him in England or elsewhere, not being in the United States of America; and he thereby confirmed every such testamentary disposition as fully as if the same were therein repeated, and he revoked all other and former wills made by him respecting any property, real or personal, belonging to him in the United States of America. The testator made four codicils to this will, all of which, I gather, were so made before the English will. In one of these, dated the 21st of June, 1871, he declared that his said will and codicils were to apply only to his estate, real and personal, in the United States, and should not apply to any estate which he might have in England or elsewhere. In another of the said codicils, dated the 2nd of October, 1874, he directed his executors to sell and convert into money, under the powers of the said will, only so much of his real and personal estate within the United States of America as might be required to pay the debts and legacies mentioned in his said will and codicils, and from time to time, as and when they should be so directed by the executors of any will he might make according to the laws of England, to realize his said real and personal estate which should not have been realized for the purposes aforesaid, and remit the proceeds to his bankers in London, with directions to them to have the same placed to account and credit with them of Henry Earl of Ducie, Charles Adolphus Earl of Dunmore, and Herbert Henry Walford, or the successors or successor of them, or of other the executors or executor for the time being of any will he might make according to the laws of England, or should there be no executors or executor then of any administrator for the time being of his effects in that country; and from time to time, as and when the rents, interest, dividends, and annual income should become due and payable to be received on such part or parts of his said real and personal estate as should not for the time being have been so realized, to remit the same to his said bankers, with directions to them to have the same placed to the account and credit with them of the persons or person thereinbefore mentioned. The codicils also made certain changes in the executors, but all those named were Americans.

On the 2nd of November, 1885, the testator made a will in England, in which, after certain bequests and devises, he recited the said codicil of the 2nd of October, 1874, to his American will, and then directed the executors of that (the English) will to stand possessed of the moneys so to be remitted by his executors in the United States of America as the proceeds of his real and personal estate in that country, upon the trusts thereinafter declared concerning the capital of the residue of his real and personal estate in Great Britain; and he directed the executors of that (the English) will to stand possessed of the moneys so to be remitted by his executors in the United States of America as rents, interest, dividends, and annual income of his real and personal estate in that country upon the trusts thereinafter declared concerning the annual income arising from the investment of the residue of his real and personal estate in Great Britain; and he thereby gave the executors of that his (English) will full and uncontrolled power to give directions to his executors in the United States of America to sell and dispose of his real and personal property in the United States of America, or any part or parts thereof, at such time or times and from time to time as they in their sole discretion might think fit, and to defer to give such directions until such time or times as they in their sole discretion might think fit; and he directed that his executors of that his (English) will should not be answerable or accountable to any person or persons whomsoever, or to any court of law or equity whatever, for any loss, injury, or prejudice which might be sustained, arise, or happen by or to his real and personal estate in the United States of America, or any part or parts thereof, either from giving or deferring to give such directions as aforesaid, or for any deficiency in price on the sale of the same, or any part or parts thereof, nor for any banker or other person in that country with whom or into whose hands the said property or the proceeds thereof (whether capital or income) or the securities for the same might be deposited or come, nor for the insufficiency or deficiency of any bills drawn or negotiated by way of remittance, nor for any omission to give

notice of dishonour, or other defect of management whatever; but that his executors in the United States of America should be solely responsible for his estate in that country and for the moneys arising therefrom, to the entire exoneration of the executors of that his (English) will, until the same moneys should be remitted and the bills of remittance duly honoured, and the moneys thereby payable be actually received by Messrs. Drummond (the bankers) and placed by them to the account and credit with them of the executors of that his (English) will; and as to all other his property, both real and personal, of what nature or kind soever, after discharging all costs and expenses incurred in converting the same into money, he directed his executors to stand possessed of the same upon certain trusts therein declared; and he appointed his son Charles James Murray and Herbert Henry Walford and Reginald John Smith the executors and trustees of that his (English) will; and he declared that any wills or will made or to be made by him according to the form prescribed by the laws of the United States of America, and which might exclusively apply to any property within that country, should not affect or in any manner interfere with the disposition and bequests thereby (that is, by the English will) made. To this will there were several codicils, but they did not contain anything which affects the question before me.

I think it is clear from the documents, the material portions of which I have referred to, that the testator intended the two sets of documents to be kept entirely distinct. He appointed executors to act in America under his American will and codicils, and executors in this country to act under the English will and codicils, and his intention was that the American executors should, after realizing so much of his property in America as they required for the purpose of paying his debts and the legacies given by his American will and codicils, realize the residue under the directions of his English representatives, and hand the proceeds thereof over to the latter in this country, to be dealt with by them when received as directed by the English will and codicils. It is equally clear that, apart from any technical question, the reasonable and simple course to adopt in this case is to prove the English will and codicils in this country, and the American will and codicils in the United States. For, even if all the documents were included in the probate granted by this court, it would still be necessary for the purpose of dealing with the American assets to obtain a further grant of probate from the proper court in the United States; which would, however, as the deceased was, if I correctly understand, a domiciled Englishman, probably follow the decision of this court and grant probate ancillary to that granted in this country as being the country of the testator's domicile. But it was stated to me that there are formalities to be complied with in order to prove the American will and codicils in the United States of America, and that, although they can be complied with, there is some difficulty in doing so, and that it would be more convenient to allow both sets of documents to be included in the probate in this country, so that the executors might be able to obtain from the proper court in America a grant of probate ancillary to that granted by this court.

It was also urged that both sets of documents together formed the last will of the deceased, and should therefore all be included in the probate. The question for my decision does not, in my opinion, depend on matters of convenience, but upon whether or not the court ought to include the American will and codicils in the probate. If the testator had made an English will only, which disposed of all his real and personal estate, the grant of probate by this court would not extend to the testator's assets in a foreign county, for, as is pointed out at page 300 of Williams on Executors, vol. 1, 9th edition, "the probate was never granted except for goods which, at the time of the death, were within the jurisdiction of the ordinary who made the grant. Though if it should become necessary that the courts of the foreign country where the assets were situated should grant probate or administration for the purpose of giving a legal right to recover and deal with them, such courts, by the comity of nations, would probably follow the decision of the Court of Probate in this country as being in the country of domicile." See also per Lord Brougham in *Attorney-General* v. *Hope*, 2 Cl. & Fin. 84, after inquiry made by him of the judge of the Prerogative Court and the King's Advocate. In the same way, if the deceased had died intestate, the grant of administration obtained here would not extend to his assets abroad, though the foreign courts would probably follow the English grant. Again, if he died leaving a will not appointing any executors to act in this country and disposing only of property in a foreign country, that will is not entitled to probate in this country: see *In the Goods of Coode*, L. R. 1, P. & D. 449, 16 W. R. Prob. Dig. 11, per Sir J. P. Wilde, "for the object of this court in making grants is to enable the executors or administrators to adminster property in this country." See also *In the Goods of Mann*, [1891] P. 293, 39 W. R. Dig. 179, and *In the Goods of Tucker*, 34 L. J. P. & M. 29, 13 W. R. Prob. Dig. 1.

It follows, in my opinion, that if two independent wills are made, one disposing of the testator's property in this country, and the other disposing of his property abroad, the former alone should be admitted to probate in this court. If, however, the two wills are not independent, the case is different. The English will, if last, may incorporate the foreign will, as in the cases of *In the Goods of Lord Howden*, 22 W. R. 711, 43 L. J. P. & M. 26, and *In the Goods of Harris*, 18 W. R. 901, L. R. 2 P. & D. 83, and then the probate should include both documents, as they virtually become one document. So also the foreign will, if last, may incorporate the English will, in which case the foreign will would not be limited in its operation to property abroad, and both would be included in the probate. In the present case the two wills with their respective codicils are independent documents, and were intended by the deceased to be so. The English will, although it mentions the American will and the codicil of 1874, does not in my opinion incorporate the American will or its codicils, and was not intended to do so. Applying the foregoing observations, it follows, in my judgment, that the American will and codicils disposing as they do of property in the United States of America only, and appointing separate executors thereof, ought not to be included in the probate to be granted by this court of the English will and codicils.

It was also argued that the American will did in fact incorporate the English will, because the former contained the clause that it was not in any manner to invalidate or interfere with any testamentary disposition theretofore or thereafter made by the testator of property belonging to him in England or elsewhere not being in the United States of America, and confirming every such testamentary disposition as fully as if the same were repeated in the American will, and because the American will, though earlier in date than the English will, should be taken as speaking from the death of the testator. I am, however, of opinion that the American will does not incorporate the English will, and that the clause just referred to

could not confirm a will not then in existence. The statute does not enact absolutely that a will shall speak as if it had been made just before the death of the testator, but only that it shall do so in respect of the property comprised in it: The Wills Act, 1837 (7 Wm. 4 and 1 Vict.), c. 26, s. 24. I was also referred to the Finance Act, 1894, but I am of opinion that that Act does not affect the question which I am called upon to decide—viz., what documents ought to be admitted to probate. There have been a number of cases on this question of English and foreign wills, and they do not all seem to be consistent; but my judgment follows the principles indicated in those cases in which the matter appears to me to have been most fully considered: see especially *In the Goods of Lord Howden*.

I therefore order that the American will and codicils be not included in the probate, and according to the practice copies of the American will and codicils must be filed in the registry, together with an affidavit verifying them; and a note must be appended to the probate that such affidavit has been filed.

Solicitors, *Walfords*.

Court of Appeal.

From Chan. Div. (Lindley, Kay, & A. L. Smith, L.JJ.) March 25.

TREVOR *v.* HUTCHINS. (*a*.)

Administration—Statute-barred debt—Fund in court—Creditor administrator of debtor—Right of retainer—Payment out.

By an order made in the presence of A. as legal personal representative of B., a fund of B. in court was carried to the credit of the separate account of B.'s personal representative, and inquiries were directed as to the persons entitled to the fund. A. was also in the position of a statute-barred creditor of B. While the inquiries directed by the order were pending A. applied to have the fund paid out to him as the legal personal representative of B., in order that he might be in a position to retain thereout the statute-barred debt. B. had other creditors whose debts were not statute-barred. The fund did not exceed the amount of the statute-barred debt.

Held, upon these facts, that the court would not order payment out of the fund to A.

Appeal from Stirling, J.

A firm of Tulloch, Brodie, & Co., who failed in 1807, executed a deed of arrangement for the benefit of their creditors. In 1875 an action was brought for the administration of the trusts of that deed. Large sums of money had been paid into court in the action.

By a certificate, dated the 2nd of August, 1883, certain sums were found due to George Hartwell, deceased, as the last surviving partner of several firms who were creditors of Tulloch, Brodie, & Co. The amount of such sums was ordered to be carried over to the account of the legal personal representative of George Hartwell, deceased, when constituted.

A considerable sum was standing to that account on the 13th of April, 1889, when Major Ricketts, as the representative of a creditor of one of the firms, presented a petition and asked for the distribution of the fund in court on the ground that it had passed to the creditors of that firm. An order was made on the petition directing inquiries, and the chief clerk found by his certificate, dated the 23rd of November, 1892, that the fund belonged (*inter alia*) as to one-fourth to George Hartwell. In August, 1893, on the further hearing of the petition, the share of George Hartwell was ordered to be carried over to a separate account, and an inquiry was directed as to the persons entitled, and in what shares and proportions.

George Hartwell died in 1842, insolvent and indebted to his son Francis Hartwell. Francis Hartwell died in 1867, leaving his son Francis Grant Hartwell his executor.

On the 3rd of July, 1890, letters of administration *de bonis non* to the estate of George Hartwell were granted to Francis Grant Hartwell, who was a party to the proceedings when the order of August, 1893, was made. He had since died, and appointed his widow, Elizabeth Hartwell, his sole executrix. She, having proved the will and taken out letters of administration *de bonis non* to the estate of George Hartwell, thus became legal personal representative of both George Hartwell and of his creditor Francis Hartwell. The last inquiries, directed in August, 1893, as to the persons entitled to the share of George Hartwell had not been answered. Elizabeth Hartwell now applied to have the fund paid out to her as administratrix of George Hartwell, with a view to retain the debt due by George to Francis Hartwell, deceased, whose personal representative she also was. Stirling, J., being of opinion that the debt was statute-barred, refused to order the fund to be paid out to the administratrix of George Hartwell in order to enable her to acquire a right of retainer, such right being an anomaly and one which ought not to be extended.

The administratrix appealed.

Buckley, Q.C., and *Fawcus*, for the appellant.—It is true that if a receiver be appointed adversely to the executor, the right of retainer is gone: *In re Jones, Calver* v. *Laxton*, 34 W. R. 249, 31 Ch. D. 440; *Richmond* v. *White*, 27 W. R. 878, 12 Ch. D. 361. But the appellant is the only person who can give a good discharge for the money standing to the credit of this action. In point of law, constructively, whether there is an action or not, the legal personal representative is always the person who is paid. Although *Loy* v. *Duckett*, Cr. & Ph. 305, is apparently against the appellant, Lord Cottenham did not in that case refuse to pay the legal personal representative; he simply ordered the other parties interested to be brought before the court. This being a windfall coming in to the estate after a long lapse of time, there was no reason for suing earlier. There being no fraud, the reason for the rule that a fund in court ought not to be paid out to an executor so as to enable him to retain a statute-barred debt does not apply; and an executor may retain a statute-barred debt.

They referred to *Peacock* v. *Saggers*, 4 De G. F. & J. 406; *Coombs* v. *Coombs*, L. R. 1 P. & D. 288, 14 W. R. Dig. 23; *In the Goods of Brackenbury*, 25 W. R. 698, 2 P. D. 272.

Graham Hastings, Q.C., and *Brabant*, for the respondents, were not called on.

LINDLEY, L.J.—I think the practical solution of this does not appear to present any real difficulty. There is a fund in court which is standing to the credit of the legal personal representative of George Hartwell. George Hartwell owed money to the estate of Francis Hartwell, and the same person is the legal personal representative of them both. By the

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

order under which this fund was carried over to what I may call the separate account of the executors of George Hartwell, an inquiry was directed in order to ascertain who the persons were who were beneficially entitled to George Hartwell's share. That was done in the presence of George Hartwell's then legal personal representative. That inquiry has not been answered, and George Hartwell's legal personal representative comes to the court and says, "Before that inquiry is answered give me all this money." Now, is it right that the court should accede to that request? The object of it is to enable the legal personal representative of George Hartwell, when she has got this money, to prefer herself as the legal personal representative of Francis Hartwell, and to pay herself in that character what is due to Francis in full, and leave the other creditors of George to go without anything, as far as I know. Now, pending that inquiry, which was directed in the presence of George Hartwell's legal personal representative, ought we to enable the appellant to defeat the object of that inquiry, by paying this money out of court to the appellant? I think not. Supposing she had waited until that inquiry was answered, what would be the position of affairs? The position of affairs would be, I assume, that her name would not appear amongst the persons certified as having a valid claim as a creditor against George Hartwell's estate, because Francis Hartwell's debt has been barred. She would not therefore appear amongst the persons certified to be beneficially entitled to this fund under the inquiry to which I have alluded. Of course, in that event the right of retainer never would arise at all; because she would not have anything placed in her hands to retain. She has no right to retain until she has money in her hands. But she now says, "in order to save me from that certificate"—in other words, "in order to defeat the inquiry which was directed in my presence, help me to get the money out of court and defeat the inquiry altogether." I do not think we ought to do it. I was rather struck with Mr. Buckley's comments upon *Loy* v. *Duckett*, a case which I have not had occasion to look at for a long time, and I thought that case went perhaps a little further than it did; but I think that case can be explained, especially with the light thrown upon it by *Peacock* v. *Saggers*. I think that the view taken by Lord Cottenham in *Loy* v. *Duckett* was this -he distrusted the legal personal representative; he thought that if the legal personal representative got the money, no one else would see a farthing of it; and therefore Lord Cottenham took the course—which was no doubt right, but which was a strong course—of saying, "We will not pay it to you at all." Now here there is no danger of misappropriation of money in that sense. But there is danger, certainly, that if Mr. Buckley's client gets this money, the other creditors will go without payment. That would be the legal consequence of her getting it. I do not know, if there were nothing else in the case, that it would be right even to follow *Loy* v. *Duckett;* but we have a very peculiar combination of circumstances, and it appears to me that what we are asked to do is that which we ought not to do, having regard to the terms of the order of August, 1893—that is to say, we ought not to assist the legal personal representative of George Hartwell to defeat the whole of that inquiry which was directed in the presence of her or her predecessors, as his representative. I do not think it would be right. I do lay some importance upon the fact that the whole object of this is to get into the position to exercise a right of retainer, and I do not see that there is any principle which compels the court to assist a person to get into that position. I agree with what James, L.J., said: "It is no business of ours either to defeat or to assist the right of retainer"; but when we are asked to do that which is inconsistent with what was done in August, 1893, for the very purpose of enabling one creditor to defeat all the others, I say "No."

KAY, L.J.—I am of the same opinion. There is no suit for the administration of the estate of George Hartwell. In this suit of *Trevor* v. *Hutchins*, which was instituted for the administration of the trusts of a creditor's deed, George Hartwell was found to be a creditor under that deed, and a certain sum was directed to be carried to his separate account in that suit. It was carried to the separate account. That fund cannot be touched except under an order of the Court of Chancery—the Chancery Division of the High Court—and accordingly this application is made in Chancery by the administratrix *de bonis non* of George Hartwell. She comes here and says practically: "I also represent a person who was a creditor of George Hartwell; I admit that the debt is barred by the statute long ago; but I say that, in my character as legal personal representative of George Hartwell, I am entitled to have this fund handed out to me. No matter what I am going to do with it, I am entitled to have it handed out to me. When I get the fund, I mean, of course, to exercise the right of retainer which will then arise for the first time, and I will pay myself in full—the fund is not more than enough to do that—and whoever else is entitled, I do not care." I should have the greatest possible hesitation in acceding to that, if the case stood there alone (this fund having been a long time in court), having regard to the rule in *Loy* v. *Duckett* which, *primâ facie*, I take to apply—viz., that the court will not pay out a fund under those circumstances to a person who happens to have obtained administration, but will find out who is entitled, and try if possible to get the fund into the hands of the people entitled. But the case does not stand there, because we have here another circumstance, which to my mind is very important and conclusive as to what the court ought now to do; and that is this: A former representative of George Hartwell, who is now dead, was before the court when the petition of Major Ricketts, who claimed an interest in this fund and asked to have it, or part of it, paid to him, was heard. In the presence of the legal personal representative of George Hartwell an inquiry was then directed to find out who were beneficially entitled to the fund. That was practically following the decision in *Loy* v. *Duckett*. The court would not hand it over to the then legal personal representative of George Hartwell. It was said the legal personal representative did not require it to be handed over. However, the court did not, in fact, hand it over; but in the presence of that legal personal representative they directed an inquiry as to who were beneficially interested in the fund.

Now, by the admission of the present appellant, the answer to that inquiry will certainly leave her out altogether, because she admits that the debt of the person of whom she is the legal personal representative is long barred. That certificate will therefore be in this form: "This fund belongs to A., B., C., and D., creditors of George Hartwell at such a sum, and must be divided among them." But among A., B., C., and D. the present appellant will not appear at all.

Although that inquiry was directed in the presence of the then legal personal representative of George Hartwell, and although that inquiry has not been answered, yet the now legal personal representative of George Hartwell comes and says: "Hand over the whole fund to me in respect of a debt which I admit

is barred—in respect of a debt which will certainly be excluded from the time when the certificate is made upon the inquiry, and stop the inquiry at once." I cannot see that the court would ever agree to that. I do not mean to say one word to encourage the legal personal representative of George Hartwell to suppose that a court of equity would under any circumstances permit her to have the fund in order that she may exercise a right of retainer and oust the other creditors.

Would it ever do it, after such an inquiry as that is directed? I think not. I think that is a complete answer to this appeal.

A. L. SMITH, L.J.—I have nothing to add except this. It seems to me that in August, 1893, this right to receive the money was waived. It cannot now be set up.

Appeal dismissed.

Solicitors for the appellant, *Bone & Heppell.*

Solicitors for the respondent, *Shearman & Rayner.*

From Chan. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) March 9.

In re BENNETT.
JONES *v.* BENNETT. (*a.*)

Will—Tenant for life and remainderman—Money lent by testator to a trading firm for a fixed period—Expense of audit of firm's books under provisions of agreement for loan.

The testator advanced money to two persons engaged in business, and it was stipulated that the testator should have no power to call the money in for a fixed term except in certain events, such as the business of the borrowers being carried on at a loss. It was also stipulated that the testator should have the right to inspect and examine the books and stock-in-trade of the firm at any time. The testator died having by his will given his property to certain persons for life with remainders over.

Held, first, that the duty of the trustee of the will was, in the absence of any special circumstances, to have an audit and stocktaking of the firm's business once a year; and, secondly, that the expenses of every such audit and stocktaking ought to be borne by the capital of the estate.

In this case two questions were raised—(1) As to how often the trustee of the testator's will ought to have an investigation as to the condition of the business of certain persons who owed money to the estate; and (2) by whom, as between tenant for life and remainderman, the expense of such investigation ought to be borne.

The testator had for some time prior to the 10th of April, 1894, carried on business in partnership with Messrs. Walton & Marshall, and, the partnership term having expired, it was arranged between the parties that the testator should retire from the business, and that Messrs. Walton & Marshall should continue to carry it on together, and by an agreement dated the 10th of April, 1894, made between the testator of the one part and Walton & Marshall of the other part, it was (*inter alia*) agreed as follows: (1) That the testator should retire from the said business in favour of Walton & Marshall as from the 16th of February, 1894. (2) That the capital of the testator in the said firm on the said 18th of February, 1894, was to be taken as settled and ascertained at the sum of £15,772 4s. 10d., and such capital sum was to be considered as money lent by the testator to Walton & Marshall on the 18th of February, 1894, at interest at the rate of 5 per cent. per annum from that day, such interest to be payable as therein mentioned, and the said capital sum to be repaid by Walton & Marshall to the testator on the 16th of August, 1904. By clause 3 Walton & Marshall were empowered to pay off the capital sum at any time. By clause 11 Walton & Marshall agreed to produce and show to the testator the balance-sheet of the business to be carried on by them, and all books and documents in relation thereto, and that the testator should have at all times free access and full liberty to inspect and examine the stock-in-trade, &c. By clause 12 it was declared that that agreement was upon the express condition that if and whenever (*inter alia*) the said business should be carried on at a loss, or if and whenever the balance-sheets and other books in connection with the said business should not be clearly and honestly kept, or if and whenever Walton or Marshall should at any time draw out more than his profit of the said business, or if and whenever the stock-in-trade of the said business should be overvalued, &c., the testator, his heirs, executors, administrators, and assigns might (*inter alia*) recover immediate payment of the said sum of £15,772 4s. 10d., or so much thereof as should then remain owing. In pursuance of such agreement Walton & Marshall had duly carried on the said business.

The testator died on the 27th of September, 1894, having by his will, dated the 14th of February, 1890, given all his residuary estate to his executors and trustees upon the usual trusts for sale and conversion and investment of the proceeds, and thereby in effect gave his property to certain persons for life, with remainders over. The said will also contained a power for the trustees to carry on his business, and the testator thereby authorized his trustees to postpone the sale and conversion of his estate for so long as they should think fit, and directed that the income of unconverted property (including the profits of his business while carried on by his trustees) should from the time of his death go in the same manner as the income of the proceeds thereof would have been applicable if the same had been converted. The will was duly proved by one only of the executors therein named, the other having renounced probate and disclaimed the trusts of the will. The trustee, not being able to ascertain whether the principal moneys owing under the said agreement had become payable under clause 12 thereof without an independent audit of the books and stocktaking of the said business being had at least once every year by duly qualified accountants and valuers, had directed one such audit and stocktaking to be taken, which was done in or about December, 1894, at an expense of about £213.

The trustee applied by an originating petition to the Court of Chancery of the County of Lancaster to have it (*inter alia*) determined (*b*) whether he should continue to have such audit and stocktaking taken once every year or at any other and what intervals, and (*c*) how the expense of the audit and stocktaking which had already taken place and of any future audit and stocktaking ought to be borne and paid, and whether out of income or capital.

The Vice-Chancellor held as to (*b*) that the trustee should have such audit and stocktaking once and once only in each year, and as to (*c*) that the expense of the audit and stocktaking which had taken place should be borne and paid for out of capital, as being part of the testamentary expenses, but that the expenses of all subsequent audits and stocktakings should be borne and paid out of income.

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

The tenants for life appealed.

Cozens-Hardy, Q.C., and *J. Rutherford*, for the appellants, argued that as the object for which these expenses were incurred was the protection of the *corpus* they ought to be borne by the capital, and so the beneficiaries would bear them in proportion to their interests. The costs in question were all really in the nature of debts and testamentary expenses.

F. Thompson and *A. & B. Terrell*, for the remainderman, argued that the order appealed from was right. If tenants for life take the income of property *in specie*, they must take it subject to all proper deductions such as the costs here.

They referred to section 18 of the Trustee Act, 1893.

P. O. Lawrence, Q.C., and *A. Rutherford*, for the trustee.

Cozens-Hardy, Q.C., replied.

LINDLEY, L.J.—The testator, on retiring from his business, lent his share of the capital to the continuing partners, and stipulated that they should repay it with interest at 5 per cent. within ten years, and might pay it off sooner if they wished, but the testator could not call it in sooner. All this was without security. Then he stipulated that as he was going to lend without security they must produce balance-sheets, and he was to be at liberty to see the books and ascertain how their business was being carried on, and whether or not his money was really safe, so that if he found it was at risk he might be at liberty to call it in. That is the substance of the bargain. He afterwards died, having by his will settled his property upon one for life, remainder over. The trustee requires the continuing partners to show him their books and have them examined by an accountant.

The Vice-Chancellor said that they might do this once a year, but not oftener. I think that direction is too strict. It will be better to direct that in the absence of any special circumstances this audit should be made once a year, but that will leave with the trustee a discretion to have it more than once in a year or not, as he thinks expedient.

Now comes the question how the expense is to be borne. The trustee says that he must employ an accountant, and asks who is to pay for that. In the first place, as between the testator's estate and the continuing partners, the expense cannot be thrown upon them; it must therefore be borne by the testator's estate. If so, why should it not be paid out of the capital of the estate? It is not exactly a debt or testamentary expense, but is much more akin to that than anything else. I think that Mr. Cozens-Hardy's suggestion was the true one—namely, that this is part of the costs, charges, and expenses properly incurred by the executor in performance of his duties. Why should it be thrown on the tenant for life. For whose benefit is the expense to be incurred. It is for the benefit of the whole estate, and should be borne by the whole estate.

The practical effect will be that the tenant for life will lose the income of the sum expended.

It has been suggested that these are annual outgoings. I do not think that they are anything of the sort. By outgoings are generally meant some payments which must be made to secure the income of the property. In my opinion the Vice-Chancellor ought to have declared that the expenses of the audit and stocktaking ought to be paid out of *corpus*, and he ought not to have drawn any distinction between the first and the subsequent payments.

KAY, L.J., referred to the facts, reading the provisions of clause 12 of the agreement of the 10th of April, 1894, and observing that they were material in reference to the present question, and continued: The trustee wants to know how often he ought to have a formal examination made, and who, as between the tenant for life and the remainderman, is to pay for it. Now, it is obvious that without an examination of the books it would be impossible for the trustee to find out whether any of the events specified in clause 12 have happened or not. How can the trustee without such an examination ascertain whether the balance-sheets are accurate? Therefore an examination of the books at some time or other is necessary. The provision is that the testator was to have an examination of the books whenever he liked; and I do not see that it was competent for the Vice-Chancellor to lay down the hard and fast rule that there should be an examination once a year, and once a year only. Why should the trustee be so fettered? It might be necessary to examine the books more frequently. He might in one year have examined the books, and then he might have a suspicion that some one of the events provided for had happened in that year since that examination, and he might want to examine the books again, and it might be necessary, in order to insure the security of the capital sum, that there should be a further examination of the books in that year. On the other hand, the business might be so well carried on that the trustee might say that he had no suspicion of anything, and did not require an examination at any particular time. Again, the principal sum owing might have been so far reduced, and there might be so little to pay, that an annual examination might not be at all necessary. Therefore I think that the trustee ought not to be told that he is to make an examination in every year whatever happens, and only to make it once in each year. His discretion should not be so fettered. I agree with the addition to the declaration of the words which Lindley, L.J., has suggested.

Then comes the question, How are the expenses of this to be paid? Is it to be paid out of capital or out of income? For what purpose are these expenses to be incurred? It is to insure the repayment of the capital. If the trustee found that one of the events provided for by clause 12 had happened, then it would be his duty to call in the money at once, and he cannot tell that without an examination of the books, which would be a costly proceeding. Surely that is a provision which the testator introduced into this agreement for the purpose of making himself safe; that is, for the purpose of securing the repayment of the money which is not charged upon the business. That is an expense which those who are entitled to the capital ought to share. Why should it be thrown upon the tenant for life? The debt is outstanding until 1904, and if the tenant for life is then living he would have paid all this expense, and the remainderman would have to pay nothing of this which was incurred to insure the safety of the capital sum. Mr. Thompson ingeniously likened it to the case of insurance, but the analogy is not a good one—for one reason because the premium bears a very small proportion to the capital amount insured; it is nothing like £213 a year on £15,000. If the trustee had no power to insure at all, of course he could not pay it out of income except under the provisions of the Act recently passed. I think Mr. Cozens-Hardy's reply touches the very point. These are strictly costs, charges, and expenses properly payable by the trustee in the administration of the estate, so that, *primâ facie*, they are a capital charge. If they are paid out of capital, the estate will to that extent be reduced, and the tenant for life will lose the

income upon such reduction. That, as between tenant for life and remainderman, is a fair way of dealing with it.

With great respect to the Vice-Chancellor, I differ from him, and think that these expenses ought to come out of capital, and not out of income.

SMITH, L.J.—The real question is whether the expense of the audit to see whether the testator's money is or is not safe ought to come out of income or capital. Is this an outgoing as was suggested; or is it more like to costs, charges, and expenses, as Mr. Cozens-Hardy said. In my opinion it comes within the latter class. It was said that it was like the case of an insurance where the tenant for life pays the premium, but the difference between that case and this is that a premium on an insurance is a voluntary payment by a tenant for life out of his income. But this is a payment made by the trustee for the benefit of the whole estate; not merely for the benefit of the tenant for life, but also for the remainderman. I am clear that their costs ought to come out of capital.

Appeal allowed.

Solicitors, *Miller, Peel, Hughes, & Rutherford*, Liverpool; *J. F. Harrison & Burton*, Liverpool.

From Chan. Div. (Lindley, A. L. Smith, and Rigby, L.JJ.) Dec. 9, 10, 16.

HARBIN *v.* MASTERMAN. (*a.*)

Will—Annuity charged on income of residue—Provision for annuity—Payment of residue to residuary legatees—Refusal of annuitant to consent—Costs improperly incurred—Liability of solicitor—Ord. 65, *r.* 11.

Where an annuity is charged upon a residuary estate with a direction that upon the death of the annuitant the residue is to be divided, the court has jurisdiction, in spite of the opposition of the annuitant, to order the residue to be paid to the residuary legatees upon provision being made for the payment of the annuity.

The court, being of opinion that the appeal had been brought, not in the interest of the appellant, but really by the appellant's solicitor for his own purposes, made an order, under ord. 65, *r.* 11, *that the appellant's costs should be disallowed as between the appellant and her solicitor, and that the solicitor should pay the costs which the appellant had been ordered to pay to the respondents.*

Appeal from Stirling, J.

J. F. Duncan, who died on the 1st of January, 1865, by his will, dated the 15th of February, 1860, gave the residue of his personal estate upon trust out of the annual income to pay a legacy and certain annuities to the persons named; but when and so often as the annual income should not be sufficient for the payment of the whole amount of the annuities there was to be an abatement among the annuitants. The trustees were to invest the surplus income (if any), and after the death of the survivor of the annuitants to pay and divide the residue between five public charities according to the amount set after their respective names.

Upon this will, in July, 1871, Wickens, V.C. (19 W.R. 1053, L.R. 12 Eq. 559), decided that the charities were entitled to the whole of the residuary personal estate and the accumulations during twenty-one years from the testator's death; and in 1893, upon a petition presented by the next of kin, Stirling, J., held that the charities, and not the next of kin, were entitled to the surplus income accumulated after the expiration of the twenty-one years. Both these decisions were affirmed by the Court of Appeal (1894, 2 Ch. 184) and the House of Lords (43 W. R. 449, [1895] A. C. 186).

One of the annuities was an annuity of £150 in favour of Mrs. M. E. Venables, who was fifty-two years of age. Various sums of Consols had been set aside to answer the annuities, a sum of £6,000 having been appropriated to Mrs. Venables' annuity.

The five charities petitioned for the payment to them of the residue, except the sums set apart for the annuities. This was not opposed by any of the annuitants except Mrs. Venables, who claimed that the whole residue should remain in court during her life.

Stirling, J., ordered the residue, except what was set apart for the annuities, to be paid to the charities, but ordered that a sum of £2,000 should remain in court as an additional security for Mrs. Venables, not to be paid out without notice to her.

From this order Mrs. Venables appealed.

Graham Hastings, Q.C., and *Johnston Edwards*, for the appellant.—The testator has said that the residue shall not be divided until the death of the last surviving annuitant, and, though it may have been the common practice, there is no jurisdiction to order the residue to be paid out. The principle of *Saunders* v. *Vautier*, Cr. & Ph. 240, has never been applied to capital. There is no reported case in which such an order has been made in the face of opposition. Stirling, J., relied on *In re Parry*, 38 W. R. 226, 42 Ch. D. 570, but that case never decided that the capital might be taken away by the legatees. In *Slanning* v. *Style*, 3 P. W. 334, the order was made subject to the annuitant's consent, and in *Weatherall* v. *Thornburgh*, 26 W. R. 593, 8 Ch. D. 261, the point was not raised. [RIGBY, L.J., referred to *King* v. *Malcott*, 9 Hare 692.]

Fischer, Q.C., and *S. Dickinson*, for the London Orphan Asylum, one of the charities.—Though there seems to be no authority in point, the practice has always been to order payment out on provision being made for the annuities, and it is absurd to suppose that if a testator leaves an estate of £100,000 and charges on the income an annuity of £100, the whole estate must be kept in hand. If the income prove deficient the annuitant can resort to the *corpus* in the hands of the charities: *May* v. *Bennett*, 1 Russ. 370; *Booth* v. *Coulton*, 18 W. R. 877, L. R. 5 Ch. App. 684. [RIGBY, L.J., referred to Williams on Executors, 9th ed., vol. 2, p. 1260, and to *Boyd* v. *Buckle*, 10 Sim. 595, and *Prendergast* v. *Lushington*, 5 Hare 171, 3 H. L. C. 195.] [LINDLEY, L.J.—It comes to this: there is no reported case where an order has been made in face of opposition. The question is whether Mr. Hastings is right in saying the thing cannot be done.] It is the practice of the court, and cannot be supposed to be wrong.

They referred also to *Simmons* v. *Bolland*, 3 Mer. 547.

Johnston Edwards, in reply.—By the decision of the House of Lords the annuities are chargeable only on the income of each year. The annuitants cannot, therefore, proceed against the charities for any deficiency.

H. Fellowes, Hadley, and *Buckley, Q.C.*, and *T. B. Napier*, appeared for the other charities.

Cur. adv. vult.

Before delivering judgment the court, being doubtful whether the appeal had been presented in the interests of Mrs. Venables, directed the official

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

solicitor to inquire into the matter, and intimated to the appellant's solicitor that they would hear him on the question whether he should not be ordered, under rule 11 of order 65, to indemnify his client against the costs of the appeal.

Dec. 16.—LINDLEY, L.J.—In this case there is an appeal, nominally in the name of Mrs. Venables, against an order made by Stirling, J., directing certain funds to be paid over to some charities which are residuary legatees, although there are annuities, or rather there is one annuity, charged upon the residuary estate and still payable to Mrs. Venables. Under orders, which I need not refer to, a sum of £8,000 in Consols has been set apart to answer Mrs. Venables' annuity. The amount of that annuity is £150 a year. In the judgment of Stirling, J., that was an ample sum to set apart to provide for the annuity, and the appellant's counsel did not really contend the contrary. It is obvious, upon consideration, having regard to the age of the lady and the amount of the annuity, that £8,000 is quite ample. But Mr. Graham Hastings, for the appellant, argued that Stirling, J., had no jurisdiction to order the residuary estate to be divided, inasmuch as Mrs. Venables' annuity was charged upon the whole residuary estate, and the part of the will which gave her the annuity and gave the charities the residuary estate is worded in this way, that after payment of the annuity the residue is to be divided. Mr. Graham Hastings' point was that the annuity had not been paid, and will not be paid until Mrs. Venables' death, and that upon the terms of the will there is no jurisdiction in the court to order the residuary estate to be distributed until her death. Now, according to the strict language of the will that is so, no doubt; but what is the meaning of a will which charges a residuary estate with an annuity or several annuities, and directs that upon the death of the annuitants the residue is to be divided? As between the annuitants on the one hand and the residuary legatees upon the other, it is a gift of the residue subject to the payment of the annuities, and it has been the invariable practice of the court to let the residuary legatees have what is theirs, subject to an ample provision for the payment of the annuities. I confess it took me by surprise to be told that there was no jurisdiction to make any such order, and that the court had never done it in the face of opposition. That the court has been in the habit of doing it ever since Lord Talbot's time is obvious from the cases, and, speaking from my own recollection (and my brother Rigby confirms me), it has been done scores of times, but we are not prepared to say that we recollect a case where it was done in spite of opposition. Now, the opposition is the opposition of a dog-in-the-manger kind, there being ample to provide for the annuity. The opposition is not only injurious, but selfish in the extreme.

Mr. Fischer referred us to a great many authorities which confirmed the practice of the court, and in addition to those decisions there are one or two more. There is one, *Fryer* v. *Buttar*, 8 Sim. 442, more particularly, which might have been referred to, and which I will name without going through it. But there was considerable opposition there, although not actually to the distribution of the final residue. The view taken by Stirling, J., is the common-sense view, and that is to let the residuary legatees have what is theirs subject to the payment of the annuities. Of course, if in some unforeseen event it should become necessary for the annuitant to have recourse to the capital so set apart, she would be entitled to do it; but to suppose it is conceivable in any case except the insolvency of the country, which is a contingency the court never contemplates, that she will not be paid her annuity in full is perfectly idle. So far there is no difficulty, and it was not because any of us felt a difficulty that we omitted to give judgment when the argument was concluded. But there was a question which occurred to us about the costs of this appeal which required care. The appeal will be dismissed, with costs, but there will be only one set of costs to be paid by the appellant.

A. L. SMITH, L.J.—I entirely agree.

RIGBY, L.J.—I also agree.

Appeal dismissed.

Their lordships then heard the appellant's solicitor on the question of costs, and afterwards delivered the following judgments:—

LINDLEY, L.J.—We have now to consider whether this is a case in which an order ought to be made against the appellant's solicitor in person, to indemnify his client against the costs of this appeal. We know now, from Mr. Hood Barrs' own statement, the whole history of this appeal, and it is perfectly obvious now that the suspicion which we had when counsel first addressed us on the merits is well founded, that this appeal cannot be fairly or properly regarded as an appeal brought in the interests of Mrs. Venables. The object of the appeal is to compel the charities to come to some terms with Mr. Hood Barrs, especially with respect to certain costs, as to some of which he has given his own personal guarantee. That explains the following passage in a letter from him to Mrs. Venables: "With regard to the appeal about which I wrote you, as I have said, you will incur no liability whatever. Whatever liability there is will be with me. I hope ultimately to get a settlement of the appeal which will be beneficial to me," that is, I will take the burden of the appeal on myself and at the same time any benefit. That expresses in a few words the real truth, and it is perfectly obvious that Mrs. Venables, although she has so far authorised and approved of this appeal as to render her responsible for the costs, yet, when we come to look at the matter as between her and her solicitor, it is quite obvious that she is a mere puppet in his hands, and this appeal is brought by him for his own purposes, and not in the interest of Mrs. Venables at all. Now, Mr. Hood Barrs has thought proper to cast aspersions on the conduct of the official solicitor. All I can say is that we are responsible for sending him to Mrs. Venables. We were convinced, or at all events strongly of opinion, that this appeal was not an appeal brought by her in her interest; in other words, we did not believe that the real object of this appeal was its apparent object—namely, to get for her a better security for her annuity. It was quite obvious that it was our duty, having that opinion, to take care that a suitor of the court was not let in for considerable costs for a purpose with which she had really nothing whatever to do. I think we were not only justified, but we should have failed in our duty if, having that view, we did not investigate the matter by sending the official solicitor to inform us more about it. The official solicitor goes as the officer of the court. He is not a solicitor for the client, nothing of the sort. He has performed his duty in a way that at least has given us perfect satisfaction, and we should be failing in our duty if we did not apply to this case ord. 65, r. 11: "If in any case it shall appear to the court or a judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any

costs properly incurred have nevertheless proved fruitless to the person incurring the same, the court or judge may call on the solicitor of the p rson by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person." If there ever was a case in which that order ought to be applied, this is one.

The charge against Mr. Hood Barrs is this, which he has proved up to the hilt by his own statement—that this appeal is not brought for the benefit of his client, but is brought for the ulterior purpose of benefiting himself in this sense—to compel these charities, if he can, to come to some arrangement with him, which they are not in the least bound to do, and which he has no right to impose. It is very nearly, if not quite, justifiable to say that it is a blackmailing appeal.

A. L. SMITH, L.J.—I am entirely of the same opinion. The question which the court has to determine now is whether it appears to the court that costs have been improperly, or without any reasonable cause, incurred; because, if the court comes to that opinion, power is given to the court, under ord. 65, r. 11, to call upon the solicitor of the client to show cause why the costs should not be disallowed, or why he should not pay the costs which have been incurred by the client.

I wish shortly to state how the matter appears to me. The testator made a will, and controversy arose as to the construction of that will. My brother Stirling put a construction upon it. This court afterwards put the same construction upon it, and the House of Lords has held that the construction put upon it by my brother Stirling and this court was right. I do not for a moment say that that litigation, which, as I understand, was undertaken on behalf of the next of kin, who were the appellants all through, in this court and in the House of Lords, was not a proper litigation for Mr. Hood Barrs to undertake. I do not say that in any shape or way up to the judgment in the House of Lords, which was given in March, 1895, any complaint can be made of Mr. Hood Barrs in the matter—none whatever. What we have to determine is as to what took place after March, 1895, when the judgment of the House of Lords was given. Now, what happened? The judgment in the House of Lords affirmed that certain charities, five in number, were entitled to the *corpus* of the property—I am putting it shortly—subject to certain annuities, and the House of Lords gave judgment for the respondents with costs against the appellants, who were Mr. Hood Barrs' clients. Mr. Hood Barrs, after that judgment had been given against his clients, did all he could to get these charities to forego their costs. That seems to me to be all right. But he could not get them to agree to that, and they were within their rights in saying, "We will not forego the costs." Then what happened? The charities want to get the property to which the House of Lords has said they were entitled. That property was invested at that time in Consols in court in the administration of the testator's estate. What the charities did was this: They took out a summons before my brother Stirling to get an order that the *corpus* should be paid out to them in the shares to which they had been adjudged entitled under the judgment of the House of Lords, but, of course, subject to such part of the *corpus* being set aside as would fully secure the annuitants having a charge on the *corpus*. What did my brother Stirling do? He took into consideration the circumstances as regards Mrs. Venables (and no doubt as regards the other annuitants, none of whom appeal against Stirling, J.'s, order) and he said: "If I set apart £8,000 and keep that in court for the purpose of satisfying your annuity, I am perfectly certain you will have your annuity of £150 a year as long as you live." I am perfectly certain that my brother Stirling was right in that, and nobody can hear what I am saying without being satisfied that the order of my brother Stirling was a just order to make as between the annuitant on the one part and the charities on the other, who were entitled to the residue of the *corpus*.

But now comes the difficulty with regard to Mr. Hood Barrs. Mr. Hood Barrs could not get the charities to agree to forego the costs, so he goes to Mrs. Venables, who is a lady certainly not in affluent circumstances, and he gets her name for the purpose of appealing against that order of Stirling, J.; and it certainly did appear to me, when Mr. Graham Hastings was arguing this case for the appellant, that it was a senseless appeal, and one which nobody could have brought unless he or she had been ill-advised, or was perverse or obstinate; and I certainly did come to the conclusion, when I heard Mr. Graham Hastings upon the point, that this was not in substance Mrs. Venables' appeal. Now, what was the court to do? It struck me, and I use a word which I have used before to-day, as no other word will properly describe it—as cruel in such an appeal as this, as we had to dismiss the appeal, that we should make this unfortunate appellant pay the costs. She has only a small annuity of £150 a year, and the costs in this court could not be otherwise than heavy, when the appeal was dismissed. What did we do? We have an officer of this court (I wish to say something about him) who is called the official solicitor. In my judgment the official solicitor is appointed official solicitor to the court in order that a judge, when he sees before him certain matters which he wants investigated, and as regards the absolute accuracy of which counsel is not instructed and has no knowledge whatever, may communicate with him with a view to obtaining information as to where the real truth of the case lies. In this case, and I say it emphatically, although Mr. Hood Barrs chooses to apply the term "dirty work" to Mr. Winterbotham, that term ought not to be applied, because Mr. Winterbotham has faithfully carried out our orders, which orders, considering the position in which we were placed, we were bound to give. Then we find out it is not Mrs. Venables' appeal. It is all very well to say that she had given instructions to Mr. Hood Barrs; but what interest had Mrs. Venables in appealing to this court? She had her £8,000 capital set apart for her for the rest of her life; which sum was more than sufficient to pay, whatever might happen, the annuity of £150 a year. Now, Mr. Hood Barrs comes and tells us—and I have no doubt accurately—the attempts he had made to settle after he had been defeated in the House of Lords. He could not get a settlement, and, as has been pointed out by my brother Lindley, this appeal is not brought in the interest of Mrs. Venables at all. It was perfectly immaterial to her, except as regards costs, which way it went; but it was brought for the purpose of coercing, if he could, these charities to come to his terms, and in the letter of the 9th of November, 1895, he says, "I hope ultimately to get a settlement of the appeal, which will be a benefit to me." If there ever was a case in which this order should be worked, it appears to me to be this, and I think the order which my brother Lindley sketched out ought to be made.

RIGBY, L.J.—I will assume for the purpose of my

judgment in this case that the conduct of Mr. Hood Barrs down to the time when the order was made for setting aside a sum to provide for this lady's annuity was not only justifiable, but, from the point of view of his client, altogether beneficial, and that in every respect down to that period he was free from blame. The order was made that £8,000 Two-and-a-Half per Cent. Annuities should be appropriated to meet an annuity of £150 a year payable to a widow during the term of her life. It was not mentioned in the order that in the improbable—one might almost say the impossible—case of the annuity even being larger than the income produced by that £8,000, she could go upon the £8,000; but at any rate it was shown us in argument that the charities offered to have that made clear upon the face of the order, and that offer, for reasons which we now perfectly comprehend, was declined. I say this because, from Mr. Hood Barrs' own statement, it becomes abundantly clear that he did not think that the £8,000 was an insufficient security. He told us himself, apparently unconscious of the conclusions that would be drawn from what he said, that he was willing after the order was made to come to terms which would release £2,000 out of the £8,000, leaving £6,000, only stipulating that he should be allowed, or rather his client should be allowed, to resort to the capital of the remaining £6,000—terms less advantageous to his client, Mrs. Venables, than those which, I believe, were effectuated by the order, but which at any rate (which for this purpose is more important) were offered by the other side at that time and declined, so that I think it would be absurd to suppose that Mr. Hood Barrs imagined that Mrs. Venables' interests were in any way concerned in this appeal. But we have now made clear, what I must say appeared to me not improbable, at any rate, that Mr. Hood Barrs had a direct personal interest in the matter, or, at any rate, had grounds for believing that if he could get this order, which his client's interest in no way required him to get, reversed on this appeal, his own pocket would be the better for it, because he could impose terms upon the charities which would relieve him, at any rate, from the personal undertaking he had entered into to pay certain costs, which I need not specifically refer to.

That being the position of things, and that being, as we have from Mr. Hood Barrs' own lips, his own appreciation of the case—namely, that Mrs. Venables was sufficiently secured, and that she had no interest, he approaches her and suggests—and a more improper suggestion I venture to say was never made—that she should lend her name to him, coming here to the court as if she were the *bonâ fide* appellant, on the terms that he should indemnify her against costs, and that he personally should take the benefit of the appeal. It startles one to find that a solicitor, an officer of this court, can come into court and openly avow a transaction of that kind and yet apparently remain unconscious of the absolute impropriety of it. It appears to me that that unconsciousness, if it were not assumed, is a very grave feature of the case.

Mr. Hood Barrs permitted himself to make observations from a high standpoint, as that of a respectable solicitor who had a right to throw aspersions on others who were doing their duty. I wish it to be known—in my judgment, at any rate—it is not the part of a respectable solicitor to induce clients to lend their names for appeals in which they have no interest at all in order that the solicitor himself may gain his own private ends. I look upon such an agreement as an abuse of the practice of the court. Mr. Hood Barrs thought it right to complain of the fact that he was not approached for information. I have formed my own judgment as to the sort of information we should have got from him if he had been allowed to be the go-between between the court and Mrs. Venables. I feel satisfied that we should not have arrived at the true state of things, and I feel certain we should have been altogether disregarding our duty if, in a case of this kind, we had not instructed our officer to find out the facts, which otherwise I feel convinced we should never have known.

I will only say that I think the official solicitor, in doing what he did, in no way exceeded the instructions that were given to him by us, and that he did what was perfectly right and proper; and I protest against the notion that the court is to be bound by any idea of etiquette, or by any theories as to what is respectable between solicitors—to shut its eyes, or rather to shut the door, to information which may be obtained, and which has been obtained, as in this case, and which would never have been obtained if we had not taken the course we did. I consider that if ever there was a case of costs being occasioned improperly this is the case. I concur in the judgment which Lindley, L.J., has delivered—that this is a case in which Mr. Hood Barrs can recover nothing from his client, and that he must repay to her any costs which she is liable to pay under the order of the court already made. The fact that he indemnified her is one of the charges against him. It is no merit that he did it. It was absolutely wrong to do it. After this I hope no solicitor will ever come and say: "I intended what was right; I used the process of the court to bring about what I thought right; and I did it by deceiving the court, in the first instance, into a belief it was not I, acting in my own interest, but an innocent client, who was bringing an appeal which the court has decided to be not only wrong, but altogether without precedent."

Solicitors, *Hood Barrs & Co.; Winter & Co.; Tandy, Mahon, & Sayer; Gadsden & Treherne; Bower, Cotton, & Bower.*

High Court of Justice.

Chan. Div.
Stirling, J. } Jan. 29, 30; March 18.

In re WHITE AND SMITH'S CONTRACT AND THE VENDOR AND PURCHASER ACT, 1874. (*a.*)

Vendor and purchaser—Leaseholds—Sale by auction—Onerous covenants—Non-disclosure by vendor—Constructive notice.

A., at a sale by auction in the City of London, bought from B. certain leasehold property. The lease contained onerous covenants of which no mention was made in the particulars and conditions, nor did the particulars or conditions state that the lease was open for inspection. A. had no actual knowledge of the contents of the lease. B. alleged that A. had had a fair opportunity of obtaining such knowledge, the lease being in fact open to inspection before the sale at the offices of B.'s solicitors in accordance with the usual custom, and being also brought by B.'s solicitor to the sale for inspection. A., however, was ignorant alike of these facts and of the custom.

On a summons by A. under the Vendor and Purchaser Act, 1874,

Held, that A. was entitled to have the contract rescinded.

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

This was a summons under the Vendor and Purchaser Act, 1874, taken out by the purchaser, asking that the contract of purchase might be rescinded on the ground of the existence of certain onerous covenants and defects of title.

On the 29th of April, 1895, certain leaseholds in Tower-street, St. Martin's-lane, were, along with other property, put up for sale by auction at the Mart, in the City of London, and formed lot 3 at the sale.

The applicant, Mr. John Thomas Smith, attended the sale and became the purchaser of lot 3, and signed a contract in the usual form indorsed on the printed particulars and conditions of sale. These particulars and conditions contained no statement as to the nature of the covenants in the lease nor any notice on the part of the vendors that the lease might be inspected at their solicitors' or elsewhere. Upon the delivery of the abstract it was found (as was not disputed) that the lease contained onerous covenants. By his requisitions on the title the purchaser claimed to have the contract rescinded on the ground of the existence of these covenants, and he also raised other objections to the title. The vendors declined to rescind and failed to remove these other objections, and this summons was taken out in consequence.

Stewart Smith, for the summons.—There is nothing in the advertisements to show that the covenants are onerous. Consequently the purchaser cannot be forced to complete the contract. He had no notice either actual or constructive. An order similar to *In re Hargreaves and Thompson's Contract*, 34 W. R. 708, 32 Ch. D. 454, should be made.

Hastings, Q.C., and *Ashton Cross*, for the vendors.—The law is stated in *Reeve* v. *Berridge*, 36 W. R. 517, 20 Q. B. D. 523. The purchaser could have seen the lease if he had wished to do so, the same being in fact open for inspection (in accordance with the usual custom) previous to the sale at the offices of the solicitors of the vendors. The purchaser is a person who attends many sales and must have known of the custom.

Stewart Smith, in reply.—The purchaser did not know of the custom, and he had no opportunity of inspecting the lease.

STIRLING, J., stated the facts as above set out, and continued:—At the hearing it was admitted by the vendors that the law applicable to the case is as laid down by the Court of Appeal in *Reeve* v. *Berridge*, 20 Q. B. D. 523, pp. 527-8. In my opinion the last paragraph of the judgment establishes that it is *primâ facie* the duty of the vendor to disclose all that is necessary to protect himself, and not the duty of the purchaser to make inquiry before entering into a contract, and that this is so whether the sale be by public auction or private contract. It seems to me that the Court of Appeal meant to lay down a general rule applicable to all sales, though, no doubt, the practice with reference to sales by private contract was put forward as one of the grounds for the establishment of the rule. It is not pretended that the applicant had any actual knowledge of the contents of the lease, but it is said that he had a fair opportunity of ascertaining its provisions. This is sought to be established from the statements in paragraphs 13-16 of the affidavit of vendors, and paragraph 7 of the affidavit of applicant in reply. Paragraphs 13-16 of the affidavit of the vendors allege that the purchaser has had previous dealings with property in the neighbourhood of the property in question, and was aware that the lease probably contained covenants and conditions of an unusual nature; that the lease was at all reasonable times between the advertisement of the particulars and the date of the sale open for inspection "in accordance with the usual custom" by intending purchasers at the offices of the solicitor of the vendors, whose name and address appeared in the advertisement aforesaid; that the vendors' solicitor was present at the sale and had with him the lease of the property, which was then open for inspection "in accordance with the usual custom"; and that the purchaser was a frequent attendant at sales of property of this description, and was well acquainted with and experienced in all the details of such customs and opportunities for examination.

Paragraph 7 of the affidavit of the applicant in reply says that the applicant did not inspect the lease prior to the sale, was never informed, nor was he aware that the lease was open for his inspection, and that he did not know that the vendors' solicitor was in attendance at the sale. It must be taken to be admitted by the applicant for the purposes of this application that the acts of the respondents spoken of in these paragraphs of their affidavit were "in accordance with the usual custom," and that the applicant knew this. The vendors, however, fail to say what means of knowledge they have on the subject of this alleged custom, or what the nature of the custom is, or how far it extends. It is well known to be a common practice for vendors to deposit the lease with their solicitors or elsewhere prior to the sale, and to announce the fact in the particulars of sale, and I am quite prepared to believe that in the majority of sales in the City of London this course is adopted. For aught that appears this may be all that is referred to in the respondents' affidavit. At all events the respondents do not venture to pledge themselves that a vendor in the City of London is to be taken to have conformed to this practice unless he gives notice to the contrary, while the applicant expressly says that he was not aware that the lease was open for his inspection, by which I understand him to mean that he was not aware that he was entitled as of right to see the lease, or that he would not be met with a refusal if he applied to see it before the sale.

The question then arises whether a purchaser under such circumstances ought to be fixed with constructive notice of the contents of the lease. The circumstances under which a purchaser without actual knowledge of a state of facts ought to be held to have constructive notice of it have been recently considered by the Court of Appeal in *Baily* v. *Barnes*, 42 W. R. 66, [1894] 1 Ch. 25, and one test there laid down appears to be whether inquiry ought to have been made as a matter of prudence, having regard to what is usually done by men of business under similar circumstances. In the application of this test all the circumstances of the case must be taken into consideration. I can well imagine cases in which the court might hold that a purchaser had failed to take reasonable precautions if he did not avail himself of an opportunity or even a possible opportunity of examining a lease; as, for example, where knowledge was brought home to him of the existence of similar covenants in leases of adjoining portions of the same estate. If, however, it be (as I think it is) the duty of the vendor to disclose the state of his title, and not the duty of the purchaser to inquire into it, and if the purchaser's attention is not called to the possible existence of onerous covenants, either by the vendor himself or by information otherwise acquired, I think that a business man of ordinary caution might abstain from examining a lease in the absence of any intimation on the part of the vendor that he will not be met with a refusal if he applies to examine the lease before the sale. Now, the

applicant, in his affidavit, says that he has never had any experience of sales or other dealings with property in the neighbourhood of St. Martin's-lane, that he did not know that leases of property in that neighbourhood contained or were likely to contain onerous or special covenants and conditions, that he had no opportunity of examining the lease, that it was not a condition of sale that he should acquaint himself with the contents of the lease, and consequently he did not do so. In these circumstances I think that it is not made out that the applicant had a fair opportunity of inspecting the lease within the meaning of the rule laid down in *Reeve* v. *Berridge*, and consequently that he is entitled to the relief for which he asks.

Solicitors, *J. H. Smith*; *T. H. Hiscott*.

Chan. Div.
Kekewich, J. } Feb. 13.

In re HANCOCK.
MALCOLM *v.* BURFORD-HANCOCK. (*a*.)

Power—Appointment—Execution—Irrevocable appointment "subject" to a prior appointment—Failure of prior appointment.

A settlement contained a power enabling the tenant for life to appoint the trust funds in favour of his children, subject to a proviso enabling him to appoint, on the determination of his life interest, one-fourth of the income of the trust funds to "his wife" for her life. The tenant for life, in exercise of his powers, irrevocably appointed "one-fourth of the income of the trust funds," upon the determination of his life interest, to his wife for life, if she should then be living, and appointed the trust funds to his children, subject to his own life interest, and "subject and without prejudice to the appointment" in favour of his wife "if the same should take effect." His wife subsequently died, and on his remarriage he purported to appoint one-fourth of the income of the trust funds in favour of his second wife for her life. His second wife survived him.

Held, that the power to appoint to his wife was a power to appoint to any wife of his, not necessarily a first or a then existing wife; but that the appointment in favour of the children being expressed to be subject to the appointor's life interest, and subject and without prejudice to the appointment in favour of his first wife, was subject only to those two prior interests, and precluded him from making any appointment in favour of the second wife.

Summons.

By a deed dated the 13th of March, 1872, a moiety of a sum of £28,000 consolidated stock and of certain shares of residuary, real, and personal estate was appointed to trustees on trust to pay the income to Sir Henry J. B. Burford-Hancock for life, with remainder to his child or children in such shares and in such manner as he should "by any deed or deeds with or without power of revocation and new appointment appoint," with a proviso to the effect that it should be lawful for him by deed, or by will or codicil, to appoint, after the determination of his life interest, one-fourth part of the income of the trust funds to "his wife" for her life "upon such conditions and with such restrictions" as he should "think fit."

At the date of the execution of this deed Sir Henry was married to his first wife, to whom, by a deed poll dated the 26th of January, 1885, he, in exercise of the above power, irrevocably appointed one-fourth part of the income of the trust funds for her life, upon the determination of his life interest, "if she should then be living," and by the same deed he appointed one-third of the trust funds to each of his three children, subject to his life interest in the income, and "subject and without prejudice to the appointment" in favour of his wife "if the same shall take effect"; the deed contained, however, a power of revocation and new appointment with reference to the one-third share appointed to his youngest child.

By a deed poll dated the 25th of December, 1892, and supplemental to the deed of 1885, Sir Henry revoked the appointment made to his youngest child, and irrevocably reappointed the same share to the same child.

Sir Henry's first wife died in 1893.

By a deed poll made upon his marriage with his second wife, and dated the 23rd of March, 1895, Sir Henry appointed one-fourth part of the income of the trust funds to his second wife for her life upon the determination of his life interest, if she should be then living.

Sir Henry died on the 23rd of October, 1895.

This summons, taken out by the trustees, raised the question whether or no the appointment in favour of Sir Henry J. B. Burford-Hancock's second wife was a valid exercise of the power of appointment in favour of "his wife," given to him by the deed of the 13th of March, 1872.

C. E. E. Jenkins, for the trustees.

Austen Cartmell, for Lady Hancock.—"Wife" means any wife of Sir Henry Hancock; further the power to jointure overrules the power to portion (Sugden on Powers, 8th edition, pp. 484-490), and the children's interest is still subject to that power of jointure. Moreover, this is merely a division between the children stating what proportions they are to take.

Renshaw, Q.C., and *Ingle Joyce*, for the children.—A devise or bequest to the wife of A. is confined to that particular wife: Jarman on Wills, 5th ed., p. 303; *Re Parrott, Walter* v. *Parrott*, 34 W. R. 553, 33 Ch. D. 274. That is in the case of a will. This case is stronger because it is a settlement. Here the power of appointing is gone because the donee has done something inconsistent with power: Farwell on Powers, 2nd edition, p. 15; *Smith* v. *Death*, 5 Madd. 371. The two points are (1) "wife" here means the first, i.e., the existing, wife; (2) if that is not so, then Sir Henry, by appointing in favour of his children, precluded himself from appointing in favour of his second wife.

Austen Cartmell, in reply.—*Re Parrott* was a pure question of construction. The meaning of "wife" is not cut down to first or then existing wife: *Isaac* v. *Hughes*, L. R. 9 Eq. 191, 18 W. R. Ch. Dig. 124.

KEKEWICH, J., after dealing with a preliminary point and holding that the power was well created, continued:—There is a power in the settlement given to Sir Henry Hancock to appoint, after his death, that one-fourth share of the income of the fund shall be paid to his wife for her life, under such restrictions as he shall think fit.

Now, the first point is, How is that to be construed? This power is inserted by way of proviso, according to what I apprehend to be the common form—that is to say, Sir Henry Hancock's share is given to two trustees. They are to hold it in trust, to invest and to pay him the interest during his life and determinable on alienation, and then, after his death, it is to go to the children according to appointment, or in default of appointment among the children equally in the usual way at twenty-one or mar-

(*a*.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

riage, and with a proviso for hotchpot and powers, all working out in the ordinary settlement of personal estate as in a marriage settlement, except that here there is no provision for the wife; and then superadded to that there comes a proviso that he shall have power to appoint in favour of his wife to the extent of one-fourth. It is in as common form as one can well conceive.

Quite apart from the authorities which Mr. Cartmell cited from Sugden on Powers, where the law is well laid down respecting the powers of jointuring and apportioning, it seems to me that this power must be construed to apply to any wife of Sir Henry Hancock, whether then existing or after taken. I think it is safer to put it in that way than to invoke the law relating to jointuring and powers, which relate to real property settlements, and which certainly have this distinction, that they operate to create new estates, as to which different considerations may apply. At any rate I put them aside, and treat it upon the construction of a deed of this character.

It so happens that Sir Henry Hancock was then married; he had a wife, and if there had been a recital of that fact, a difficulty it seems to me would possibly have followed, which would have depended upon the language of the recital introducing different intentions. But in the absence of any recital it seems to me this ought to be construed as a power given to him to provide for a wife, not necessarily a wife then living, and not necessarily the first wife he should then marry. That seems to me to be the result. The only case cited against that is *Walter* v. *Parrott*, before the Court of Appeal. That seems to be the case of the construction of a particular will, and the words of that will strongly pointed to the particular husband as the person referred to, not to a husband generally. Upon that point, therefore, I am in favour of Lady Hancock.

The other point is a much more difficult one; it arises upon the deed of the 26th of January, 1885. Then Sir Henry Hancock was still married to the first Lady Hancock, and he had three children. By this deed he exercised both powers. First, he appointed one-fourth to the then Lady Hancock, subject to his life interest, and then he proceeded to appoint the fund among his children. As regards the appointment to one child he reserved the power of revocation, but that power of revocation was afterwards itself revoked, and so I may treat it as having become really an irrevocable appointment as regards all the children. It was done in a peculiar way; he first exercises his power in favour of Lady Hancock; then it is subject to and without prejudice to the trusts in his own favour; and then, "subject to and without prejudice" to the trusts in favour of the said Lady Hancock thereinbefore declared, he appointed in thirds among the children.

The argument in favour of the present Lady Hancock, who took under the exercise (by the deed of 1895) of the power, is that you must read this into the settlement, and that the power of appointment in favour of the wife still overrides the power exercised in favour of the children, who must be taken to have had their interests given to them subject only to the exercise of that power. There, again, comes in the consideration of the law of real property, and settlements and powers of jointuring and apportioning; and they are, as Mr. Cartmell has said, somewhat akin.

But there seems to be also another principle which I ought to apply. Nothing could have been easier than for the settlor, the appointor here, to have saved the power which, in my view, he still had of making an appointment in favour of an after-taken wife. No doubt the possibility was not then contemplated; and nothing of the kind is said; and he does appoint in favour of the then Lady Hancock, and in favour of his children subject to that appointment to Lady Hancock. He does not say subject only to that, but it is subject to that express appointment.

Then something was said in argument about a release or an implied release. I do not think that is the right way of putting it on behalf of the respondents, the children. What is said is that I ought to apply the principle that no one is allowed to derogate from his own grant. That principle is equally applicable to appointments as to actual grants, and it has been over and over again applied, and Mr. Renshaw has cited some illustrations upon the point.

It seems to me that if I were to hold that the appointment to the present Lady Hancock is good, I should be in effect saying that Sir Henry Hancock has introduced a limitation in priority to the children; whereas he has expressly said here that there is no such limitation, it is not actually introduced at all.

Mr. Cartmell argued that it is only a division of the fund among the children, but it is an irrevocable division for their benefit, and there is nothing to prevent the children raising money, making settlements on their marriage, or otherwise dealing with their shares. That they have not done so seems to me to be immaterial. There is this provision made for them, and it seems to me I should be going against the principle to which I have referred if I allowed Sir Henry Hancock, through the present Lady Hancock, to say: "Although I have made that provision in order that you (the children) may go out into the world having that provision made for you at a certain time, yet I now say that to a certain extent your interest shall be postponed."

On that principle I think the claim of Lady Hancock fails.

Solicitors, *H. P. Spottiswoode; Rowcliffes, Rawle, Co.; J. Rogers.*

Q. B. Div.
(Day and Wills, JJ.)

March 18.

VESTRY OF ST. LEONARD'S, SHOREDITCH, *v.* PHELAN. (*a.*)

Metropolis — Drain — Sewer — Combined drain — Pipe draining two houses — Disconnection of one of the houses — Nuisance — Liability of Vestry — Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 250.

A pipe, prior to 1895, *drained two houses. It was not proved when the combined drain was constructed, or that it was made under the order of the Vestry. In* 1895, *in compliance with a notice of the Vestry complaining of a nuisance, the owner of one of the houses cut off his drainage from the pipe in question, which thereupon only drained one instead of two houses. Shortly afterwards the respondent, who was the owner of the other house, received a notice from the Vestry under section* 4 *of the Public Health (London) Act*, 1891, *stating that a nuisance existed, and requiring him to abate it. Upon the respondent refusing to comply with this notice, the Vestry took out a summons against him.*

Held, that the pipe in question was, prior to 1895, *a sewer, not a drain; that when once a pipe becomes a sewer it always remains a sewer; that such sewer remained vested in the Vestry, there being no statutory provision divesting them of it; and consequently, that*

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

the Vestry, not the respondent, was bound to abate the nuisance.

Case stated by J. Bros, Esq., one of the metropolitan police magistrates.

This was an appeal by the Vestry of St. Leonard's, Shoreditch, against an order of the said magistrate dismissing a summons taken out by them against the respondent complaining of a nuisance that existed on his premises, and asking for an order for its abatement.

On the hearing of the summons the following facts appeared in evidence:—

In the rear of No. 42, Westmoreland-place (the respondent's premises) is situate a house known as 36, Nile-street, this latter house being contiguous to the back wall of the yard belonging to 42, Westmoreland-place. Prior to April, 1895, the watercloset and sink of No. 36, Nile-street, adjoined, but did not communicate, with the said yard of No. 42, Westmoreland-place and a watercloset situate therein belonging to 42, Westmoreland-place. The said premises were not within the same curtilage. The alleged drain referred to in the summons was a pipe which, after taking the sewage from the watercloset of No. 42, Westmoreland-place, passed under part of the premises of No. 36, Nile-street, took the sewage from the watercloset and waste water and sink of No. 36, Nile-street, and, after again passing the respondent's premises, emptied into the main sewer under the roadway of Westmoreland-place. The said pipe did not carry the drainage of any other house except No. 36, Nile-street, and 42, Westmoreland-place. It was not proved at what date the houses or waterclosets or the combined drainage were constructed or made, but they were proved to be ancient. It was not proved that the combined drainage was made under the order of the appellant Vestry, or pursuant to the order or direction, or with the sanction or approval, of the Metropolitan Commissioners of Sewers.

In April, 1895, the owner of No. 36, Nile-street, removed the watercloset and sink of that house, and constructed another in the yard in the rear of No. 40, Westmoreland-place (also his property), to the drainage of which house he connected it. Thus, as soon as this work was completed, which was before the 19th of April, 1895, the pipe draining the watercloset of 42, Westmoreland-place, was a pipe only draining that one house, instead of two as formerly. It was proved that the owner of 36, Nile-street, had made this alteration at the instance of the sanitary inspector of the appellants, and pursuant to an intimation in writing in that behalf addressed to him by the appellants, and signed and served upon him by their said inspector, and purporting to be under section 3 of the Public Health (London) Act, 1891, but without being compelled to do so by legal proceedings. The said intimation was served upon the owner of No. 36, Nile-street, after an intimation on a similar form had been served on the respondent with reference to the part of the pipe upon his premises, in answer to which the respondent had alleged the pipe to be a sewer.

On the 10th of May, 1895, a statutory notice, under section 4 of the said Public Health (London) Act, 1891, was served on the respondent as owner of No. 42, Westmoreland-place, by the appellants, stating that a nuisance existed at the said premises by reason of a defective drain, and requiring him to alter or amend the drain as might be found necessary, and fit the same with proper pipes, traps, and bends, and junctions to secure safe working; and the notice stated that if default were made in complying with the requisitions thereof, a summons would be issued for the purpose of enforcing the abatement of the nuisance complained of.

This notice was not complied with by the respondent, and on the 22nd of May the said summons was issued.

The appellants contended, first, that the said drain, prior to April, 1895, was a drain made for draining a group or block of houses by combined operation under the order of a vestry, because, although no evidence was given that such order had actually been made, yet, as the drain was constructed many years ago, at this distance of time it must be presumed that everything connected with the laying had been lawfully done, and therefore that such an order had been made by the Vestry, otherwise the making of the drain was a wrongful act under section 76 of the Metropolis Local Management Act, 1855, which prohibits any drains being laid without the sanction of the vestry. They also contended that the respondent should not be allowed to set up the assumption that such wrongful act had been committed, as that would enable a wrongdoer to profit by his wrong. Secondly, the appellants contended alternatively that if it was held that the alleged drain was a sewer before April, 1895, yet it was not a sewer at the date of the aforesaid notice, because it was then only draining the closet of No. 42, Westmoreland-place, the drain from the closet and sink of No. 36, Nile-street, having been previously disconnected; and they contended that the words used in the interpretation clause (section 250) of the said Act indicated that the condition of things at the time of the proceedings must be looked at, and it was immaterial that the said drain might at one time have drained more than one building; and that as it was then used for the drainage of one building only, it came within the definition of "drain" in the interpretation clause, and was therefore repairable by the owner, and not by the local authority.

The respondent contended that she was not liable to alter or amend the said alleged drain, but that the same was a sewer vested in and repairable by the appellants under sections 68, 69, and 250 of the Metropolis Management Act, 1855, inasmuch as it had not been proved to be a drain for draining any group or block of houses by a combined operation under the order of the appellant Vestry, or pursuant to the order or direction, or with the sanction or approval, of the Metropolitan Commissioners of Sewers; that it could not cease to be a sewer and become a drain within the meaning of the above sections by reason of the disconnection of the watercloset and sink of No. 36, Nile-street, under the circumstances hereinbefore set out.

The learned magistrate decided that, having regard to the provisions of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), and of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), as to the construction and maintenance of drains and sewers, the alleged drain was a sewer, and he held that it was therefore vested in and repairable by the appellants, and not by the respondent, and he refused to make an order requiring the respondent to alter and amend the alleged drain.

The question for the opinion of the court was whether, upon the facts proved, the magistrate ought, as a matter of law, to have found the pipe to be a drain within the meaning of section 250 of the Metropolis Local Management Act, 1855.

Lawson Walton, Q.C. (*C. E. Allan* with him), for the appellants.—At the time the summons was taken out this pipe only drained one house, and therefore it was then a drain. The magistrate, when determining such a question as here raised, must look at the actual

state of facts existing at the time when the summons is taken out. The pipe exists exclusively for the benefit of this house. The contention that if a pipe once becomes a sewer it is always a sewer is untenable. A great responsibility would be thrown upon the magistrate if he were obliged to ascertain former circumstances and facts. If the pipe ceases to be used for the drainage of more than one house, it ceases to be a sewer. There is no need for a statutory provision for divesting the vestry of a sewer when it becomes a drain: see 18 & 19 Vict. c. 120, s. 69; *Kershaw* v. *Taylor*, *ante*, p. 28, [1895] 2 Q. B. 208, 471.

G. Rowlatt, for the respondent.—The case of *Kershaw* v. *Taylor* is not in point. In that case the owner obtained permission to make two combined drains for the four houses; but, instead of that being done, the builder he employed made only one combined drain for all the houses. When once a pipe becomes a sewer it always remains a sewer. The vestry then obtains the right of entering on the premises in order to repair the sewer. It cannot become a drain again, for there is no statutory power enabling the vestry to divest themselves of it, and without such power the vestry cannot get rid of their liability to maintain and repair it.

Counsel also referred to *Travis* v. *Uttley*, 42 W. R. 461, [1894] 1 Q. B. 233, and *Bateman* v. *Poplar Board of Works*, 36 W. R. 501, 37 Ch. D. 272.

DAY, J.—I am of opinion that this appeal should be dismissed. I think the magistrate was quite right in the decision he arrived at. It clearly appears from the facts as stated in the case that at one time this pipe carried away the drainage of two houses—36, Nile-street as well as 42, Westmoreland-place; and such a pipe is deemed to be a sewer. The pipe, therefore, being a sewer, vested in the parish authorities, who are bound to keep it in repair. We find, however, that the Vestry allowed it to get so out of repair that a nuisance arose. They thereupon decided to get an order to abate such nuisance, and instructed their sanitary inspector to serve an intimation in writing on the owner of 36, Nile-street, in consequence of which intimation the owner removed his closet and sink and connected them with the drainage of another house, and cut off his drainage from 42, Westmoreland-place. This being done, the Vestry served a statutory notice under section 4 of the Public Health (London) Act, 1891, on the owner of 42, Westmoreland-place stating that a nuisance existed, and requiring him to abate it. They said the pipe had become a drain, and that the owner was liable, and they asked the magistrate to inflict penalties upon the owner for omitting to keep the alleged drain in repair. This the magistrate absolutely refused to do, and rightly so. This pipe still remained a sewer, though it no longer carried away the drainage from any other house than 42, Westmoreland-place. In my opinion, once a drain becomes a sewer it remains a sewer; I will not say it always remains a sewer, but it remains a sewer so long as it is used for drainage purposes. On becoming a sewer it vested in the local authorities, and, in my judgment, has never ceased to vest in them. There is no enactment divesting them of it on its ceasing to answer the statutory definition of a sewer. This appeal must therefore fail.

WILLS, J.—I am of the same opinion. The question we really have to decide is whether the pipe was a drain so as to make the owner of No. 42, Westmoreland-place, liable. Section 68 of the Metropolis Management Act, 1855, is the governing factor in determining this question. That section provides that all sewers, except main sewers, made and to be made within any parish or district specified in the schedule, shall be vested in the vestry of such parish or in the board of works for such district. So long as the sewer remains vested in the vestry, the various steps provided in the Act to make the owner of the property liable cannot be taken. I think you want express words to change the ownership, and divest the local authorities of the sewer on its ceasing to drain more than one house. There is no such provision in the Act, and in my opinion the sewer remains vested in the Vestry. As an instance, take the case where four or five houses are constructed with one combined drain for all of them, and suppose that after a time only one of these houses is left connected with this drain, all the others being cut off. Would it not be unreasonable to say that such drain ceased to be a sewer, and so saddle the owner of the remaining one house with the repair and maintenance of a system of drainage suitable for four or five houses? In my opinion, this drain once having been vested in the Vestry as a sewer remains so vested.

As to another point raised by the appellant, I think that there can be no presumption that the consent of the local authorities was given to the construction of a combined drain, if evidence be forthcoming that the drain was constructed before the law required that such consent should be given. It is therefore impossible for us to say that the authorities gave their sanction to the construction of the sewer in question.

Appeal dismissed.

Solicitor for the appellants, *Mansfield Robinson.*

Solicitors for the respondent, *Powell & Skues.*

Q. B. Div.
(Lindley and Kay, L.JJ.) Feb. 14.

PHILLIPS (*Appellant*) *v.* EVANS (*Respondent*). (*a.*)

Revenue—Excise—Dog tax—Shepherds' dogs—Certificate of exemption—Jurisdiction of magistrates—Offence of trifling nature—30 & 31 *Vict. c.* 5, *s.* 8—*Customs and Inland Revenue Act*, 1878 (41 *Vict. c.* 15), *s.* 22—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 16.

Justices have no jurisdiction to review the decision of the Commissioners of Inland Revenue refusing to grant a certificate of exemption from the dog tax under section 22 *of the Customs and Inland Revenue Act*, 1878. *They cannot refuse to convict the owner of a dog who has neither a licence nor a certificate of exemption on the ground that he is in their opinion entitled to such a certificate, and that his offence is therefore of a trifling nature within the meaning of section* 16 *of the Summary Jurisdiction Act*, 1879.

Case stated by justices of the county of Cardigan.

An information was preferred against the respondent by the appellant, an officer of Inland Revenue, for the recovery of a penalty imposed by section 8 of the 30 & 31 Vict. c. 5, as altered and amended by the Customs and Inland Revenue Act, 1878, in respect of keeping a dog without the excise licence required for the keeping thereof.

It was proved that the respondent kept a dog and had neither an excise licence nor a certificate of exemption under section 22 of the Customs and Inland Revenue Act, 1878; and that he had applied for such a certificate, and delivered the declaration required by

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

that section, and that the Commissioners of Inland Revenue had refused to grant the certificate on the ground that in their judgment he was not entitled to receive it.

The justices then, overruling the objection of counsel for the appellant, admitted evidence tendered with the object of showing that the respondent was a person to whom a certificate of exemption ought to have been granted.

They found "that the respondent was a person who under the provisions of section 22 was entitled to receive a certificate of exemption, and though the charge might, in the absence of such certificate of exemption have been considered as proved, were of opinion, under the circumstances stated, that the alleged offence was of so trifling a nature that it was inexpedient to inflict any punishment"; they therefore dismissed the information.

The questions for the opinion of the court were:—

(1) Whether, upon the facts found by them, the decision of the justices was correct in point of law.

(2) Whether, as the respondent had neither a licence to keep a dog nor a certificate of exemption, they were bound to convict him of the offence charged in the information.

The Customs and Inland Revenue Act, 1878, enacts:—

"In the case of dogs kept and used solely for the purpose of tending sheep or cattle on a farm or in the exercise of the calling or occupation of a shepherd exemption from duty may be obtained by the owners of such dogs in the following manner:

(1) The Commissioners of Inland Revenue shall cause such forms of declaration to be prepared as may be required for carrying out the purposes of this section.

(2) The owner, whether a farmer or shepherd, may fill up and sign a declaration in the prescribed form . . . and, upon delivering the declaration so filled up and signed by him to the person named therein as the person to whom the same is to be delivered, he shall be entitled to receive a certificate of exemption from duty in respect of the dog or dogs, not exceeding two in number, kept by him solely for use in tending sheep or cattle or in the exercise of the calling or occupation of a shepherd."

Section 16 of the Summary Jurisdiction Act, 1879, enacts:—

"If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, the court of summary jurisdiction think that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment—

(1) The court without proceeding to conviction may dismiss the information. . . ."

Sir R. B. Finlay, S.G. (*Danckwerts* with him), for the appellant.—The justices had no jurisdiction to review the refusal of the commissioners to grant a certificate of exemption: *Graham* v. *Haig*, 58 J. P. 835; *James* v. *Nicholas*, 50 J. P. 292. Upon proof that the respondent kept a dog and had neither a licence nor a certificate of exemption they were bound to convict. The only ground upon which the justices held that the offence was of a trifling nature was that the commissioners ought to have granted a certificate of exemption. This is merely another mode of reviewing the decision of the commissioners, and it was not competent for them to hold the offence to be trifling upon such grounds. The discretion which justices are empowered to exercise under section 16 of the Summary Jurisdiction Act, 1879, is a judicial discretion, and cannot be exercised in such a way as practically to nullify the provisions of an Act of Parliament: *Banton* v. *Davies*, 56 J. P. 294, 40 W. R. Dig. 134.

The respondent did not appear.

LINDLEY, L.J.—Section 22 of the Customs and Inland Revenue Act, 1878, is not very happily worded; it says that in certain circumstances a person "shall be entitled" to receive a certificate of exemption. But I think the meaning is clear that an owner of a dog who can produce neither a licence nor a certificate of exemption must pay the penalty if proceedings are taken against him.

The point arising upon the Summary Jurisdiction Act, 1879, is far more difficult. [His lordship read section 16 (1), and continued:—] Now, the justices first found that the respondent kept a dog and had no licence and no certificate of exemption; they also found that he was a person who was entitled to receive a certificate of exemption; they dismissed the information because they were of opinion that no offence had been committed, and that if there was an offence it was of so trifling a nature that it was inexpedient to inflict any punishment. If they had said that if the respondent then paid for a licence they would not convict, I do not think that we could interfere. But what they have held is that it is a trifling matter for a man to say that he will not pay a tax which has been imposed by the Legislature. We therefore hold that it was not in law a trifling matter, and that the justices had no jurisdiction to say that a man need not pay a lawful tax. The appeal must therefore be allowed.

KAY, L.J.—I am of the same opinion. It is clear to my mind that the justices had no jurisdiction to review the decision of the commissioners refusing to grant a certificate of exemption. They found that the respondent was entitled to a certificate; in so finding they completely exceeded their jurisdiction; they are not made the judges of this, nor had they before them the evidence upon which the commissioners decided to refuse the certificate.

The rest of their finding I understand to be that under the circumstances, although the respondent had no certificate and was therefore, *primâ facie*, liable to pay the tax, it was a trifling matter. The "circumstances" are that the respondent was in their opinion entitled to a certificate. Although the respondent refused to pay the tax, the justices held that his offence is a trifling matter. I cannot think that any sensible person can say that it is trifling. I think that the justices were wrong in law in so holding. The case did not fall within section 16 of the Summary Jurisdiction Act, 1879, and the justices were bound to convict.

Appeal allowed.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Q. B. Div.
(Lindley and Kay, L.JJ.) Feb. 10.

HEWITT v. TAYLOR. (a.)

Adulteration—Milk—Evidence — Analyst's certificate—Evidence of the defendant—Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 21.

In proceedings under the Food and Drugs Act, 1875, *the certificate of the analyst is not conclusive evidence of the facts therein stated, even when the defendant has not required the analyst to be called as a witness.*

Case stated by the justices of Mossley.

Taylor was summoned under section 6 of the Food and Drugs Act, 1875, for selling on the 26th of April, 1895, as new milk a substance which had had six parts of water added to every hundred parts of the poorest new milk.

A pint of milk was purchased from Taylor for analysis. The analysts' certificate was as follows:—"We, the undersigned public analysts for the county of Lancaster do hereby certify that we received on the 26th of April, 1895, from P.C. Bridge a sample of new milk for analysis (which was then marked No. 834), and have analysed the same, and declare the result of our analysis to be as follows:—We are of opinion that the said sample contained the parts as under: 2·94 per cent. fat, 7·98 per cent. other solids=10·92 per cent. total solids, and that upwards of six parts of water have been added to every hundred parts of the poorest milk. Observations: No change had taken place in the constitution of the sample that would interfere with the analysis."

Taylor pleaded "not guilty," but did not require the analysts, or either of them, to be called as witnesses. He tendered himself as a witness, and stated that on the day of the purchase by the appellant the milk of two cows was put into the can from which the purchase was made, and there was no water in the can when he began to milk the cows; that he milked the cows himself, and that he added no water afterwards, and no person but himself had control of the can from the time the milk was put there till the time of the sale to the appellant. He stated, further, that one of the cows referred to had calved on the 9th of April, and for some time subsequent to that and prior to the 26th of April he had noticed that her milk was of poor quality.

The magistrates, having considered the whole of the facts, and having regard to the respondent's denial and to the difficulty of determining an exact standard when adulteration by means of added water begins, and to the fact that one of their number formerly owned the cow which the respondent stated gave poor milk and knew that that was so, dismissed the summons.

Section 21 of the Food and Drugs Act, 1875, is as follows: "At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness; and the parts of the article retained by the person who purchased the article shall be produced, and the defendant may, if he think fit, tender himself and his wife to be examined on his behalf, and he or she shall, if he so desire, be examined accordingly.

Clay, for the appellant.—As the respondent did not require either of the analysts to be called as a witness, the certificate must be taken to be sufficient evidence of the facts stated therein in accordance with the provisions of section 21: *Harrison* v. *Richards*, 45 J. P. 552.

F. Newbolt, for the respondent, was not called upon.

LINDLEY, L.J.—This question turns upon the true construction of section 21. The analysts, in their certificate, stated that there was 6 per cent. of added water. That was what the analysts chose to say.

The respondent gives evidence upon which the magistrates were satisfied that no water was in fact added. But the appellant says that the magistrates were bound to accept the evidence of the certificate as conclusive. That depends on section 21. But the section only says that the certificate shall be sufficient evidence of the facts stated therein. It does not say it shall be conclusive. The section means that the respondent may be examined to show that there has been some mistake. The magistrates were entitled to act on that evidence, and to weigh it against the evidence of the certificate.

KAY, L.J.—There was evidence given on both sides, and the magistrate decided that no water was added. It was a simple question of fact. Section 21 does not mean that the certificate is to be conclusive evidence; it only says that it is to be sufficient evidence.

The defendant or his wife were entitled to give evidence showing that the certificate was inaccurate. They did so, and it thereupon became the magistrates' duty to weigh the evidence, and come to a conclusion of fact.

Appeal dismissed.

Solicitor for the appellant, *F. C. Hulton.*

Solicitors for the respondent, *Emmett & Co.*, for *J. H. Fletcher*, Mossley.

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Q. B. Div.
(Hawkins and Kennedy, JJ.) Jan. 27.

FORTUNE (*Appellant*) v. HANSON (*Respondent*). (a.)

Adulteration — Milk — Added water — Certificate of analyst—Bare statement of result of analysis—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 18, 21—*Sale of Food and Drugs Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

In a prosecution under the Food and Drugs Act, 1875, *for the adulteration of milk, the analyst certified that the sample "contained 5 per cent. of added water."*

Held, that such certificate was insufficient evidence of adulteration, because, water being one of the natural constituents of milk, the certificate should have stated what standard of percentage of water in milk was adopted by the analyst in arriving at the excess of 5 per cent. which he stated was added.

Special case stated by a stipendiary metropolitan magistrate.

An information was preferred by the appellant, an inspector of nuisances for St. Mary, Islington, against the respondent at Clerkenwell Police Court. The offence charged was that Hanson did sell and proceed to deliver on the 24th of April, 1895, to Elias Jones a churn of milk in pursuance of a contract to sell, the same not being of the nature, substance, and quality of the milk demanded by the purchaser, in that it contained 5 per cent. of added water contrary to

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

section 6 of the Sale of Food and Drugs Act, 1875, and of section 3 of the amending Act of 1879.

The churn of milk, to which was attached a warranty in writing, was sold to Jones by Hanson on the 24th of April. The inspector of nuisances procured a sample of the milk and had it analysed by the public analyst, who gave his certificate in the form set out in the schedule of the Act filled in (so far as is here material) as follows: "I . . . do hereby certify that I received on the 25th day of April, 1895, from Mr. Fortune a sample of milk marked as above for analysis (which then weighed 20oz.) and have analysed the same, and declare the results of my analysis to be as follows: I am of opinion that the said sample contained percentages of foreign ingredients as under—5 per cent. of added water to the prejudice of the purchaser."

This certificate was objected to as being bad evidence, on the ground that it did not set out as the results of the analysis what the analyst considered to be the normal proportion of water in pure milk.

The magistrate rejected the certificate as bad and dismissed the information, but granted this case at the request of the appellant.

Macmorran, for the appellant.—The certificate is sufficiently explicit. It states that a foreign substance has been introduced into the milk—namely, 5 per cent of added water. If the respondent desires further particulars of the analysis, he has power to call the analyst and cross-examine him.

Morton Smith, for the respondent.—The certificate is bad, for the charge here is not one of abstraction, but of addition, and therefore the constituent parts of the article analysed must appear in the certificate: *Bakewell* v. *Davis*, [1894] 1 Q. B. 296, and *Newby* v. *Sims*, [1894] 1 Q. B. 478, 38 SOLICITORS' JOURNAL 202. Water, to a greater or less extent, exists in pure milk, and the presence of water in milk does not *per se* show that a foreign substance has necessarily been introduced. What proportion of water should be deemed to exist in a given quantity of pure milk has not yet been agreed upon. The certificate must contain such information that if unchallenged would enable the magistrate to decide the case without further evidence being given.

Macmorran, in reply.—The case of *Newby* v. *Sims* is no authority when the article adulterated with water is milk, for milk is placed on a different footing to other articles by the Amending Act of 1879. The certificate is only intended to be *primâ facie* evidence, and is in the form required by the Act: *Harrison* v. *Richards*, 45 J. P. 552. The magistrate ought, therefore, to have accepted it as evidence.

HAWKINS, J.—It seems to me that the certificate is not sufficient for the purpose the Act of Parliament requires it to be given. It was admitted that in all milk in its normal state there is a certain proportion of water, and it has not been shown to my satisfaction that there is any known method by which the water that has been added to the milk can be distinguished from the water which naturally exists in the milk itself. It was argued that if any substance was found by the analyst to have been added, a bare statement to that effect was sufficient. That may or may not be the case where the added ingredient is such a "foreign" substance that it could not possibly exist in the article in a natural state—for instance, if pepper were found to be present in the sample of milk analysed; but that is not the question we have to decide here. It is the duty of the magistrate in cases of this kind to determine whether or not the charge has been made out, and he cannot do so on the evidence of the analyst, unless his certificate sets out the standard made use of as the basis of his calculations. If it were not so, the magistrate might have one standard of percentages in his mind, while the analyst might have in fact used another. The bare statement that so much percentage of added water was found in the sample of milk is a mere statement of opinion. With regard to the form of the certificate, it is the analyst's duty merely to analyse and report the result of the analysis. So far as he states in due form that result, and does not report extraneous facts not connected with the analysis, his certificate is good evidence for the magistrate to act upon. Indeed, in many cases the certificate is practically conclusive evidence, unless it is challenged by the defendant, who may require the analyst to be called. It is the magistrate's duty, therefore, to decide whether the certificate is good evidence or not, and in the present case the magistrate was right in refusing to convict on the evidence of this certificate.

KENNEDY, J.—I am of the same opinion. Great power is given by the Act as to the use to be made of the certificate of the analyst. Speaking for myself, and in no way expressing an opinion whether or not water added to milk is a foreign substance within the meaning of those words in the Act of 1875, I think that a certificate to be evidence must not merely state the bare result arrived at by the analyst, but must also furnish all the *data* required by the magistrate to decide the question, without it being necessary for him on that point to call further evidence. While I decline to say what may and what may not be a foreign substance, I should like to say that in my opinion it makes all the difference in deciding that point whether the presence of a certain amount of the substance alleged to have been added is necessarily present in the article or not; and the same consideration applies in deciding the sufficiency of the certificate.

Appeal dismissed.

Solicitor for the appellant, *Stanley Hoare.*

Solicitors for the respondent, *Lickorish & Co.*

Prob. Div. & Adm. Div. } Nov. 4.
Probate. }

In the Goods of OAKEY. (*a.*)

Administration — Grant de bonis non *— Amount of security.*

On the application for a grant de bonis non *the court allowed the grant to go, upon the usual bond being given in double the amount of the unadministered estate.*

Motion for a grant of letters of administration of the unadministered personal estate and effects of Sophia Oakey, who died on the 21st of August, 1891, a widow and intestate, to Herbert Oakey, for the use of two minors, children of the said Sophia Oakey, until one of them should attain the age of twenty-one years, upon giving a bond in two sureties in double the amount of the unadministered estate—viz., £12,228.

Sophia Oakey at her death left five children, her only next of kin.

On the 27th of October, 1891, letters of administration were granted to the oldest child, Ernest John Oakey, who intermeddled in the estate, and died on

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

the 14th of November, 1891, leaving part unadministered.

On the 18th of December, 1891, letters of administration *de bonis non* were granted to the said Herbert Oakey, a half-brother of the deceased, and the curator or guardian duly elected by the four surviving children, who were all minors, to take the grant for their use and benefit until one of them should attain the age of twenty-one years. This grant ceased by the second child, Sophia Kathleen Oakey, attaining the age of twenty-one years on the 22nd of February, 1893. She having in writing renounced her right to the grant, and the other children having elected Herbert Oakey as their guardian for this purpose, a similar application to the present was made to, and on the 2nd of May, 1893, granted by, Gorell Barnes, J., the unadministered estate then being £18,390.

This grant ceased on the 23rd of May, 1895, by the third child, Evelyn Susan Oakey, having attained the age of twenty-one years; whereupon she renounced her right to the grant, and the remaining two minors appointed in writing Herbert Oakey their guardian for the purpose of this application.

Priestley, in support of the motion.

GORELL BARNES, J., granted the motion.

Motion allowed.

Solicitor, *Daniel Stock*.

House of Lords.

From C. A. (England).

March 2.

Ex parte BARNES. (*a*.)

Company — Winding up — Public examination — Companies (Winding-up) Act, 1890, *s.* 8, *sub-sections* 1, 2, 3, 7.

The words "after consideration of any such report" in sub-section (3) *of section* 8 *of the Companies (Winding-up) Act*, 1890, *have reference to the "further report or further reports" mentioned in sub-section* (2), *and do not refer to the "preliminary report" mentioned in sub-section* (1) *of that section.*

The court has no jurisdiction under sub-section (3) *of section* 8 *to order any person to attend and be publicly examined unless the official receiver has, in addition to the preliminary report mentioned in sub-section* (1), *made a "further report or further reports" in the terms of sub-section* (2) *stating matters showing that in his opinion a fraud has been committed by the person sought to be examined.*

Ex parte Barnard, In re Great Kruger Gold Mining Co., 40 *W. R.* 625, 641, [1892] 3 *Ch.* 307, *explained.*

This was an appeal from an order of the Court of Appeal (Lindley and Kay, L.JJ.) dated the 29th of May, 1895, affirming an order of Vaughan Williams, J., which refused an *ex parte* application of the appellant, who is the official receiver under the Companies Acts, 1862 to 1890, for an order directing the attendance for examination pursuant to section 8, sub-section (3) of the Companies (Winding-up) Act, 1890, of the persons named in the schedule to the official receiver's report.

The winding-up order was made on the 7th of November, 1894, and on the 11th of March, 1895, the official receiver made his preliminary report under sub-section (1) of section 8 of the Companies (Winding-up) Act, 1890, in which he stated his opinion that further inquiry was desirable as to the conduct of the business, and in particular as to the character of the investments of capital and the insufficient record of large payments made. But the official receiver had made no "further report" under sub-section (2) of section 8.

Vaughan Williams, J., made no order upon the application, considering that a "further report" under sub-section (2) of section 8 was necessary; and this was affirmed by the Court of Appeal.

The official receiver appealed.

The case turned upon the construction of the Companies (Winding-up) Act, 1890, s. 8, which pro vides so far as is material as follows:—

Sub-section (1): "Where the court has made an order for winding up a company, the official receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the court:

(*a*) As to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities; and

(*b*) If the company has failed, as to the causes of the failure; and

(*c*) Whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

Sub-section (2): "The official receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court.

Sub-section (3): "The court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as a director or officer of the company.

Sub-section (7): "The person examined shall be examined on oath, and it shall be his duty to answer all such questions as the court may put, or allow to be put, to him. The person examined shall at his own cost, prior to such examination, be furnished with a copy of the official receiver's report, and shall also at his own cost be entitled to employ at such examination a solicitor with or without counsel, who shall be at liberty to put such questions to the person examined as the court may deem just for the purpose of enabling that person to explain or qualify any answers given by him. Provided always, that if such person is, in the opinion of the court, exculpated from any charges made or suggested against him, the court may allow him such costs as the court in its discretion may think fit."

Sir R. E. Webster, *A.G.*, and *Ingle Joyce* (*W. B. Lindley* with them), for the appellant.—This is practically an appeal from *Ex parte Barnard, In re The Great Kruger Gold Mining Co.* (1), 40 W. R. 625, 641, [1892] 3 Ch. 307. In the *Bertram Luipuard's Vlei Gold Mining Co.* (3), 40 W. R. 689, 691, [1892] 3 Ch. 332, Lindley, L.J., corrected the language which he had used in *Ex parte Barnard.*

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Lord HALSBURY, C.—I have endeavoured, as well as I could, to keep my mind free from the prejudice which may have existed in it from my memory of what took place at the time of the passing of the Act which we have to construe in this case. I have endeavoured to steel myself against any impression derived from what then took place, and simply to look at the language of the statute as if I had never heard of it before.

I cannot help thinking, with the utmost deference to the judicial opinions that have been given, that the provisions are reasonably plain. The Legislature for very obvious reasons—obvious I mean when one looks at what the course of legislation has been with reference to the formation of companies and the conduct and management of them—thought that there might be cases in which it would be very desirable to have persons, who might be supposed to have some personal interest in the conduct and management of companies, brought to the test of a public examination, and accordingly the Legislature—the court in the first instance having made an order for winding up a company—imposed upon the official receiver a duty as soon as practicable after the receipt of a statement of the company's affairs to submit a preliminary report to the court. That preliminary report was to contain "the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities." That was an actual duty cast upon the official receiver. If the company had failed, he was to report "as to causes of the failure," and whether in the opinion of the official receiver "further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company or the conduct of the business thereof." So far there seems to be no difficulty, and no necessity for further exposition of the object and meaning of the legislation that was then arrived at.

But then there came what seems to me to be an absolutely independent and separate set of provisions, and that was that if the official receiver thought fit he was to make a further report. It is left to him to do it if he thinks fit — it is not made necessary for him to do it in every case, but only in such cases as in his judgment demand such a course to be pursued. "If he thinks fit," he is to "make a further report or further reports, stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court" (sub-section (2)).

The next sub-section (sub-section (3)), upon which the whole question turns, begins with these words: "The court may, after the consideration of any such report." Now the first question which arises is as to a point on which Mr. Ingle Joyce relies; he says he relies on the literal meaning of the words. I confess, to my mind, reading those words as I have read them, it seems to me reasonably plain that the word "such" there, refers to the last preceding provision, and that what the draftsman was doing was this: After having provided for the general preliminary report which has reference to the status and conduct of the company and its affairs, the draftsman goes on to provide that where a specific report has been made with reference to some person who has committed a fraud (I will say a word presently as to what I mean by "some person") the court is then invested with a new jurisdiction. "The court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as a director or officer of the company" (sub-section (3)).

Now, in the first place, it is difficult to imagine what can be the sense or meaning of those provisions, unless they have reference to the report which calls attention to the fact that some person has committed a fraud in the promotion or formation of the company, or since the promotion or formation of the company. Those two provisions seem to be correlative. What is the sense or meaning of them unless they are correlative? And if they are, certain consequences are to follow. What are the consequences? At first sight one would say that, if the object is a public examination, and if the public examination is to be upon the subject which has been, by the hypothesis, called to the attention of the court by any such report, the person against whom the allegation is made is naturally the person who is to be brought before the court and examined in respect of it. I mean the broadest possible view of any such legislation would at once suggest that the person who has been reported as guilty of fraud is to be examined, and he must answer—he is to be summoned to answer—upon the subject. Certain consequences follow upon that. If he is summoned, and if he is exculpated, he is to get his costs; if not, he is to be brought there at his own expense. There are provisions whereby, before he is examined, "the person examined shall, at his own cost, prior to such examination, be furnished with a copy of the official receiver's report, and shall, also at his own cost, be entitled to employ at such examination a solicitor with or without counsel, who shall be at liberty to put such questions," and so on. If all these provisions have reference to a person who is incriminated by the report, and who is brought there in the position of a person against whom a suggestion is made that he has been guilty of fraud, the whole system, the whole code thereby created, is intelligible and rational, and one can understand what the meaning of each part of it is; each part of it reflects light upon the rest. But if, because A. has been found guilty—I mean found guilty in a preliminary sense, that is to say, that a preliminary case has been made against him as being guilty of fraud—if because A. has been in that sense incriminated by the official receiver, B. can be summoned, and B. can be made subject to all these consequences, although no preliminary charge of fraud has been made against him at all, the whole thing becomes irrational and unintelligible.

I confess I entertain not the smallest doubt that the meaning of this legislation is that, in order to give the court jurisdiction to make such an order, there must be a finding of fraud and a finding of a fraud against an individual who is by that made subject to being summoned before the court, and is compelled to answer, whether the answer incriminates him or not; but, being exculpated, receives his costs. I confess I am unable, looking at the whole of the legislation on the subject, to entertain the least doubt that that was what the Legislature intended; and I am a little surprised, I confess, that there should have been any doubt that fraud must be found; by which I do not mean that the particular word "fraud" must be used, but that such facts must be found by the official receiver as suggest fraud against the person incriminated, and that there must be an individual person incriminated. It is not that there is a general finding that fraud must have

existed somewhere, which would mean nothing; but there must be an individual person pointed to, and in respect of whom all these different provisions, for his protection as well as for his being made an example of, become perfectly reasonable. In the event of there being no fraud found, or in the event of there being no individual pointed out as being suggested to be guilty of fraud, I entertain no doubt that the court has no jurisdiction to make any such order for a public examination.

All the observations that have been addressed to us with reference to the necessity of an inquiry and so forth are disposed of by the mere existence unrepealed of the 115th section in the Act of 1862. There are there ample means of inquiry; no injustice or want of investigation into the affairs of the company can possibly occur if that provision is put into force. This later provision is by itself a kind of penal section against a fraudulent director, officer, or promoter; and, inasmuch as it is directed to that person and to that person alone, it seems to me that it follows as essential to the jurisdiction of the court that there should be a preliminary finding, which is the foundation of that jurisdiction—namely, that fraud has been committed by the individual person who is pointed out by the report; and in the absence of that finding I am of opinion that the court would have no jurisdiction.

Under those circumstances I move your lordships that this appeal be dismissed.

Lord WATSON.—I am of opinion that the court has no statutory jurisdiction to direct a public examination under sub-section 3 except upon consideration of a further report made by the official receiver in terms of sub-section 2. I am also of opinion that the power committed to the court by that sub-section has no application to any one of the persons therein mentioned who is not inculpated in in this sense, and that a *primâ facie* case of fraud on his part is disclosed by the further report.

I therefore concur in the judgment that has been moved.

Lord HERSCHELL.—I am of the same opinion. I think that the natural construction of the words "any such report" in sub-section 3 is to refer them to the report or reports which are mentioned in sub-section 2. But, in addition to that, it seems to me that the other provisions contained in the section make it clear that such must have been the meaning. Sub-section 7 applies to every case in which an order for examination is made; and I think sub-section 7 is only reasonably applicable in the case of a person inculpated in a report of the official receiver. Of course I do not mean for a moment to suggest that the official receiver must use any particular language in the report which he makes under sub-section 2; it must appear from that report that in his opinion a fraud has been committed by A. or B. or C., as the case may be, in order to justify an order for the examination of A. or B. or C. Of course no form of words would be necessary, and although the matter is left to the discretion of the official receiver, I think none the less it would be his duty to exercise that discretion in the particular way of making a report, if in his opinion there were a case of fraud established by the facts against any particular person or persons.

Now these provisions, I think, must be read in the light of the provisions of the Companies Act, 1862, which were left existing when this later legislation was passed. The court had the fullest power to summon before it anyone it pleased within the limits specified in section 115 of that Act, which I think would have included any person who could give information that would lead to proceedings for the recovery of money for the benefit of the company. And I think that an object, if not the only object, of the 1st sub-section of this section 8 was to impose on the official receiver at an early period, the duty of bringing before the court information upon certain matters connected with the company which would be very important in guiding the judgment of the court as to the persons who ought to be summoned under section 115. I think there is a purpose amply sufficient to be served by the report under sub-section 1, without supposing that it was intended upon that report to found the proceedings referred to in sub-section 3 and the following sub-sections.

Now, in section 115 of the Act of 1862, although all the persons there referred to might be summoned, they could only be summoned on a tender to them of their reasonable expenses of coming to be examined. When we deal with the provisions of the present Act, which it must be remembered are intended to operate side by side with section 115, we find that the expense in the first instance is cast absolutely upon the person to be examined. He must bear even the expense of knowing what he is to be examined about. The official receiver's report is only to be had upon those terms; and the later provisions (as to which I will say something in a moment), about allowing him costs if he exculpates himself from the charges, show that intention clearly. Now, that is perfectly intelligible if you suppose that the person referred to in sub-section 3 and the subsequent sub-sections is an inculpated person; otherwise it is unintelligible. If he is not a person who is *primâ facie* to blame, why should he be put to the expense of ascertaining what the charge against him is? why should all the costs be thrown upon him? and why should he not have any expenses tendered to him? It is quite unintelligible why he should be put in that position if he is a person in no way appearing to be inculpated.

When one comes to look at sub-section 7, it is quite clear that the court can only allow expenses to a person ordered to attend for examination if in the opinion of the court he is exculpated from any of the charges made or suggested against him. Both the Attorney-General and Mr. Ingle Joyce conceded that those words were only applicable when the person was inculpated in the report of the official receiver. If their construction is right, you have this preposterous result. You have A., we will say, inculpated in the report of a charge of fraud. It is suggested that B. and C. were co-directors with him, or co-officials of some kind or other, and you have an order made, and as the appellant's counsel say properly made, for the examination of A. and B. and C., and then on the examination it turns out that none of these persons were to blame. Then A. applies for his costs. "Yes," say the court, "you are exculpated, and we will give you your costs." But when B. and C. come the answer is, "No, you have not been exculpated, because you were never charged, and therefore you must bear the expenses yourselves." Such legislation would be absolutely preposterous. The only construction of the legislation that can make it reasonable is that the only persons who can be ordered to be examined and attend at their own expense are those who are *primâ facie* inculpated. It is quite reasonable that they should be required to attend at their own expense. They are saved from injustice by the provision that if they are exculpated the court can and doubtless will give them their costs. If, on the other hand, persons could be examined at their own expense who could not be allowed their costs however clear it might be that they had done

nothing whatever that could be the subject of blame, the provision would certainly be very harsh, very unjust, and very unreasonable.

Therefore, when all the provisions are regarded together, and also the enactment existing in section 115 of the Act of 1862, it seems to me that the intention of the Legislature is reasonably clear, nor is there any mischief that I can see likely to arise from such a construction. If it were the case that the report of the official receiver on such a point must be made once for all, so that, if there appears a *primâ facie* case against A. for a public examination, he never afterwards could make a report which would lead to the public examination of B. or C., it might be said that mischief might arise. But it is clear that if there is not at the outset a case of fraud shown against anybody but A., then B. and C., who are officials of the company, and are supposed to know something, or may perhaps be suspected of being concerned in something, which was improper, can still be summoned for examination under section 115. It may well be that something which transpires in the public examination of A. will show the necessity of summoning B. or C. under section 115. If, when they are examined under section 115, it turns out that there is no cause for believing them to have been guilty of fraud, the matter will of course end there. They will have been examined, they will have given all the information they can, and no further steps will be necessary. But if that leads to a *primâ facie* case of fraud against them, they are not to be exempted in any way from a public examination; it is still open to the official receiver to make a futher report about their conduct, upon which their public examination will ensue.

It seems to me, therefore, that while the construction which your lordships' House is putting upon this sectiou will in many cases prevent injustice, it will in no case prevent justice being done, and the fullest inquiry being made in all legitimate cases.

Lord MACNAGHTEN and Lord MORRIS concurred.

Lord SHAND.—I also concur; and I only venture to add to what has been said by Lord Herschell that it occurs to me that there might be an examination of directors other than those named originally, without having recourse to section 115. I venture to suggest that if it appeared upon the examination of a person A., who had been inculpated, that B. and C. are in a somewhat similar position, then the official receiver might in that case make a second or further report, without having recourse to the power under section 115. In all other respects I quite agree with what my noble and learned friends have said.

Lord HERSCHELL.—In consequence of what Lord Shand has just said, I wish to explain that I did not intend to imply that procedure under section 115 would be a condition precedent to any further report justifying any further order, but merely that what came out might render an examination under section 115 desirable, and that it might be taken, notwithstanding the previous report.

Lord DAVEY.—I concur.

Appeal dismissed.

Solicitor, *Solicitor to the Board of Trade.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — March 6.

DUBOWSKI *v.* GOLDSTEIN. (*a.*)

Restraint of trade—Covenant—Validity—Reasonableness—Partial enforcement.

The defendant, on entering the service of the plaintiff, a milkman, agreed that he would not during the continuance of such service, or at any time thereafter, serve, solicit, or interfere with, for his own benefit or for the benefit of any person other than the plaintiff, "any of the customers which shall at any time be served by or then belonging to the employer" in his business; the plaintiff's business was then carried on exclusively in the locality of St. George's-in-the-East.

Held, that the agreement referred only to the business as then carried on by the plaintiff in that locality, and would not apply to a new business started by the plaintiff in any other locality, and that the restraint was reasonable as to space; that the covenant was severable, and an injunction could be granted restraining the defendant from serving persons who were customers of the plaintiff during the time when the defendant was in the plaintiff's service.

Appeal of the defendant from a decision of a Divisional Court (Vaughan Williams and Wright, JJ.) varying the judgment of his honour Judge Bacon at the Whitechapel County Court.

The plaintiff was a dairyman, carrying on his business at several shops in different parts of St. George's-in-the-East. By an agreement, dated the 2nd of May, 1892, the defendant agreed to serve the plaintiff in his business as a milk carrier and general servant. The agreement contained the following covenant on the part of the defendant: "The employee shall not nor will during the continuance of such service, or at any time thereafter, serve or cause to be served for his own benefit, or for the benefit of any other person or persons or any company, either directly or indirectly, or solicit or in any way interfere with or cause to be solicited or interfered with any of the customers which shall at any time be served by or then belonging to the employer, his successors or assigns, in the said business."

The defendant left the plaintiff's service in 1895, and the plaintiff alleged that since that time the defendant had committed a breach of the covenant.

The county court judge gave judgment for the plaintiff, granting an injunction in the terms of the covenant and damages.

The Divisional Court varied the judgment by limiting the injunction so as to restrain the defendant from serving only such persons as were customers of the plaintiff during the time when the defendant was in his service.

The defendant appealed.

Jessel, for the defendant.—The covenant by the defendant is much wider than is reasonably necessary for the plaintiff's protection, and therefore cannot be enforced. The covenant is unlimited as to the place in which the plaintiff's business may be carried on, and it also prevents the defendant from serving any person who may at any future time become a customer of the plaintiff. The Divisional Court held, on the authority of *Baines* v. *Geary*, 35 Ch. D. 154, 35 W. R. Dig. 64, that the covenant was severable. A covenant

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

such as this is not severable, and *Baines* v. *Geary* was wrongly decided: see comments of Chitty, J., in *Baker* v. *Hedgecock*, 36 W. R. 840, 39 Ch. D. 520.

He cited *Nicholls* v. *Stretton*, 7 Beav. 42; *Price* v. *Green*, 16 M. & W. 346; *Rannie* v. *Irvine*, 7 M. & G. 969.

E. Shortt (with him *Gwynne James*), for the plaintiff.—The covenant is reasonable, but, if not, that part which relates to persons who become the plaintiff's customers after the defendant left him may be disregarded and an injunction granted as to the remainder.

Jessel replied.

Lord ESHER, M.R.—In this case there is an agreement with regard to a particular business by which the defendant, who was formerly in the plaintiff's employ, undertook not to carry on business in a certain manner.

The Divisional Court have granted an injunction in respect of the agreement, and the question for this court is whether the injunction, as granted by the Divisional Court, can be supported. We must first construe the agreement according to the ordinary canons of construction. The agreement relates to the business of a milkman carried on in St. George's-in-the-East. The plaintiff had several shops, but they were all in that locality; and it is there, and nowhere else, that the business is carried on. General words are used in the agreement which might apply to any business, but they are, in fact, applied only to this particular business to which the agreement relates. If the plaintiff were to transfer his business to some other locality so remote that the business could not be carried on from St. George's-in-the-East, then it would not be the same business, but it would be an altogether different business. I think, therefore, that the locality to which the agreement applies is fixed. The covenant entered into by the defendant was as follows. [His lordship read the covenant.] The agreement refers to something which the defendant might do after leaving the plaintiff's employment.

Now, the plaintiff's customers are obviously divisible into two sets. First, there are those who were customers at the time the defendant was in the plaintiff's employment. They would therefore be known to the defendant, and, according to what is, in my opinion, the true construction of the agreement, the defendant undertakes not to interfere with them after he has left the plaintiff's service.

But then there is another set of customers—viz., those who became customers after the defendant left the plaintiff. The plaintiff desires to protect himself against interference with the latter set, and obtained in the county court an injunction in the terms of the agreement, but the Divisional Court limited the injunction by restraining interference with only those persons who were customers of the plaintiff when the defendant was in his service.

The Divisional Court appears to have been troubled with the case of *Baines* v. *Geary*, which is a decision of North, J., and to have thought that that case covered this one. I am not going to express any opinion about that case. North, J., did not assume to decide any new principles of law. If he applied the law wrongly to the facts in the case before him, then the law as stated by him is binding on a court of co-ordinate jurisdiction, but not the application of the law to those facts.

The law applicable to this case is, that the restraint must be such as is reasonable. I am inclined to think that the injunction as originally granted was right; but I will assume that it was too wide. It is quite clear that the two classes of customers can be separated, and I can see no objection to an injunction relating to the first class of customers only. The appeal will therefore be dismissed.

LOPES, L.J.—I am of the same opinion. This is an agreement in restraint of trade. From all the cases this principle is deducible. The court must determine whether, having regard to all the circumstances, the restraint is greater than is reasonably necessary for the protection of the plaintiff. This agreement is said to be too wide, both as to space and and as to time. With regard to the question of space, I think that when the agreement is carefully looked at it will be seen that there is nothing in the defendant's contention, for the agreement must be construed with reference to the nature of the business carried on by the employer at the time the agreement was entered into. A difficulty arises, I think, with regard to the period of time during which the restraint is imposed. If the two parts of the covenant could not be severed, I am disposed to think that the agreement could not be upheld. The agreement has reference to two distinct classes of persons—first, those who were customers of the plaintiff's during the period when the defendant was in his employ; secondly, those who may become his customers at any time and in any place; but, after carefully considering the language of the agreement, I have come to the conclusion that it is possible to separate the two classes of customers. If that is done, then the injunction as granted is perfectly right, for so far as the covenant relates to persons who were customers of the plaintiff whilst the defendant was in his employ I have not the slightest doubt that the restraint is reasonable. The plaintiff is therefore entitled to an injunction in the form granted by the Divisional Court, and this appeal must be dismissed.

RIGBY, L.J.—I am of opinion that this appeal cannot succeed. I am much influenced in coming to that conclusion by the consideration that in the view which I take of the agreement, even if there had been no suggestion as to the two parts of the covenant being severable, the injunction ought to be granted. The decisions have gone far beyond the law as stated by Tindal, C.J., and other judges in the past, for the views of judges of our age on questions of public policy necessarily differ considerably from the opinions held by judges of an earlier period. The only test which we have now to apply in construing an agreement which is said to be void as being in restraint of trade, is whether or not the restraint is reasonably necessary for the protection of the party. If the restraint is reasonable, then the agreement cannot be held to be against public policy. Now, in this case the covenant is not a general covenant not to carry on business in any part of England. A milkman's business is necessarily local. We do not know exactly the locality of this business, but we do know that it is local, and even if it extended to the whole City of London it would still be local. I should have no hesitation in saying that this agreement only refers to the business carried on during the existence of the agreement, wherever it may have extended to. A new business at a new place would not be within the contemplation of the parties. If, for instance, the plaintiff extended his business to the West End of London, it would in this case be a new business. Therefore we have a strict limitation as to locality, capable of being ascertained quite easily, involved in the very nature of the agreement.

The agreement refers to two classes of customers, covered by one sentence in the agreement. I conceive that that excludes persons who once were, but who no longer are, customers; for it only includes

actual customers. It is suggested that the defendant would have much difficulty in ascertaining who are the customers, but he can avoid that difficulty by going out of the district. If the defendant places himself in a difficult position by setting up a business in the same locality, he has only himself to blame. As to the suggestion that a man cannot legally agree not to serve customers whom he does not know, even if that was at one time the law, it is not so now. In the first place it would exclude all large companies, because an employee of a large trading company never can know all the customers.

I come to the conclusion that it was reasonably necessary for the complete protection of the plaintiff that the defendant should not interfere with any persons who were customers of the plaintiff at any given time, and in my view the agreement is valid without any severance. Still, it is not absolutely necessary to decide that, for the plaintiff is willing to accept an injunction in the limited form granted by the Divisional Court.

Appeal dismissed.

Solicitor for the plaintiff, *T. R. Watson.*

Solicitor for the defendant, *E. R. Adler.*

App. Bankruptcy.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) March 6.

In re LEONARD.
Ex parte LEONARD. (*a.*)

Bankruptcy — Petition — Receiving order—No assets— "Sufficient cause"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.

The mere fact that a debtor has apparently no assets is not a sufficient cause why a receiving order in bankruptcy should not be made against him.

Appeal of the debtor from the decision of the registrar in bankruptcy making a receiving order against him.

The debtor alleged that he had no assets.

Herbert Reed, Q.C., and *C. L. Attenborough*, for the debtor.—If it is probable that, owing to the debtor having no assets, the bankruptcy proceedings will produce no beneficial result, the court, in the exercise of its discretion, will refuse to make a receiving order: *In re Otway, Ex parte Otway*, [1895] 1 Q. B. 812, 43 W. R. Dig. 17. To make a receiving order under the circumstances of this case would, in the words of Jessel, M.R., in *Ex parte Robinson, In re Robinson*, 31 W. R. 553, 22 Ch. D. 816, be "a vain thing."

Ringwood, for the petitioning creditor.

Lord ESHER, M.R.—I can see no possible ground for interfering with the decision of the registrar in this case. The suggestion is that if the debtor is made a bankrupt nothing can be got, and therefore there ought to be no receiving order, because, using a phrase which has been caught up from the judgment of Jessel, M.R., in *Ex parte Robinson, In re Robinson*, it is said a receiving order will be "a vain thing." It has also been contended that *In re Otway, Ex parte Otway*, is an authority for the proposition that if it is probable that the bankruptcy will show no assets, a receiving order ought not to be made. In my opinion there is no case which decides that proposition, but there is a case, *In re Hecquard, Ex parte Hecquard*, 38 W. R. 148, 24 Q. B. D. 71, which clearly shows that the proposition is one which cannot be supported. In *In re Hecquard* both Lindley, L.J., and Lopes, L.J., point out that at the time when the petition is presented and a receiving order made the petitioning creditor cannot tell whether there will be any result from the bankruptcy. He has no means of knowing the truth as to the position of the debtor's affairs. All he can say is that he has a debt which has not been paid, and therefore he desires to make his debtor a bankrupt. The court may eventually come to the conclusion that adjudication will be "a vain thing," not at the date of the receiving order, but after the debtor has been publicly examined as to his position. That having been laid down in *In re Hecquard*, there is the case of *Ex parte Robinson*, where the only question was whether the court had jurisdiction to make the alleged debtor a bankrupt in England. It was admitted that there were no assets in England, though there were assets in Scotland, and the court decided that there was jurisdiction to make the debtor a bankrupt in England, but as there were sequestration proceedings then pending in Scotland the court, in the exercise of its discretion, declined to make the debtor bankrupt in England. Then as to *In re Otway* it is no authority for the proposition that the mere fact of no assets, either probable or possible, is sufficient to prevent a receiving order. It was a fact in that case that the effect of a receiving order would be to deprive the debtor of the only asset available for the payment of a composition to his creditors; but there was a further fact that the petitioning creditor had endeavoured to obtain from the debtor £25 as a condition for agreeing to an adjournment of the petition, and it was obvious that the petitioning creditor was using the bankruptcy proceedings for the purpose of endeavouring to extort money from the debtor. The court did not decide that there was no jurisdiction to make the debtor a bankrupt, but they held that under all the circumstances of the case there was sufficient reason for refusing, in the exercise of their discretion, to do so.

I say most emphatically that *In re Otway* is no authority for the proposition in support of which it has been cited in this case. I am of opinion that this receiving order was rightly made, and the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. Mr. Reed has tried to bring the case within the words of section 7, sub-section 3, of the Bankruptcy Act, 1883, which provides: "If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition." It was argued that the fact that nothing could be got by the bankruptcy was in itself "sufficient cause" for dismissing the petition. I do not think the case comes within the sub-section, nor do I think that *In re Otway* is an authority for that proposition. When *In re Otway* is examined it is seen that the facts there were very different from the present case, because in that case there was *malâ fides* on the part of the petitioning creditor, and also the court thought that it was undesirable that there should be bankruptcy proceedings because bankruptcy would have deprived the debtor of his only asset. On these two grounds, and these two only, did the court act in that case.

Then, again, in *In re Hecquard* it was contended that because there was only one creditor and no

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

assets in England a receiving order ought not to be made; but the court said that it was premature to say that the bankruptcy proceedings would be useless, because at that stage no one could say with certainty what assets there might be.

In my opinion none of the cases which have been cited support Mr. Reed's proposition.

RIGBY, L.J.—I entirely agree with the reasons that have already been given.

Appeal dismissed.

Solicitors for the debtor, *Stanley, Attenborough, & Tyer.*

Solicitors for the petitioning creditor, *C. & S. Harrison.*

App. Bankruptcy.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) Feb. 21.

Re BIRCH.

Ex parte THE CAUCASIAN TRADING CORPORATION (LIMITED). (*a.*)

Bankruptcy—Act of bankruptcy—Arbitration—Award on submission—Order of court to enforce award—Seizure of goods under fi. fa.*—"Process in a civil proceeding" in High Court—Arbitration Act,* 1889 (52 & 53 *Vict. c.* 49), *s.* 12—*Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 1.

Upon an application by originating summons under order 54, *an order under section* 12 *of the Arbitration Act,* 1889, *was obtained to enforce an award in the same manner as a judgment or order to the same effect; and the goods of the debtor were seized and sold by the sheriff under a writ of* fieri facias.

Held, that the summons was a "civil proceeding" in the High Court, and that the issue of the writ of fi. fa. *was a "process in a civil proceeding," and that as the debtor's goods had been seized and sold thereunder by the sheriff, the debtor had committed an act of bankruptcy under section* 1 *of the Bankruptcy Act,* 1890.

This was an appeal by the creditors in a bankruptcy petition from an order of the registrar, Mr. Hope, who refused to make a receiving order, and dismissed the petition.

The question raised before the registrar was whether a seizure and sale under a writ of *fi. fa.* of a debtor's goods under an order to enforce an award on a submission to arbitration in the same manner as a judgment or order to the same effect, constituted an act of bankruptcy within the meaning of section 1 of the Bankruptcy Act, 1890 (53 & 54 Vict. c 71).

The appellants, the Caucasian Trading Corporation (Limited), bought certain property from the debtor Birch and two other persons, who guaranteed the value of the property.

A dispute arose between the parties as to whether the property really was of the value guaranteed, and thereupon, under a clause contained in the contract, they went to arbitration under the provisions of the Arbitration Act of 1889.

On the 22nd of July, 1895, the umpire made an award for £12,917 in favour of the appellants.

On the 7th of August the appellants took out an originating summons in the High Court under R. S. C., 1883, ord. 54, for leave to enforce the award in the same manner as a judgment or order to the same effect, under section 12 of the Arbitration Act, 1889. This summons was intituled "In the matter of an arbitration between the Caucasian Trading Corporation (Limited) and John Grant Birch, R. Everitt, and J. S. Horner, formerly trading as John Birch & Co., and in the matter of the Arbitration Act, 1889."

A further summons, dated the 9th of August, 1895, was taken out for leave to enforce the award against the individual partners, and the court ordered that the appellants should be at liberty to levy execution against the defendants individually.

A writ of *fieri facias* was issued against the respondent Birch, and goods belonging to him were seized.

On the 27th of September the respondent applied under section 145 of the Bankruptcy Act, 1883, that the sheriff should be at liberty to sell the goods by private contract, and the goods were so sold on the 28th of September; but they did not realize a sufficient sum to satisfy the debt.

On the 28th of November application for a receiving order was made by the appellants, the act of bankruptcy alleged in the petition being that there had been a seizure and sale by the sheriff of the respondent's goods under process in a civil proceeding in the High Court.

The registrar dismissed the petition, on the ground that he was bound by the decision in *Shaw* v. *Ronaldson,* [1892] 1 Q. B. 91, 40 W. R. Dig. 183, that a submission to arbitration in the first instance is not a civil proceeding in the High Court, and that section 12 of the Arbitration Act, 1889, does not make the submission an order of the court.

The petitioning creditors appealed.

By section 12 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), it is provided that: "An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect."

By section 1 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), it is provided that: "A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days."

Herbert Reed, Q.C. (*Æneas Mackintosh* with him), for the appellants.—There has been an execution levied here under process in a civil proceeding in the High Court. In order to enforce an award as a judgment the leave of the court must be obtained, and this is done by means of an originating summons under ord. 54, r. 4, f. 3. This is a "step in a 'civil proceeding,'" and every subsequent summons is a "matter" in court. The writ of *fi. fa.* and the seizure of the goods is a "process" in that proceeding. Section 100 of the Judicature Act, 1873, provides that "action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court, and shall not include a criminal proceeding by the Crown; and that "matter" shall include every proceeding in the court, not in a cause. Here a civil proceeding was commenced when the originating summons was taken out. There has been a seizure and sale of the debtor's goods in that proceeding, and therefore there has been an act of bankruptcy within the meaning of section 1 of the Bankruptcy Act, 1890.

C. Herbert Smith (*Bigham, Q.C.,* with him), for the respondent.—Section 1 of the Bankruptcy Act, 1890, must be construed in the sense most favourable to the debtor: *Re North, Ex parte Hasluck,* [1895] 2 Q. B. 264, 43 W. R. Dig. 10. An arbitration is not an action in the High Court, although the sub-

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

mission be ordered to be enforced in the same manner as a judgment or order; and the submission is not a proceeding in the court: *Re An Arbitration between Shaw & Ronaldson*. Section 12 does not make the award equivalent to a judgment. The effect of the section is not to alter the old practice: *Newton* v. *Boodle*, 6 C. B. 529, 18 L. J. C. P. 73; *Farmer* v. *Mottram*, 1 Dow. & L. 781. The application made was an application in an arbitration. The issuing of a writ of *fi. fa.* is not a process in a civil proceeding. A civil proceeding is in the nature of an action. A summons taken out under order 54 is not a civil proceeding: *Re Binstead*, 41 W. R. 452, [1893] 1 Q. B. 199.

Lord ESHER, M.R.—The whole case turns on the construction of section 1 of the Bankruptcy Act, 1890. In this case the goods of the debtor were seized in execution and sold under a writ of *fieri facias*, which is a process in the High Court. In respect of what was the writ issued? There was an arbitration and an award, and a summons was taken out to enforce that award in the same manner as a judgment or order to the same effect. That summons was a civil proceeding in the High Court, and the summons to issue a writ of *fi. fa.* was a civil proceeding in the High Court, and the writ itself was a process in that civil proceeding. It is said that we are to construe the words "any civil proceeding in the High Court" as meaning a proceeding in the nature of an action, but section 1 of the Bankruptcy Act, 1890, speaks of them as distinct and separate. It says "in an action in any court, or in any civil proceeding in the High Court." We must construe the section according to the ordinary meaning of the words we find therein, that is, we must construe each of the enactments separately according to the ordinary meaning of the words respectively contained in them. I am of opinion that the originating summons was a civil proceeding, and that the issuing of the writ of *fi. fa.* was a process in that civil proceeding. Therefore in this case there has been a seizure and sale of the debtor's goods under a process in a civil proceeding in the High Court, and it follows that there has been an act of bankruptcy within section 1 of the Bankruptcy Act, 1890. Therefore I am of opinion that the decision of the registrar was wrong, and this appeal must be allowed.

LOPES, L.J.—I am of the same opinion. In this case an originating summons was taken out to obtain the leave of the court to enforce an award in an arbitration in the same way as a judgment or order to the same effect, as provided for by section 12 of the Arbitration Act, 1889, and the court made an order that the award should so be enforced. A writ of *fi. fa.* was then issued, and the debtor's goods were duly seized and sold. It has been argued by counsel that this was not a "civil proceeding" in the High Court within the meaning of section 1 of the Bankruptcy Act, 1890. In my opinion we must construe that section as meaning that an act of bankruptcy is committed if the debtor's goods have been seized under process in an action in any court, either High Court or county court, or in any step which may be called a civil proceeding in the High Court. It is clear that the award could not be enforced without application to the High Court, and I am of opinion that such application is a civil proceeding. The appeal must be allowed.

RIGBY, L.J.—I am of the same opinion, and for the same reasons. The summons taken out here was not a continuation of the arbitration. It was quite outside the arbitration. It was a civil proceeding in the High Court, and was the same as the old action to enforce an award. It was a matter brought into existence upon the taking out of the summons under order 54. The appeal must be allowed.

Appeal allowed.

Solicitor for the appellant, *Alfred Bright*, for *Batesons, Warr, & Wimshurst*, Liverpool.

Solicitors for the respondent, *Collyer-Bristow*, *Russell, Hill, & Co.*

From Prob. Div. & Adm. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) March 4.

LANCASTER v. LANCASTER. (*a*.)

Practice—Divorce—Judicial separation—Agreement for settlement of action—Costs of preparation and execution of separation deed.

In an action for judicial separation the parties mutually agreed to a separation by deed and to the settlement of the action, the respondent paying the petitioner's costs of suit, and the terms of the agreement being made a rule of court.

Held, that the costs of settling the deed were not costs of suit, but might have been provided for in the agreement; as they were, however, not provided for, the court had no jurisdiction over them.

Appeal from a decision of the President of the Probate Division (reported [1896], P. 75).

On the hearing of a petition presented by the wife praying for a judicial separation from her husband, the petition was settled on the terms of an agreement (signed by both parties and their respective counsel), containing the following provisions:—

"A deed of separation to be entered into with all usual clauses to be settled by Mr. Bayford.

"Mr. Lancaster will pay to Mrs. Lancaster £500 on the execution of the deed, and will consent to pay Mrs. Lancaster £1,500 per annum. . . . This payment to continue during the joint lives of Mr. and Mrs. Lancaster, and to be in discharge of all claims for and in respect of Mrs. Lancaster and her children. . . .

"Mr. Lancaster is to pay Mrs. Lancaster's costs of suit, to be taxed by Mr. Registrar Hannen in case of difference. . . .

"These terms may be made a rule of court."

On taxation the taxing master refused to allow the wife's costs of the preparation and execution of the deed, which were stated to be £140.

The President affirmed the taxing master's decision, stating as his reason that the agreement was a substantive agreement which (apart from its being made a rule of court) could be enforced by an action for specific performance; and as it could be made a rule of court, it could also be enforced by any division of the High Court of which it might be made a rule, and therefore was not strictly in the suit for judicial separation, nor were the carrying out of it and the enforcement of it, steps in the same suit.

The petitioner appealed.

Sir Edward Clarke, Q.C., and *Bargrave Deane*, for the appellant.—These costs may be made a rule of court. They are costs of suit, though no authority can be found for that proposition. It was an essential step in the suit, and the husband was to pay the wife's costs of suit, whatever they were. If either

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

party had refused to enter into this compromise, then the suit would not have been disposed of, and the court would have made an order. The President made the compromise a rule of court, and the petition remained on the file until the deed had been executed by all parties; therefore the deed was essentially part of the terms in that suit.

Ingle Joyce and *Barnard*, for the respondent, were not called upon.

LINDLEY, L.J.—There is no doubt that the costs of suit is a technical expression. Every person at all conversant with the law knows the meaning of the expression. I think the true ground is expressed by the President where he says that "the agreement is not strictly in this suit, nor are the carrying out of it and the enforcement of it steps in this suit. It follows that the costs of settling the deed are costs which the parties might have provided for by agreement but have not, and I have no jurisdiction over them." It would be a bad precedent to vary the order. The appeal must be dismissed.

KAY, L.J., concurred, and said that the parties ought to have added words in the agreement so as to include the costs of the deed.

A. L. SMITH, L.J.—I am of the same opinion. The deed says Mr. Lancaster will pay to Mrs. Lancaster £500 on the execution of the deed. The costs of suit do not include the costs of the preparation and execution of the deed. There were disputes before the taxing master, and it may be that these costs were not intended to be included.

Appeal dismissed.

Solicitors for the appellant, *Leggatt, Rubinstein, & Co.*

Solicitors for the respondent, *Greig, Meikle, & Briggs.*

High Court of Justice.

Chan. Div. North, J. Feb. 25.

In re BOWES.
SIRATHMORE *v.* VANE. (*a.*)

Will—Legacy to trustees to plant trees—Benefit of owner of the estate—Payment.

A sum of money was bequeathed by testator, who was tenant for life only of a real estate, on trust to lay out the money in the planting of trees thereon, regard being had, as to the manner and place of planting such trees, to the wishes of the person for the time being entitled to such estate.

Held, that the trust was primarily for the benefit of the owners of the estate, and as the evidence showed that the planting of the trees would not be a benefit or improvement to the estate, that the persons who together constituted the absolute owners of the estate were entitled to the bequest for their own use.

Petition.

William Bowes, by his will dated the 1st of September, 1878, bequeathed to his trustees "the sum of £5,000 sterling upon trust to expend the same in planting trees for shelter on the Wemmergill Estate, being part of my settled estates. If I shall have designated in my lifetime the places where I desire my trustees or trustee, to plant the same, in the places which I shall have designated; but if I shall not have designated the places, then I desire my trustees or trustee in the place and manner of planting such trees to have regard to the wishes of the person for the time being entitled to the possession of the Wemmergill Estates. I have long had the intention of planting trees on the Wemmergill Estate for the improvement thereof, and I consider that the Scotch fir is the best to be used."

The testator, who was only tenant for life of the Wemmergill Estate, died on the 9th of October, 1885, and had not designated the places where the trees were to be planted. The testator's estate was being administered in this action, and the £5,000 was standing in court to the credit of an account entitled "The legacy to the trustees of the testator's will upon trust to plant trees on the Wemmergill Estate."

This was a petition by the Earl of Strathmore, the present tenant for life of the Wemmergill Estate, for payment out of the said sum. Lord Glamis, one of the respondents to the petition, was the tenant in tail in remainder; the other respondents were the executors and trustees, and the Royal Bank of Scotland.

The evidence showed that it was impossible to plant trees on the high-lying land of the estate as they would not grow there, and that as to the rest of the property it was too valuable to make tree planting profitable, and that no profit could be made from the timber owing to the absence of roads and railways.

Crackanthorpe, Q.C., and *S. Dickinson*, for the petitioner.—This legacy is for the benefit of the person entitled to the estate, and should be paid over to him. When such is the case the money need not be expended as indicated, but can be paid over on Lord Glamis executing a disentailing assurance: *Palmer* v. *Flower*, 20 W. R. 174, L. R. 13 Eq. 250; *Re Skinner's Trusts*, 8 W. R. 605, 1 J. & H. 102; *Lockhart* v. *Hardy*, 9 Beav. 379; *Earl of Lonsdale* v. *Berchtoldt*, 3 K. & J. 185, 5 W. R. Dig. 131; Theobald on Wills, 4th ed., p. 405.

Heath, for the executors and trustees.—In all the cases cited the legatee was named, and it was for his interest distinctly; here the intention was to embellish the estate. What is not used for planting trees ought to fall into the residue: *Cowper* v. *Mantell*, 4 W. R. 500, 22 Beav. 231; *In re Ward's Trusts*, 20 W. R. 1024, L. R. 7 Ch. App. 727. There is no more intention shown to benefit the owner of the estate than would a trust to plant trees in Hyde Park.

G. A. Watson, for Lord Glamis.

Foster Corke, for the Royal Bank of Scotland.

NORTH, J.—The case is shortly this. Mr. Bowes, being tenant for life but nothing more, speaks of this estate as part of his settled estates. His interest ceased at his death, and then the estate went to the Earl of Strathmore for life, with remainder to his issue in tail, and that limitation is still subsisting, though under a new settlement. That being so, Bowes' will contains this gift: "I bequeath to my trustees the sum of £5,000 upon trust to expend the same in planting trees for shelter on the Wemmergill Estate." Pausing there I think that is a clear trust. It does not give the trustees any choice about the matter; it says that that sum is to be laid out by them and to be spent in planting trees upon the estate. I have no doubt about the testator's intention. It is agreed that the estate would hold far more trees than could be put upon it for that sum; but it is said that it would be a very disadvantageous way of spending that sum to apply it in planting trees upon any part at all of the estate, because for some reasons applicable to one part, some to another, it is not for the interest of anyone that the trees should

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

be planted; nevertheless, there is the trust directing it to be done. The testator seems to have thought that, though the estate was not his after his death, he would still have power over it as to giving directions where trees should be planted. Of course it was not his own estate, and nothing could be done at all without consulting the person who was in possession. Mr. Bowes' estate is now being administered by the court, and the defendants, the trustees, have paid or carried over to separate accounts the principal of all the legacies. The £5,059 Consols in court represents this legacy, and the question is to whom does it belong. Lord Strathmore, being the tenant for life, and his eldest son, Lord Glamis, who has attained twenty-one, being tenant in tail, are now capable, on Lord Glamis executing a disentailing deed, of dealing with the estate exactly as they like. I have not forgotten the prior charges, but all persons having them consent or will consent.

Then the sole question is where is this money to go to. Of course it is a perfectly good legacy, there is nothing illegal about it, and it might be carried out; but it is not necessarily capable of being performed, because the owner of the estate may say that he will not have any trees planted on it. If that were the position he took up and if he did not contend for anything more than that, of course the legacy would fail. But he says that he does not refuse to have trees planted upon it, he is quite content that trees should be planted on some part. The legacy, therefore, has not failed. If it were necessary, trees could be planted on the whole of it until the fund was exhausted. Therefore there is nothing illegal in the gift itself. But the owners of the estate say: "It is a very disadvantageous way of spending the money; the money is to be spent for our benefit and that of no one else; it was not intended for anything except our benefit and that of the estate; there is no reason why it should be thrown away by doing what is not for our benefit, instead of being given to us who want the enjoyment of it." I think that contention is right. I think the fund is intended for improving the estate, and improving the estate for the persons who are absolutely entitled to it. If it had been for the benefit of or improving the estate by making it a public park, or something of that sort, the case might possibly have been different. I do not think a gift to plant Hyde Park is really a case in point. Here it is to be planted, not as part of a public trust, but for the benefit of the owners of the estate, the owner in possession being the person whose wishes are to be considered, not merely whether he will give leave for the planting, but in considering where the trees shall be planted. I consider it is for the benefit of the estate and the persons for the time being who are entitled to the estate, that that direction is given.

Then is it a mere power to the trustees to lay out that sum, or is it a trust to lay it out? I think it is a clear trust to lay out money for the benefit of the persons entitled to the estate. If that is so, the case comes within the class of cases where there is not a mere power to lay out the money, in which case the money may go or not, according to whether the power is exercised or not. In the present case there is a trust to lay it out, and in my opinion the persons entitled to the money are entitled to it whether it is actually laid out or not. The case seems to me to come exactly within *Lonsdale* v. *Berchtoldt* and *In re Skinner's Trust*. I think the remarks of Lord Langdale in *Lockhart* v. *Hardy* also in point, and the remarks in *In re Ward* are strongly the same way. Therefore, upon proof that all the proper consents have been given, and that the disentailing deed has been executed by Lord Glamis, I make the declaration that the owners are entitled to have the money paid out to them.

Solicitors, *Young, Jones, & Co.; Western & Sons; Minet, Harvie, & Co.*

Q. B. Div.
(Lindley and Kay, L.JJ.) Feb. 14, 15.

LOWE (*Appellant*) *v.* VOLP (*Respondent*). (*a*.)

Tramway—Bye-law—Validity of—Passenger refusing to show his ticket—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 46.

A bye-law of a tramway company, made in pursuance of the powers conferred by section 46 *of the Tramways Act*, 1870, *provided that: "Each passenger shall show his ticket (if any) when required so to do, to the conductor or any duly authorized servant of the company"; and a penalty was attached to a breach of the bye-law.*

Held, that the bye-law was a reasonable bye-law "for regulating the travelling in or upon" a tramcar, and was valid, and that a passenger who had duly paid his fare and received a ticket, but who refused to show the same to an inspector of the company, ought to have been convicted under the bye-law for refusing to show his ticket.

Special case stated by Mr. Cluer, metroplitan police magistrate, sitting at the South-Western Police Court.

The respondent was summoned to appear to answer a complaint preferred against him by the appellant, an inspector of the South London Tramways Co., for refusing to show his ticket while travelling in a tramcar of the South London Tramways Co.

This summons was dismissed by the magistrate on the 9th of October, 1895.

A printed copy of the bye-laws and regulations made by the company was produced at the hearing, and formed part of this case.

Upon the hearing of the summons the following facts were proved or admitted.

An inspector of the company entered the car in which the respondent was travelling, and asked the respondent to show to his ticket. The respondent refused to show the ticket, but gave to the inspector a number which was the number of the ticket which he had received from the conductor. The respondent had duly paid his fare, and in refusing to show his ticket had no intention to defraud and did not in fact defraud the company.

No alternative demand was made by the company's officials for the fare on non-production of the ticket by the respondent.

The appellant contended that the respondent was liable to a penalty not exceeding forty shillings under bye-law 22, for refusing to show his ticket in conformity with bye-law 10.

The magistrate dismissed the summons, as he was of opinion that, assuming the bye-law (10) to be valid in law, the reasonable construction of it required it to be read as giving to the respondent the alternative of either showing his ticket or paying the fare, and this alternative was not offered to him by the company's officials; if this construction was wrong, and the strict grammatical sense of the bye-law was to be adopted, he held the bye-law to be unreasonable as offering no alternative, and therefore bad. He was also of opinion that the bye-law was invalid, and not

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

authorized by the power to make bye-laws conferred by the Tramways Act, 1870, section 46, in that no power is given by that statute to the company by means of bye-laws to impose penalties upon their passengers for an act which, at the most, would be a breach of contract, and not fraudulent; and he relied on the authority of *Saunders* v. *The South-Eastern Railway Co.*, 29 W. R. 56, 5 Q. B. D. 456 (especially p. 461), and on the fact that the Tramways Act, 1870, sections 49 to 54, expressly provides for criminal offences.

The question for the opinion of the court was whether the decision of the magistrate on the facts was right in law, or whether he ought on such facts to have convicted the respondent.

The bye-laws and regulations purported to be made by the South London Tramways Co. under the powers conferred on the company by the Tramways Act, 1870. No. 10 of these bye-laws—the bye-law in question—provided that "each passenger shall show his ticket (if any) when required so to do, to the conductor or to any duly authorized servant of the company, and shall also, when required so to do, either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger."

No. 22 provided that: "Any person offending against or committing a breach of any of these bye-laws or regulations, shall be liable to a penalty not exceeding forty shillings."

Then at the end of these printed bye-laws and regulations there was a certificate from the assistant secretary of the Board of Trade certifying that a true copy of the foregoing bye-laws and regulations had, in accordance with the provisions of section 46 of the Tramways Act, 1870, been laid before the Board of Trade not less than two months before such bye-laws and regulations came into operation, and that such bye-laws and regulations had not been disallowed by the Board of Trade within the said two months.

Spokes (*Hume-Williams*, with him), for the appellant.—The validity of this very bye-law has been before the courts on two occasions—namely, in the cases of *Heap* v. *Day*, 34 W. R. 627, 51 J. P. 213, and *Hanks* v. *Bridgman*, *ante*, p. 285, which was before this court a short time ago. In each of those cases the bye-law in question was considered and was held to be reasonable and valid, and the decisions in those cases are really conclusive in the present case.

F. Watt (*May*, with him), for the respondent.—The magistrate was right in holding the bye-law unreasonable and bad. Under the first part of the bye-law the passenger is to show his ticket (if any), and he has no option or alternative given to him; whereas in the second part of the bye-law (under which these cases were decided) he is to deliver up his ticket when requested to do so or pay the fare. There is, therefore, a larger penalty attaching to a breach of the first part, than there is to the second part, of this bye-law, because under the second part he has the alternative of paying his fare, whereas under the first part he has no such alternative, but must pay the penalty. Section 108 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20) gave powers to railways to make regulations "for regulating the travelling upon . . . the railway," and section 46 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), gave powers to tramway companies to make regulations "for regulating the travelling in or upon any carriage belonging to them." Thus the powers conferred on railway companies and on tramway companies to make regulations of this kind are precisely similar. The cases therefore decided as to railway companies and their powers to make such bye-laws are precisely in point here, and all the cases show that such a bye-law as this, where a penalty is imposed in the absence of an intention to defraud, is *ultra vires*, unreasonable, and void.

He referred to *Saunders* v. *The South-Eastern Railway Co.*, 29 W. R. 56, 5 Q. B. D. 456; *Huffam* v. *The North Staffordshire Railway Co.*, 43 W. R. 28, [1894] 2 Q. B. 821; *Dyson* v. *The London and North-Western Railway Co.*, 29 W. R. 565, 7 Q. B. D. 32; *Bentham* v. *Hoyle*, 26 W. R. 314, 3 Q. B. D. 289; and to section 5 of the Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57).

LINDLEY, L.J.—I consider this matter really covered by authority. The learned magistrate has refused to convict the respondent under a bye-law which has come before the court more than once. It is a bye-law made by a tramway company under the powers in section 46 of the Tramways Act, 1870. The section first of all authorizes the local authority to make certain bye-laws and regulations, and then it authorizes the promoters of any tramway to make regulations "for regulating the travelling in or upon any carriage belonging to them"; and, by a later section (s. 47), to enforce a reasonable penalty. Under that power this bye-law has been passed. [His lordship then read the bye-law.] I agree with the contention for the respondent that that may be regarded as two bye-laws in one clause. The first is that "each passenger shall show his ticket, if any, when required"; and the next is, "and shall also, when required so to do, either deliver up his ticket, or pay the fare legally demandable for the distance travelled over by such passenger." Those are two totally different things. The second part of that bye-law has been brought before the court on more than one occasion, especially in the case of *Heap* v. *Day*, and in the case of *Hanks* v. *Bridgman*, in which we followed *Heap* v. *Day*. The argument was to this effect: It was contended for the respondent that the company cannot enforce duties upon passengers to enable the company to check its own servants. I think there is something in that argument, but that is precisely the argument which was addressed to the court in *Heap* v. *Day*, and was distinctly overruled. We cannot, of course, overrule *Heap* v. *Day*, and that argument being gone, what seems to me to be the best point of the whole case is gone too.

The learned magistrate has refused to convict for these reasons. He finds, in the first place, that the respondent did refuse to show his ticket when requested. He finds that as a fact, then he gives three reasons for his opinion. He says: "I dismissed the summons as I was of opinion that, assuming the bye-law to be valid in law, the reasonable construction of it required it to be read as giving to the respondent the alternative of either showing his ticket or paying the fare, and this alternative was not offered him by the company's official." With great deference to the learned magistrate, I cannot read the 10th bye-law in any such way; I cannot tack on the alternative "pay the fare legally demandable" to the first clause of it. The words of the first clause are: "Each passenger shall show his ticket, if any." The expression "if any" is very important. There is no alternative of that. The alternative about paying the fare legally demandable, is confined to the next clause: "And shall also when required so to do either deliver up his ticket or pay the fare."

Now we have not got the words "ticket, if any," there, and the reason, I apprehend, is this, that when we come to the alternative, if the passenger has lost the ticket or has not got it, he must pay the fare over

again. That is not in the first clause at all. On the construction of the 10th bye-law it seems to me the learned magistrate has gone too far and has misconstrued it.

Then we come to the second reason which he gives: "If this construction was wrong, and the strict grammatical sense of the bye-law was to be adopted, I held the bye-law to be unreasonable as offering no alternative, and therefore bad." There, again, I do not see that there is anything at all unreasonable in saying that if a man has got his ticket and refuses to produce it, he shall be liable to a small penalty. The only conceivable ground for holding that to be unreasonable, is that to which I have already alluded, and which is negatived by the case of *Heap* v. *Day;* and if we look at the judgment of Lush, J., in *Saunders* v. *The South-Eastern Railway Co.*, there is a very distinct opinion expressed by that very eminent judge that such a bye-law would be perfectly reasonable; and I think it is. The second ground therefore seems to me to be untenable and bad.

I now come to the third reason: "I was also of opinion that the bye-law was invalid, and not authorized by the power to make bye-laws conferred by the Tramways Act, 1870, in that no power is given by the statute to the company by means of bye-laws to impose penalties upon their passengers for an act which at most would be a breach of contract, and not fraudulent." Then the magistrate referred to the case of *Saunders* v. *The South-Eastern Railway Co.* That ground has been supported in argument by a reference to *Saunders* v. *The South-Eastern Railway Co.*, *Dyson* v. *The London and North-Western Railway Co.*, and *Bentham* v. *Hoyle.* That ground, however, seems to me to be bad also, for in every one of those cases the Act of Parliament there applicable dealt with precisely the same bye-law in each of those cases, and the bye-law was one which left out very material words which were essential to the reasonable protection of the public. When we come to the penalty section in this Act (section 47) we do not find this particular language alluded to at all; and we have already the authority of *Heap* v. *Day* for saying that this is a bye-law—the second part of it at all events—which is reasonable for regulating the traffic in or upon the tramway.

I think on all these grounds the learned magistrate has made a mistake, and that the appeal must be allowed with costs, and that the case must go back to him.

KAY, L.J.—I am of the same opinion. As to the construction of the bye-law, I differ from the construction put on it by the learned magistrate. It seems to me plain that the alternative of paying the fare legally demandable applies only to the second clause of the bye-law. To "either deliver up his ticket or pay the fare" shows clearly that the alternative does not apply to the first part of the bye-law, where we have not got "shall either show his ticket or pay the fare." The alternative is confined to the last clause.

The chief argument has been that it is an unreasonable bye-law, and that it is bad. *Heap* v. *Day* has held it to be a perfectly good bye-law as to the second part. I agree that the attention of the court was not specially directed to the first part, and therefore it is possible to say that *Heap* v. *Day* did not decide that a bye-law severable as to the first and second part of it, was good as to the first part; and therefore the point may be open to argument by the respondent.

How does the matter arise? In the Tramways Act, 1870, section 51 imposes a penalty on any person who avoids or attempts to avoid payment of his fare; section 46 authorises to tramway company to make bye-laws for regulating the travelling in or upon any tramcar; and by section 47 any such bye-law may impose reasonable penalties for offences against the same. I agree that if this bye-law were a bye-law to the effect that if a passenger did not pay his fare he should be liable to a penalty, and omitted the words I have read in section 51—the words showing that the penalty by statute was only imposed where he wilfully refused to pay his fare, as in the case of *Saunders* v. *The South-Eastern Railway Co.*—the bye-law would then be creating an offence, and imposing a penalty for the non-payment of the fare under circumstances in which the statute did not impose the penalty, and in which the statute plainly showed it was not intended that the penalty should be imposed. But I do not think that is a good argument in the present case.

Is not this strictly a bye-law for the purpose of regulating "the travelling in or upon any carriage belonging to the company"? I confine myself for the present to this part of the bye-law. A passenger when he pays his fare receives a ticket from the conductor. The company say that the conductor shall deliver a ticket, and he does deliver a ticket, to the passenger. Then the inspector, or the conductor, or any officer of the company, according to this bye-law, may call upon the passenger to show his ticket, if any. It is notorious that the check which the company have upon their servants is by an inspector continually going upon one or other of their tramcars and asking the passengers to show their tickets; the object of that is to see whether the conductor has performed his duty in giving the passengers a ticket. It is thus seen at once if the passenger has paid his fare, and the conductor is liable for the fare that he has so received. This is, or may be, intended to enable the company to have a check on the conductor. Then, again, the conductor may ask to see the ticket. The conductor may have received the fare and given a ticket and may have forgotten it, and he asks the passenger to show his ticket, as he may not be sure whether the man has paid his fare or not. This bye-law does not say that in every possible event a passenger shall show his ticket or pay a penalty, but that he shall show his ticket, "if any;" that means if he has a ticket to show. If the man says "I had a ticket, but unfortunately I have lost it and cannot show it," possibly he might on that ground escape altogether, because the words of the bye-law are "if any." But why is this bye-law unreasonable? It does not, as it seems to me, come within the class of cases to which we have been referred. It does not in the least interfere with, or carry further, the right of the company to obtain a penalty from a man because he has not paid his fare. But it is said that in this case everything must be inferred in favour of a man who is accused of a criminal offence, and that it must be inferred here that he had lost his ticket and could not show it. I cannot go into that. That is not the conclusion to be drawn from the language of this case. If he had lost his ticket, he would have said so; but the case does not find that he said that, but on the contrary that he refused to show his ticket. He gave the number of the ticket, and that shows that he had received a ticket, but he refused to show it. I think he was wrong in so doing, and I think he certainly infringed the bye-law. The bye-law seems to me not unreasonable. It comes within the class of cases to which reference has been made. It does not contravene the statute, or extend the statute as to payment of fares beyond section 51; and therefore I think the learned magistrate was not right either on the construction of the bye-law or in the way he dealt with the traveller who had committed the breach

of the bye-law. I think a breach of the bye-law was committed. I think the bye-law was good, and I think the magistrate ought to have convicted.

Appeal allowed. Case remitted to magistrate.

Solicitors for the appellant, *Blyth, Dutton, Hartley, & Blyth.*

Solicitor for the respondent, *E. R. Oliver.*

Q. B. Div.
(Lindley and Kay, L.JJ.) Feb. 13.

COLLMAN (*Appellant*) *v.* ROBERTS (*Respondent*). (*a*.)

Master and servant — Shop — Employment of young person in — Employment partly in shop and partly outside — Employment "in or about shop" — Shop Hours Act, 1892 (*55 & 56 Vict. c.* 62), *s.* 3.

When a young person is employed in a shop, and when his employment is partly inside the shop and partly outside the shop, the time occupied in the outdoor employment is time occupied "in or about the shop" within the meaning of section 3 *of the Shop Hours Act*, 1892; *and the time so occupied in the outdoor employment when added to the time of employment in the shop itself cannot, in any one week, exceed the limit of seventy-four hours laid down in that section.*

Case stated by Mr. Bushby, metropolitan police magistrate.

A complaint was made by the appellant on behalf of the London County Council against the respondent, that the respondent did, during the week commencing the 16th of June, 1895, at his premises (being a shop within the meaning of the Shop Hours Act, 1892), unlawfully employ in and about the said shop one Charles Medcraft (being a young person within the meaning of the Act) for a longer period than seventy-four hours, including meal-times.

The respondent was a newsagent, and occupied the premises in question for the purpose of receiving and retailing newspapers, and these premises were a shop within the meaning of the Shop Hours Act, 1892.

The respondent employed Medcraft (who was a young person within the meaning of the Act) in connection with the receiving and retailing of newspapers, and in the course of such employment Medcraft fetched newspapers from Fleet-street, and delivered them to customers at their addresses sold newspapers for the respondent both inside and outside the shop; and inside the shop he folded up newspapers, did up country parcels, swept out the shop, and cleaned the windows.

The period of time calculated from the time Medcraft arrived at the shop to the hour at which he ceased working for the respondent during the week in question amounted to 84½ hours, and during the whole of such period of 84½ hours Medcraft was occupied in performing some portion of the above-described duties in the course of his employment, or taking his meals in the times allowed him for that purpose.

If the period to be calculated for the purposes of the Act is limited to the times during which Medcraft was at work in or about the premises occupied by the shop, then he was not employed in or about the shop for a longer period than seventy-four hours, including meal-times, in that week; but if the period to be calculated for the purposes of the Act is not so limited, but should include the times occupied in fetching newspapers from Fleet-street, and delivering them to customers at their addresses not in or about the premises, then Medcraft had been employed for a period of 84½ hours, including meal-times, in that week.

The magistrate adopted the first of these constructions of the Act, and dismissed the summons.

Section 3 of the Shop Hours Act, 1892 (55 & 56 Vict. c. 62), provides: "No young person shall be in or about a shop for a longer period than seventy-four hours, including meal times, in any one week." Section 9: "A 'young person' means a person under the age of eighteen years; and 'shop' means retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire, and includes licensed public-house and refreshment houses of any kind."

Avory, for the appellant—The whole question is, What is the meaning of the words "in or about" a shop? The magistrate decided that these words meant actually on the premises of the shop. That is too narrow a construction of the section, and it would not prevent the mischief aimed at by the Act, which was to prevent too long hours of employment of young persons engaged in shops and warehouses. The words "in or about" a shop mean in or about the business of the shop, and the words cannot be limited to the actual employment in the shop itself. If the view of the magistrate were adopted, then a boy could be kept in a refreshment house all day running in and out of the house, and he might be employed for much longer than the specified time, provided he was not employed more than the seventy-four hours in the house itself. That could not have been the intention of the Act.

The respondent did not appear.

LINDLEY, L.J.—This is an important case, and one by no means easy to decide, as it is impossible to read this Act without seeing that the word "shop" throughout the Act is used with reference to a structure or place—a place of business as distinguished from the business carried on there. We have in this case a shop and a boy employed in the business which is carried on at that place; his work is partly indoors, and partly outdoors; and his outdoor work takes him some distance away from the place where this shop is situated. The question is whether, whilst he is employed in doing the outdoor work, he can be said to be employed "in or about the shop" within the meaning of this Act. To answer that question we have to see what the object of this Act was, and what was the mischief it was intended to prevent. It was passed for the purpose of protecting the health of young persons employed in shops and warehouses. The Act does not aim at protecting the health of young persons by the improvement of the sanitary condition of the places in which they are employed. Its object is to protect their health by preventing their employment for an undue length of time, and if we were to adopt the very narrow construction of the section—which, I must say, the words of it warrant—we should be reducing the Act to a dead letter in all cases in which the duties of young persons employed in shops are partly indoors and partly outdoors. I think it would not be right to put upon the language of this Act a construction so limited as to make it futile in many cases which would certainly come within the mischief of the Act. I think the true construction is this, that where you have a shop, and a shop boy or shop girl under the age of eighteen employed in that shop, that boy or girl is not to be

(*a*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

employed for the purposes of the business carried on at that shop by the shopkeeper for more than seventy-four hours in the week, including meal-times. That is the substance of the matter, and, although the learned magistrate has adopted a construction of the Act which is warranted by the words of it, I do not hesitate to say that his construction is calculated to defeat the object of the Act to such an extent that I do not think it can be the true construction.

KAY, L.J.—I am entirely of the same opinion. The question is a very important one, and it is one on which the efficiency of the Act greatly depends. The Act was passed for the purpose of preventing shopkeepers from employing young persons for an undue length of time, and if in this case we are to deduct the time occupied by the boy in his outdoor duties, he might be kept all day and all night so employed without infringing the Act. If that were the construction, then there might be many similar cases which the Act would fail to reach. I cannot think that it would be a true construction of the Act, looking to the purpose and object of it, to limit it in that way. If it were so limited, shopkeepers might easily evade its provisions and employ young persons in their business for more than seventy-four hours in one week. The mischief aimed at was the employment of young persons for an undue length of time, and employment beyond the time specified in the section is an infringement of the Act, unless the employer can show that the case is clearly not within the words of the Act. I think the learned magistrate has placed too narrow a construction upon this very useful and important provision.

Appeal allowed.

Solicitor for the appellant, *W. A. Blaxland.*

Q. B. Div.
(Lindley and Kay, L.JJ.) Feb. 13.

KYFFIN (*Appellant*) *v.* THE EAST LONDON WATERWORKS CO. (LIMITED) (*Respondents*). (*a.*)

Water—Metropolis—Constant supply of water—Failure of water company to give—Right of private individual, being aggrieved, to sue for penalties—Metropolis Water Act, 1871 (34 & 35 *Vict. c.* 113), *ss.* 7, 16, 44, 45—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 43.

When a water company which comes within the operation of the Metropolis Water Act, 1871, *fails to give a constant supply of water within section* 7 *of the Act, a private individual, who may be aggrieved in consequence of such non-supply, cannot sue for the penalties imposed by section* 16 *of the Act. For such penalties for failure to give a constant supply to districts, the metropolitan authority alone can sue, and if a private individual be aggrieved his remedy is not under the Act of* 1871, *but under section* 43 *of the Waterworks Clauses Act*, 1847, *under which section it is a condition precedent of his right to sue that he shall have paid or tendered the water rate in advance.*

Special case stated by Mr. Bushby, metropolitan police magistrate, sitting at Worship-street Police Court.

A complaint was preferred by the appellant (Kyffin) against the respondent company for that the company on the 16th and 17th days of July, 1895, at 463 and 465, Hackney-road, in the county of London, did unlawfully fail to supply a sufficient quantity of water for domestic purposes.

The magistrate heard this summons on the 20th of July, 1895, and dismissed the complaint.

At the hearing of the complaint the appellant, who was the only witness called, stated that he was the occupier of certain premises in Hackney-road, which included the premises named in the summons, and that on the 16th and 17th days of July, 1895, the water supplied by the respondent company to these premises was not sufficient for domestic purposes.

Upon the above evidence it was contended for the appellant that the respondents had contravened the provisions of section 7 of the Metropolis Water Act, 1871, and that the respondents had incurred the penalty prescribed by section 16 of that Act. By 35 & 36 Vict. c. 79, s. 35, the Local Government Board is substituted for the Board of Trade.

On behalf of the respondent company it was contended upon the above evidence, as preliminary points of law: (1) That a private individual could not take proceedings under those sections; (2) that it must be proved that the respondent company had been required or had proposed to furnish a constant supply to the district, and that the other conditions in sections 8 to 12 had been fulfilled, and also that the notice mentioned in section 16 had been given; (3) that the penalty was for not giving a constant supply to the district, and not to an individual, and that the appellant had not proved any offence within the section; (4) that no individual could take proceedings against a water company for failure to supply his premises unless he had paid the water rate in advance (it was admitted by the appellant that he had paid no rates since the period up to Christmas, 1894); see section 43 of the Act of 1847, which was incorporated in the respondent company's Act.

The magistrate was of opinion that, in the absence of the notice required by section 16 of the Metropolis Water Act, 1871 (as amended by 35 & 36 Vict. c. 79, s. 35), the fourth objection must prevail, and he therefore dismissed the summons.

The question for the opinion of the court was whether the magistrate was right in so doing, or whether upon the evidence a *primâ facie* case had been made out against the respondent company in respect of the offence charged, and in the latter event the matter was to be remitted for further hearing.

The Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), provides:—

Section 7. — "Subject to the provisions of this Act, every company . . . . shall, when required so to do, in the manner directed by this Act, provide and keep throughout their water limits, or throughout such parts of such limits as they may be required in manner aforesaid, a constant supply of pure and wholesome water sufficient for the domestic purposes of the inhabitants within such water limits constantly laid on at such pressure as will make such water reach the top story of the highest houses within such water limits . . . and every such company shall, subject to the provisions of the special Act as the same are amended by this Act, give and continue to give to such inhabitants a constant supply for domestic purposes in manner prescribed."

Section 16. — "Any company which violates, refuses, or neglects to comply with any of the preceding provisions of this Act shall be liable to a penalty not exceeding two hundred pounds, and to a further penalty not exceeding one hundred pounds for every month during which such violation or

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

refusal or neglect to comply with the said provisions continues, after they shall have received notice in writing from the Board of Trade" (now the Local Government Board by section 35 of 35 & 36 Vict. c. 79) "to discontinue such violation, refusal, or neglect as aforesaid."

Section 44.—"Every penalty incurred by any company by reason of non-compliance with any of the provisions of this Act shall go and belong to the metropolitan authority within the jurisdiction of which the same has been incurred, and may be sued for and recovered by such metropolitan authority in any court of competent jurisdiction for the recovery of any ordinary simple contract debt of the like amount, and shall be paid and applied as such metropolitan authority shall from time to time direct," &c.

Section 45.—"Except as is by the next preceding section expressly provided, all penalties under this Act may be sued for and recovered in the court of summary jurisdiction."

Section 43 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), provides: "If, except when prevented as aforesaid, the undertakers neglect or refuse . . . to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of ten pounds, and shall also forfeit to the town commissioners, and to every person having paid or tendered the rate, the sum of forty shillings for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply."

Bousfield, Q.C., and *W. H. Eldridge*, for the appellant.

Darling, Q.C., *Cripps, Q.C.*, and *R. M. Bray*, for the respondents.

LINDLEY, L.J.—This is a case stated by one of the metropolitan police magistrates who refused to fine the defendants, the East London Waterworks Co., at the instance of the plaintiff. There is a good deal of ambiguity about the information, and it is consistent with several interpretations. It does not say whom the company has failed to supply; it does not say whether the complaint was that the company failed to supply the district with a constant supply, or whether the omission complained of was a failure to supply this particular house with water.

The learned magistrate seems to have thought that the informant was not entitled to the penalty asked for, because some notice referred to in section 16 of the Metropolis Water Act, 1871, had not been given. But when you come to look at that section the notice there referred to has no reference to the complaint of the appellant—whichever way it may be read, whether for omitting to supply this particular house or omitting to supply the district. The notice is a notice required to be given by the local government authority—formerly the Board of Trade, but now the Local Government Board—to continue a local supply. The particular ground on which the magistrate decided appears to me to proceed on a misconstruction of section 16, and in fact that has been admitted on behalf of the company during the argument.

The real question of controversy here is an extremely important one—that is, whether an inhabitant who considers that he is aggrieved is entitled to proceed for the penalties which are imposed by section 16 of the Metropolis Water Act, 1871. That section is as follows. [His lordship read the section, and proceeded:—] The notice referred to in that section is the notice to which I have been referring, and the appellant's contention is that, notwithstanding sections 44 and 45, he is entitled to enforce this heavy penalty. Section 44 shows the way in which the penalty is imposed, and also shows, to my mind, who is to sue for it. [His lordship then read sections 44 and 45.] Now, the penalties to be incurred by the company evidently do not go to common informers, and they do not go to the Exchequer. They go to the metropolitan authority, and may be sued for and recovered by that metropolitan authority by what is commonly called an action. The appellant contends that, notwithstanding that, he is, as a person aggrieved, entitled to sue for this penalty; not for his own benefit—he did not say that—but in order to put the money at the disposition and control of the metropolitan authority. At first sight there seemed to be some difficulty about that both ways; but we have been referred by counsel for the Waterworks Co. to the Waterworks Clauses Act of 1847, and when we come to look at the two Acts of Parliament I think the argument for the company ought to prevail. I think it is quite obvious that under section 43 of the Waterworks Clauses Act, 1847, any inhabitant who is aggrieved by not receiving the water which he is entitled to under the Act is entitled to proceed under that section for the penalty there referred to, which is comparatively a small one. The penalty is £10, and 40s. a day; "and shall also forfeit to the town commissioners, and to every person having paid or tendered the rate, the sum of forty shillings for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply." Unfortunately for the appellant he cannot enforce section 43 of the Act of 1847, because he has not paid his rate in advance, which is a condition precedent. Therefore the remedy which he has under that section for any injury inflicted upon or sustained by himself he is not in a position to pursue.

That being the case, the appellant says, "Apart from that, I can sue you for this penalty imposed by section 16 of the Act of 1871, because," he says, "you have failed to comply with section 7 of the Act of 1871." Now section 7 of the Act of 1871 is not addressed to the supply of each particular inhabitant, but to something which was new in 1871, namely, a constant supply of water to districts. [His lordship then read section 7.] Now the appellant says, "I am aggrieved because I did not receive the constant supply for domestic purposes, and therefore I shall sue for the penalty under that section." That means the £200 penalty, and it certainly would be curious if a person who cannot sue under section 43 of the previous Act of 1847, in respect of injury done to himself personally, can sue in respect of that very same injury done to him personally, under section 7 of the Act of 1871, and sue for a penalty of £200. It does not seem consistent.

It appears to me that there are two distinct principles underlying the structure of these Acts; and that as regards constant supply districts the company are responsible to the metropolitan authority, and that it is for them to enforce the duties imposed by the Act of 1871 upon the company for failure to supply a district; and for that, the metropolitan authority is the proper person to sue, and the only proper authority to sue, for penalties. That does not in the least deprive any person of his right to complain of any deficient supply to him personally, his remedy being under section 43 of the Act of 1847. That appears to me to make the whole legislation consistent, and also to be in accordance with what appears to me, on looking carefully through the Act of 1871, to be the obvious scheme of the Legislature.

There is a great deal of good sense in this, because

we know perfectly well that this constant supply is an extremely onerous burden, and there are sections which prevent the company from being under any liability for not giving it if, from any drought or accident, they are prevented from so doing; all of which matters can be much better considered by the metropolitan authority than by any inhabitant who may happen to be aggrieved by not receiving what he thinks is a sufficient supply. I am quite satisfied that the scheme of the Act is that for which the company have contended, and that the appeal must be refused.

The appellant has an adequate remedy. His remedy is under section 43 of the Act of 1847, and not at at all under the Act of 1871. Upon the true construction of the Act, it appears to me therefore to be unnecessary to criticise the cases which have been referred to. Therefore I come to the conclusion that if the appellant is suing for a non-constant supply of water to the district, he is not the proper person to sue; if he is suing for injury to himself personally, he is out of court, because he cannot comply with section 43 of the Act of 1847.

KAY, L.J.—I am entirely of the same opinion. Looking at the Act of 1871 alone there is a difficulty, and a very ingenious argument has been raised upon the statute, which would be difficult to get over if that statute stood alone. But when we look at the whole scheme of the legislation it is easy to see what is meant. By the Act of 1847 an individual who does not get a proper supply of water has a remedy given to him to recover a penalty, which is to go into his pocket—as to 40s. a day at any rate—and that remedy can be enforced, we are told, by summary proceedings. But that is subject to a condition precedent—which is a very reasonable one—that he should have paid his rate, as we may see by reading the section. In 1871 comes a statute which says that, upon the requisition of the metropolitan authority, the undertakers shall be obliged to supply water constantly to a particular district—that is, to give a constant supply; and if they fail to do that, they are liable to a very large penalty—namely, £200, and £100 a month for every month during which they refuse to comply with the requisition. Then there is a special provision in section 44 that these penalties payable by the company may be recovered by the metropolitan authority by action in any court which would give them a remedy to recover a simple contract debt for the same amount. That shows the means by which penalties payable by the company under that Act are recovered. Then section 45 says: "Except as mentioned in section 44, all penalties under the Act may be sued for and recovered in a court of summary jurisdiction." First of all it struck me that one might reconcile these two sections in this way: Section 44 enables the metropolitan authority to recover the amount by an action as though it were a debt, and section 45 enables it to be recovered in a court of summary jurisdiction—that may be, as *primâ facie* it always is, by anybody—but in any case it has, under section 44, to go to the metropolitan authority. The question was whether the remedy by action, looking to section 45, was intended to be the only remedy for the recovery of that penalty, or whether it might be recovered either by the metropolitan authority or any other person in a court of summary jurisdiction under section 45. That is a difficulty which, if the Act stood alone, it might not be very easy to get over. When we look at this Act, and the preceding Act of 1847, the difficulty vanishes. It would be the most ludicrous thing in the world if an inhabitant who had not a sufficient supply of water could not take any proceedings under the Act of 1847 until he had paid his rate, even to get the 40s. a day or any other penalty coming to him under that Act, and yet might under the Act of 1871 take proceedings to recover £200, and £100 a month. It would be ludicrous to suppose that the Legislature meant that.

To my mind the plain meaning of all the legislation is this. The inhabitant who does not get a sufficient supply of water may take proceedings under the general Act of 1847. Under that Act, if he has paid the rate—subject, of course, to that condition precedent—he may get a small penalty. The not giving a supply of water to a district is a matter between the metropolitan authority and the company, and the metropolitan authority are the people to make that requisition. If the requisition is not complied with, a heavy penalty is imposed; and the person to recover that penalty is the metropolitan authority who have made the requisition, and not the inhabitant who, by reason of the supply not being constant, says he does not get all the water he wants for domestic purposes. That construction makes the two Acts perfectly consistent and makes the legislation intelligible, and it avoids that which I cannot help saying would be a gross absurdity—that an inhabitant aggrieved should not be enabled to get a small penalty under the Act of 1847 without first paying his rate, and yet for the very same grievance—namely, that he does not get a sufficient supply for domestic purposes—may go, under the Act of 1871, and get a penalty of £200.

I therefore think—although I do not agree with the special reason given by the learned magistrate, which has been disavowed in argument on the part of the company—that this is a case in which the appellant, not having paid his rate, has no right whatever to proceed for penalties under that Act.

The appeal will therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Tiddeman & Enthoven.*

Solicitors for the respondent company, *George Kebbell & Miller.*

Prob. Div. & Adm. Div. } March 30.
Probate. }

In the Goods of BARON VON LINDEN, DECEASED. (*a.*)

Probate — Foreign will — Some assets in England — German law — Executor according to the tenor — Probate of copy.

The will of a domiciled German was proved by his widow in Germany and deposited with a committee of the Parish Council, and by the law of Germany could not be removed from their custody. By the will the widow had the same duties and rights as an executor here.

Held, that probate might be granted of a notarial copy of the original will properly proved to the widow, as executrix according to the tenor, limited to such time as might elapse before the original will should be brought in.

Motion for a grant of probate of the will of Baron Hugo von Linden, deceased, as contained in a certified notarial copy thereof, to the Baroness von Linden, widow of the deceased, as executrix according to the tenor.

The deceased was a German subject domiciled in Wurtemburg, and made his last will at Stuttgart on the 8th of May, 1886, by which he appointed as his heirs his wife and two daughters, or their descend-

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

ants, his wife, during her life, to "have the unrestricted right of administration and of usufruct of the whole of his estate, and without giving security."

A German advocate deposed to the validity of the will, and that it was sufficient in law if the will was formally opened and read to the family in the presence of the "Theilungsbehoerde" (a body consisting of members of the Parish Council) by a notary on their behalf, and acknowledged by the heirs, and the inheritance accepted by them, and a memorandum of that fact, as in the present case, made by the notary, the original will would remain in, and not be allowed to leave, their custody; but a copy under the signature and seal of the notary (as supplied in this case) would be received as evidence in all German courts of justice. The widow had taken upon herself the administration of and was in possession of the German assets, but the estate also consisted of stocks and shares of companies registered in England.

Priestley, in support of the motion, referred to *In the Goods of Lemme*, [1892] P. 89, 40 W. R. Dig. 209.

JEUNE, P.—The only question here seems to be whether the grant should be made to the applicant as executrix according to the tenor, or as administratrix. It seems to me that there is no exact authority. In 1894 I decided, in *In the Goods of Briesemann*, [1894] P. 260, 43 W. R. Dig. 152, to grant administration. The rule appears to me to be that where in a foreign will persons are named in terms as executors, with the same powers as executors would have here, then probate should be granted; but where the persons so named have less powers than executors would have, then administration should be granted. This is neither of those cases, but this is a case where a person is not appointed an executor in terms, but where the court infers from the terms of the will that the testator intended to appoint the person as executor, or, as we say, executor according to the tenor. I would only add that in case of a foreign will it is, perhaps, necessary for the court to see more clearly the intention of the testator to constitute executors. Therefore I make the grant to the widow as executrix according to the tenor, and, following my practice in *In the Goods of Lemme*, probate will be granted of the copy of the will until such time as the original will is brought in.

Motion allowed.

Solicitors, *Clarke, Rawlins, & Co.*, for *Percival & Son*, Peterborough.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.) [and Q. B. Div.] — March 24; May 4.

REG. *v.* SODEN. (*a.*)

Election law — Parliament — Franchise — Registration — Adjudication upon claims and objections — Closing the lists — 6 & 7 Vict. c. 18, s. 41.

A revising barrister gave notice that his court would be held on two successive days, and that the lists would be closed at the conclusion of the sitting on the second day. On the evening of the second day, having satisfied himself that there were no more claimants or persons objected to present who were desirous of being heard, he declared the lists closed. On the following day the revising barrister sat in court to read the lists and to initial names inserted or expunged. Whilst this was being done a person applied to be heard in support of his claim to be on the list.

Held, that the lists having been declared closed, the applicant had no right to be heard in support of his claim.

Rule *nisi* calling upon the revising barrister for East Leeds to show cause why a *mandamus* should not issue to him to hear and determine an application by John Kelly to be placed on the list of Parliamentary electors and the burgess list for the city of Leeds or to state a case.

The revising barrister filed an affidavit in which he stated that he had given notice that he would hold his court at the Town Hall, Leeds, on the 16th and 17th of September, 1895, for the revision of the lists of Parliamentary electors and burgesses of the East Division of Leeds, and that the lists would be closed at the conclusion of the sitting on the 17th of September. The revising barrister held his court on these two days, and at 8 p.m. on the 17th of September, having been informed by the agents of the respective political parties, and having satisfied himself from inquiries made in open court, that there were not then present any more claimants or persons objected to, he declared in open court that the lists were closed. On the following day he sat in open court in order to read out and write his initials against the names expunged from or inserted in the list, in accordance with 6 & 7 Vict. c. 18, s. 41, and 28 & 29 Vict. c. 36, s. 15.

The applicant, John Kelly, was not present either on the 16th or 17th of September, but was in court on the 18th, and when his name was read out he desired to be heard in support of his claim.

The revising barrister declined to hear him or to state a case.

W. Graham, for the revising barrister, showed cause against the rule.—6 & 7 Vict. c. 18, s. 41, provides that the barrister shall, upon the hearing in open court, finally determine upon the validity of claims and objections. In this case the hearing took place on the 16th and 17th of September. At the closing of the lists on the latter day all claims and objections had been finally determined. 28 & 29 Vict. c. 36, s. 15, provides that the revising barrister, before signing the list, shall read out "the names expunged and inserted," which shows that the decision must have been given on the previous day. The sitting on the 18th, although required by statute to be in open court, was for the purpose of doing the clerical work only. In any case, it would be futile to grant a *mandamus*, because there are no means of altering the register which is now in force: see 6 & 7 Vict. c. 18, s. 49. The register can only be altered after a special case; but the court will not grant a case here, for there is no point of law to raise. The question simply is whether a revising barrister has power to arrange how the business of his court shall be conducted.

He cited *Brumfitt* v. *Bremner*, 9 W. R. 144, 30 L. J. C. P. 30.

Mattinson, Q.C. (*Sylvain Mayer* with him), in support of the rule.—The revising barrister has refused to hear the evidence in support of Kelly's claim, and therefore the *mandamus* ought to go. The validity of Kelly's claim was not finally determined on the 17th of September within the meaning of 6 & 7 Vict. c. 18, s. 41, for it was not until the 18th that his name was first called out. On that day the name was still on the list: it had not been struck out, and the revising barrister had not, in fact, delivered judgment upon the claim.

(*a.*) Reported by F. O. ROBINSON and W. F. BARRY, Esqs., Barristers-at-Law.

He cited *Mayor of Rochester* v. *The Queen*, 27 L. J. Q. B. 434; *Reg.* v. *Mayor of Monmouth*, L. R. 5 Q. B. 251, 18 W. R. Dig. 19.

LAWRANCE, J.—I am of opinion that this rule should be discharged. The sole point is whether a revising barrister has the right to manage the business in his own court. It is contended on behalf of the applicant that at any time prior to the actual moment when a claimant's name is struck off the list he has a right to appear before the revising barrister and have the claim heard. On the other hand, it is said that the revising barrister has power to make arrangements for the transaction of the business of his court. In this case the barrister gave notice that he would hold his court on the 16th and 17th of September, and that the list would be closed on the 17th. That was done, and by eight o'clock on the 17th the claims and objections of all persons who had attended the sitting of the court had been determined by the barrister in accordance with 6 & 7 Vict. c. 18, s. 41, and the barrister then declared the list closed. On the following day the revising barrister sat in open court in order to initial the names which had been inserted or expunged, and the only question in this case is whether a person could then come, while the list was being initialled, and put forward a claim. In my opinion there is no such right as is contended for. In large towns, where the lists are very long, it would be impossible ever to get through the business if claims and objections were being put forward while the list was being read and initialled. The applicant in this case did not appear when the court was being held, and that being so he has no right, in my opinion, to appear in support of his claim after the list has been closed and when the purely clerical work is being done.

COLLINS, J.—I am of the same opinion. I am clear that no case has been made out either for a *mandamus* or a special case, and I have very little to add to the reasons given by Lawrance, J. The practice which has been adopted by the barrister is one entirely in the interests of the public, for it would be most inconvenient if all persons with claims had to sit in court while lists of enormous length were being read, and to have their claims dealt with intermittently. Mr. Soden therefore very properly laid down the rule that he would on the first two days deal in open court with the claims and objections, and then when he had disposed of all the cases in court he would deal with the clerical work. When the revising barrister closed the list he had adjudicated on all the claims and had finally decided against the claims of all persons who had not attended the court and supported their claims. The next day this final decision was formally recorded in the manner provided by the statutes, but after the revising barrister had declared his decision by closing the list no one had a right to be heard, although the purely formal work still remained to be done.

Rule discharged.

The applicant appealed.

May 4.—*Mattinson, Q.C.*, and *Sylvain Mayer*, for the appellant.

W. Graham, for the respondent, was not called upon.

Lord ESHER, M.R.—It seems to me that the revising barrister has in this case followed the ordinary course adopted by revising barristers generally. He had given due notice of the days on which he was going to sit for the purpose of revising the lists for the East Division of Leeds, and he had given notice that the lists for that division would close on the evening of the last day. Accordingly, at the close of the sitting on the evening of the last day the revising barrister asked the agents on both sides whether there were any more claimants or persons objected to present who desired to be heard, and he was told that there were none. He also made inquiries in open court, and no one came forward to be heard. Therefore the agent who acted for the appellant said in effect that the appellant was not present and did not desire to be heard. The revising barrister thereupon declared the lists closed. That was in effect a decision that the name of the appellant should be struck out. The next day the revising barrister had only to go through the manual labour of initialling the names inserted or struck off, and such like work. The appellant had no right to be heard then, and the *mandamus* was rightly refused.

A. L. SMITH, L.J.—I am of the same opinion. The revising barrister gave due notice that he would hold his court on Monday and Tuesday, the 16th and 17th of September, to revise the lists, and that the lists would close on the evening of Tuesday. On Tuesday evening accordingly he asked the agents and made inquiries in open court whether anyone else desired to be heard in support of his claim, and no one applied to be heard. On the next day he initialled the names inserted or struck out. Thereupon the appellant applied to have his claim heard and adjudicated upon. The revising barrister refused to hear him, and in my opinion he was not entitled to be heard then. I can see no ground for this application for a *mandamus*.

RIGBY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the revising barrister, *Hickin, Smith, & Capel Cure.*

Solicitors for the applicant, *A. Scott Lawson*, for *Walter & E. H. Foster*, Leeds.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — April 30.

WILLSON *v.* LOVE. (*a*.)

Landlord and tenant—Lease—Stipulation for payment of additional rent of £3 per ton by way of penalty for every ton of hay or straw sold off the premises—Material difference between manurial value of hay and straw—Penalty—Liquidated damages—Stipulations of varying importance.

A lease of a farm contained a stipulation that the lessee should pay additional rent at the rate of £3 per ton by way of penalty for every ton of hay or straw which should be sold off the premises during the last twelve months of the tenancy. It was proved that there was a material difference between the manurial value of hay and the manurial value of straw.

Held, that the sum of £3 per ton was a penalty, and could not be recovered as liquidated damages.

Wright *v.* Tracey, 7 *Ir. R. C. L.* 134, *not followed.*

Application for a new trial or judgment.

The plaintiffs were the executors of the lessor of a farm, and the defendants were the executors of a deceased lessee and the surviving lessee. The action was brought on the expiration of the lease to recover liquidated damages at the rate of £3 per ton for hay or straw sold off the farm during the last twelve

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

months of the tenancy, or in the alternative for unliquidated damages for breach of covenant.

The lease was expressed to be for a term of twenty-one years at a certain rent payable by half-yearly payments, and contained the following clause: "And also yielding by like half-yearly payments the additional rent of £3 per ton by way of penalty for every ton of hay or straw which shall be sold off the premises during the last twelve months of the tenancy, provided also that for every ton of hay or straw so sold off the premises before the lastly hereinbefore mentioned twelve months the lessees shall bring an equivalent in manure on the land."

The lease also contained a covenant on the part of the lessees that they would not during the last twelve months of the tenancy sell or dispose of or carry away any hay, straw, grass, clover, turnips, or fodder, which should grow upon or be produced from the demised premises or any part thereof, but would spend and consume the same upon the said premises.

The action was tried before Collins, J., and a jury. It was admitted that the defendants had sold hay and straw off the premises, and the defendants had paid into court the sum of £62 10s. The learned judge, being of opinion that the sum of £3 per ton mentioned in the lease was a penalty and not liquidated damages, left to the jury the question what was the manurial value of the hay and straw sold off the premises. Evidence was given showing that the manurial value of hay was from 15s. to £1 per ton, and the manurial value of straw was 4s. or 5s. less. The jury, having found that the manurial value was £60, judgment was entered for the defendants.

The plaintiffs asked for a new trial or judgment on the ground that the learned judge had misdirected the jury on the question of damages. They contended that the sum of £3 per ton was liquidated damages, and that they were entitled to damages at that rate.

Forbes, Q.C., and *H. F. Manisty*, for the plaintiffs.

Channell, Q.C., and *W. A. Meek*, for the defendants.

The following cases were cited: *Kemble* v. *Farren*, 6 Bing. 141; *Astley* v. *Weldon*, 2 B. & P. 346; *Magee* v. *Lavell*, 22 W. R. 334, L. R. 9 C. P. 107; *Sainter* v. *Ferguson*, 7 C. B. 716; *Wright* v. *Tracey*, 7 Ir. R. C. L. 134, 21 W. R. Dig. 132; *Dimech* v. *Corlett*, 12 Moore, P.C., at p. 229, 7 W. R. H. L. Dig. 10; *In re Newman, Ex parte Capper*, 25 W. R. 244, 4 Ch. D. 724; *Wallis* v. *Smith*, 31 W. R. 214, 21 Ch. D. 243; *Lord Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Cas. 332, 35 W. R. Dig. 68.

LORD ESHER, M.R.—The question is whether the sum of money in dispute is a penalty or liquidated damages. It is clear that if it is liquidated damages, there was nothing to be done but for the jury to give a verdict for that sum; but if it is a penalty, then it would be the duty of the jury not to give a verdict for that sum, but to determine the true damages to which in their opinion the plaintiff was entitled. It is equally clear that the question whether it was a penalty or liquidated damages was for the judge, though any facts which it might be necessary for him to know in order to determine that question might be left by him to the jury. He had to determine the question on the construction of the lease, and a fact which it was necessary for him to know was whether there was any difference between the manurial value of hay to be consumed on the farm and the manurial value of straw to be consumed on the farm. It was shown that there was a difference—viz., a difference of 5s. a ton. The learned judge thought that it was a material difference, and, inasmuch as by the terms of the lease the sum of £3 a ton was to be paid whether there was a breach with regard to hay or a breach with regard to straw, he held that the sum was a penalty. The parties themselves say that the sum is to be paid as additional rent by way of penalty. It is argued that it ought to be considered as rent, and treated as such. The contention is that it is not expressed to be payable as a penalty, but merely by way of penalty. I cannot see the distinction which is sought to be drawn. That, however, is not decisive. If we were now laying down the law on the subject for the first time, I should be disposed to say that we ought to keep the parties to what they have said, and that as they have called the sum a penalty, it ought to be treated so. But it has been held that the use of the word "penalty" is not conclusive, and that the circumstances are to be looked at. No case, however, says that the words used are to be disregarded.

I think it is true that there is no absolute decision on the point now before us except the Irish case of *Wright* v. *Tracey*. But there is a series of *dicta* of great judges on the question. In *Wallis* v. *Smith* Jessel, M.R., went through them all and criticised them, and showed that he did not agree with them. His opinion was that the parties ought to be bound by the words which they had used. But since then the point has been before the House of Lords in the case of *Lord Elphinstone* v. *Monkland Iron and Coal Co.* I think that they did not actually decide the point now before us, but it seems to me that they followed the previous *dicta* of which Jessel, M.R., had disapproved. Lord Watson said: "When a single lump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification." If, instead of "trifling damage," he had said "less substantial damage," then I think his statement would support the previous *dicta*. Lord Herschell said: "The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled." In the present case there is a substantial difference between the two obligations for the breach of which compensation is to be paid; yet the same sum is payable in the event of the breach of either. Therefore I think that it is a penalty, and not liquidated damages. We are not bound by the Irish case; and, in my opinion, the appeal must be dismissed.

A. L. SMITH, L.J.—The lease contains a covenant that if the tenant shall remove hay or straw during the last twelve months of the tenancy he shall pay additional rent at the rate of £3 per ton by way of penalty. The defendant says that this sum cannot be recovered as liquidated damages, but that the plaintiff must show the damage which he has actually suffered. I have no doubt that the covenant ought to be so construed. There are two separate stipulations, one as to hay, the other as to straw, and evidence was given showing these stipulations to be of varying importance; and I take it to be the law that where one sum is fixed for breach of stipulations of varying importance that sum is *primâ facie* to be treated as a penalty. I do not think that the use of the word "penalty" in the covenant is conclusive; but when, as seems to me to be the case here, the circumstances show that the sum is one which the courts treat as a penalty, the fact of that word being used by the parties seems to me to make the case stronger.

RIGBY, L.J.—I have not so clear an opinion on this question as the other members of the court. It is a question on which learned judges have taken different views. In my opinion the courts have gone wrong in departing from the principle of giving effect to the intention of the parties in construing written agreements. The result has been that it is now impossible to reconcile the various decisions in accordance with any principle. The conclusion to which I have come is that I do not feel able to dissent from the judgment of Collins, J., in this case, though I confess that I have a good deal of doubt on the matter.

Appeal dismissed.

Solicitors for the plaintiffs, *Wilmer & Reeves*, for *A. W. Granger*, Durham.

Solicitors for the defendants, *Cunliffe & Beaumont*, for *Wilson, Ornsby, & Cadle*, Durham.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith, and Rigby, L.JJ.) April 21.

KISSAM *v.* LINK. (*a.*)

Banker—Inspection of banker's book—Banker resident in Scotland—Jurisdiction—Bankers' Books Evidence Act, 1879 (42 *Vict. c.* 11), *s.* 7.

The English court has jurisdiction under section 7 of of the Bankers' Books Evidence Act, 1879, *upon an application made in an English action, to order inspection of a banker's books where the banker is resident in Scotland.*

Appeal from an order made by Cave, J., at chambers.

This was an application by the plaintiff under section 7 of the Bankers' Books Evidence Act, 1879, for liberty to inspect and take copies of entries in the books of the Union Bank of Scotland (Limited), of Glasgow, containing the account of the defendant.

The application was granted by the master, but his order was reversed by Cave, J., on the ground that there was no jurisdiction to make such an order on a Scotch bank.

The plaintiff appealed.

A. T. Lawrence, for the plaintiff.—By the terms of section 7 the application can only be made by a party to a legal proceeding; and section 10 shows that the court to which the application is made must be the court in which the legal proceeding is held or taken. Therefore in this case the order can only be made by the English court. There is nothing in the Act which says that the order cannot be made by an English judge when the banker is resident in Scotland.

C. C. Scott, for the defendant.—There is no jurisdiction to make the order. The banker must be a banker over whom the court has jurisdiction. The Act does not provide any machinery by which an order could be enforced against a Scotch or Irish banker; and the court will not make an order which cannot be enforced.

Lord ESHER, M.R.—The question is whether an English judge may make an order under the Bankers' Books Evidence Act on a banker resident in Scotland. The interpretation clause says that the expression "a judge" in the Act means, with respect to England, a judge of the High Court of Justice. I think that the meaning of that is that where the cause is in England the order is to be made by a judge of the High Court. There is no limit in the Act as to where the banker may be resident. Therefore, where the cause is in England, the order may be made by a judge of the High Court, though the banker be resident in Scotland.

I therefore think that the appeal must be allowed.

A. L. SMITH, L.J.—I am of the same opinion. This is an application under section 7 of the Bankers' Books Evidence Act, which says that "on the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings." Section 10 says that "the court" means the court, judge, arbitrator, persons, or person before whom a legal proceeding is held or taken; and "a judge" means with respect to England a judge of the High Court of Justice, and with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a judge of the High Court of Justice in Ireland. Further, the judge of a county court may, with respect to any action in such court, exercise the powers of a judge under the Act. The Act clearly applies to Scotland and Ireland; and in my opinion, where the action is proceeding in England, the order may be made by an English judge on a banker who may be resident in Scotland or Ireland.

It is said that there is no machinery provided by the Act by which an order if made against a Scotch or Irish banker can be enforced. I am not at all sure that that is correct. But however that may be, I think that there is power to make the order.

RIGBY, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiff, *C. F. Martelli.*

Solicitor for the defendant, *R. Davies.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) March 24.

DARBYSHIRE *v.* LEIGH. (*a.*)

Practice — Pleading — Document — Contents — Effect — Sufficiency—R. S. C., 1883, *ord.* 19, *r.* 21.

The statement of claim in an action for the recovery of land contained the following paragraph: "By the will of the said H. L., made on the 27th of February, 1785, and duly proved on the 18th of July of that year, the said M. L. became entitled to the said estates in fee in reversion on the determination of certain estates tail limited in the said will."

Held, that the paragraph was properly pleaded under ord. 19, *r.* 21, *and that it was not necessary to set out the precise words of the will.*

Appeal from an order of Lawrance, J., that a paragraph in a statement of claim should be struck out as embarrassing.

The statement of claim in an action for the recovery of land alleged that in 1728 Mary Taberner was seised in fee and in possession of certain lands and hereditaments, and that in 1765 Mary Taberner married Holt Leigh, and they jointly levied a fine of the said estates to certain uses limited therein.

The 4th paragraph was as follows: "By the will

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

of the said Holt Leigh, made on the 27th of February, 1785, and duly proved on the 18th of July of that year, the said Mary Taberner or Leigh became entitled to the said estates in fee in reversion, on the determination of certain estates tail limited in the said will."

The statement of claim then alleged that the last of the said estates tail was determined by failure of the issue of the said Holt Leigh in or about the month of June, 1868, and that the plaintiffs were entitled in fee as heirs at law of the said Mary Taberner or Leigh. The plaintiffs claimed possession of the said estates.

The defendants took out a summons under ord. 19, r. 27, asking that the 4th paragraph of the statement of claim might be struck out as embarrassing, inasmuch as it did not sufficiently set out the words of the will.

Lawrance, J., having ordered that the paragraph should be struck out unless it was amended within a certain time, the plaintiffs appealed.

C. A. Russell, for the plaintiffs.

Ambrose, Q.C., and *R. Eaton White*, for the defendants.

Lord ESHER, M.R.—In this case the question is whether the plaintiff has pleaded improperly so as to make it right that the judge should order part of his statement of claim to be struck out. That seems to me to depend on whether he has followed the terms of ord. 19, r. 21, which says that "wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material." In the case of *Philipps* v. *Philipps*, 27 W. R. 436, 4 Q. B. D. 127, things were said, which, I think, throw light on the meaning of that rule. A distinction was drawn between two kinds of facts—viz., facts which it is necessary for a party to prove in order to support his case, and facts which are evidence of those necessary facts. In pleading, as a general rule, the party ought to state the facts which it is necessary for him to prove. Rule 21 deals with facts which are evidence of the facts which have to be proved. The question is how to deal with a document which is evidence of facts to be proved. The rule says that it is sufficient to state the effect thereof as briefly as possible. That is the general rule, to which there is this exception: "Unless the precise words of the document or any part thereof are material." This exception refers to cases of libel, and although in my opinion we ought not to say that it is confined to libel, still I think that the cases other than libel in which the precise words of a document are material, must be very few. But are the precise words material here? I think not. The effect of the document is material, and the plaintiff, having stated the effect, has not broken the rule. The case of *Philipps* v. *Philipps* is not against our present decision. The paragraph in question is properly pleaded, and ought not to be struck out. The appeal must therefore be allowed.

LOPES and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiffs, *Cartwright & Cunningham, for Donnison & Edwards*, Liverpool.

Solicitors for the defendants, *White, Borrett, & Co.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) March 23.

KEMP AND ANOTHER v. LESTER. (*a*.)

Practice—Writ—Specially indorsed writ—Action for recovery of land—Landlord and tenant—Mortgagor attorning tenant to mortgagee — Tenancy at will — Ord. 3, r. 6 (f); ord. 14, r. 1.

By a mortgage deed the mortgagor attorned tenant to the mortgagee from year to year, there being a clause in the deed that the mortgagee might at any time, without giving any previous notice of his intention to do so, enter upon and take possession of the premises and determine the tenancy created by the attornment. The mortgagee having brought an action to recover possession of the premises,

Held, that the tenancy created by the attornment clause was a tenancy at will which the mortgagee could determine at any time; that the claim to possession was not based on a forfeiture; and that the writ could be specially indorsed under ord. 3, r. 6 (f), and judgment for possession signed under ord. 14, r. 1.

Arden *v.* Boyce, 42 *W. R.* 354, [1894] 1 *Q. B.* 796, *distinguished.*

Appeal from an order of Cave, J., at chambers giving the plaintiffs leave to sign final judgment for possession under ord. 14, r. 1.

The writ was indorsed with a claim for possession of certain premises and mesne profits. The defendant by deed mortgaged the premises to the plaintiffs to secure the repayment of £2,500, with interest at the rate of 4 per cent. per annum. By the deed the defendant attorned tenant of the premises from year to year to the plaintiffs at the annual rent of £100, payable half-yearly; and the deed also provided that the plaintiffs might at any time, without giving any previous notice of their intention so to do, enter upon and take possession of the premises, and determine the tenancy created by the aforesaid attornment.

Default having been made in payment of the interest, the plaintiffs brought this action, and applied for leave to sign final judgment under ord. 14, r. 1. Cave, J., made the order as asked.

The defendant appealed.

Montague Lush, for the defendant.—This case does not come within ord. 3, r. 6 (*f*), and therefore the writ cannot be specially indorsed. This is an action to recover possession founded on a forfeiture, and *Arden* v. *Boyce*, 42 W. R. 354, [1894] 1 Q. B. 796, shows that ord. 3, r. 6 (*f*), does not apply to such a case. The attornment in the mortgage deed created a tenancy from year to year, and the subsequent clause giving the mortgagee power to retake possession at any time was a forfeiture of the tenant's estate. Further, assuming that a tenancy at will was created by the attornment clause, such a tenancy does not come within ord. 3, r. 6 (*f*), as it is not a tenancy for a "term which has expired": *Daubuz* v. *Lavington*, 32 W. R. 772, 13 Q. B. D. 347; *Hall* v. *Comfort*,, 35 W. R. 48, 18 Q. B. D. 11; *In re Willis, Ex parte Kennedy*, 36 W. R. 793, 21 Q. B. D. 384.

A. T. Toller, for the plaintiffs, was not called upon.

Lord ESHER, M.R.—In *Arden* v. *Boyce* it was decided that ord. 3, r. 6 (*f*), does not apply to a case where the determination of the term is brought about by a forfeiture. The question therefore is whether there was in this case a determination of the term by a forfeiture. There is a clause in the mortgage deed

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

whereby the mortgagor attorns tenant to the mortgagee from year to year. But there is also a subsequent clause which gave the mortgagee power, without there being any default on the part of the mortgagor, to enter upon and take possession of the premises at any time without giving previous notice. This latter clause is entirely independent of any forfeiture. Accordingly the decision in *Arden* v. *Boyce* does not apply, and judgment can be signed under order 14.

LOPES, L.J.—I am of the same opinion. In *Arden* v. *Boyce* this court held that ord. 3, r. 6 (*f*), does not apply to a case in which the right to eject is based upon a forfeiture. In the present case the mortgagee seeks to eject the mortgagor, simply because the relationship of landlord and tenant has determined. True, one clause in the mortgage deed says that the mortgagor is to be a tenant from year to year. But by a subsequent clause the mortgagee might at any time, without giving any notice, enter upon and take possession of the premises, and determine the tenancy. That is to say, the mortgagor was made tenant at the will of the mortgagee, the landlord. The landlord has determined the tenancy as he was entitled to do, and there has been no forfeiture, and the decision in *Arden* v. *Boyce* does not apply.

RIGBY, L.J.—I am of the same opinion. The law takes no notice in general of the length of a term of years. A term does not give the seisin. It merely gives the possession as long as the term continues. The word "term" signifies a right to possession until the term comes to an end. The term may be for 1,000 years, or for any other fixed period, or during the will of the landlord. But in each case the term is of the same quality in the eye of the law. The decision in *Arden* v. *Boyce* was founded upon a principle which had been established by a long course of practice at chambers under ord. 3, r. 6 (*f*), and the previous statutory enactments containing similar words, that the court will not give a summary judgment in cases where an action for the recovery of land is based upon a forfeiture. A forfeiture is founded upon some default. In the present case there was no default whatever. It was agreed under the terms of the mortgage deed that there should be a tenancy from year to year, subject to a very important condition that the tenancy could be put an end to at any time without any precious notice, and without any default on the part of the tenant. The landlord determined the tenancy under the provisions of that clause. There was therefore no forfeiture. It would be strange, indeed, if a tenant for 1,000 years would, at the determination of the term, be liable to have judgment for possession entered against him under order 14, while a tenant at will would, on the determination of his tenancy, have a higher right.

Appeal dismissed.

Solicitors for the plaintiffs, *Field, Roscoe, & Co.*, for *Stone, Billson, Willcox, & Dutton*, Leicester.

Solicitor for the defendant, *L. Kirkman*, for *Bulman*, Leicester.

From Lancaster Palatine Court of Chancery. Lindley, Kay, and A. L. Smith, L.JJ.) March 5, 6.

KENNEDY *v.* DE TRAFFORD. (*a*.)

Mortgage — Power of sale — Mortgage by tenants in common — Sale by private tender to one of mortgagors for exact amount of mortgage debt — Other mortgagors not informed of sale — Validity of sale.

A mortgagee is not a trustee of a power of sale for the mortgagor, and is entitled to look after his own interests first, provided that he does not fraudulently, wilfully, or recklessly sacrifice the property of the mortgagor.

A sale under the ordinary power of sale in a mortgage was made by the mortgagee, by private contract to one of several of the mortgagors, at a price exactly equal to the amount of the principal interest and costs, but without the knowledge or consent of the other mortgagors;

Held, that such a sale was not necessarily invalid; and it appearing that an out and out sale was in fact intended, and that the mortgagee had previously given all the mortgagors the fullest opportunity of obtaining a transfer of the mortgage or of selling, if they could, the transaction was upheld as a valid sale to—not a mere redemption by—one of the several mortgagors.

Dictum of Lindley, L.J., *in* Farrar *v.* Farrars (Limited), 37 *W. R.* 196, 40 *Ch. D.* 395, *explained.*

Appeal from the Vice-Chancellor of the Duchy of Lancaster.

On the 1st of March, 1877, certain property in Manchester was mortgaged to Sir H. de Trafford by two tenants in common, Dodson and Carswell, to secure £60,000. The mortgage contained a power of sale in the usual form.

Sir H. de Trafford, the mortgagee, died on the 4th of May, 1886, and on the 9th of August, 1886, one of the mortgagors, Carswell, became bankrupt.

From the year 1883 the mortgagee's solicitor, Mr. Taylor, began to ask to have the mortgage money reduced, and on the 4th of November, 1886, after the bankruptcy of Carswell, notice calling in the mortgage was served. Various propositions were subsequently made for the reduction of the mortgage, but no part of it was paid off. On the 9th of January, 1888, the plaintiff, Dr. Kennedy, became the trustee in Carswell's bankruptcy. In May, 1888, Mr. Taylor was informally advised that the security was insufficient for a loan of £60,000, and he again pressed for payment, threatening foreclosure. Upon this there was further correspondence with a view to finding a purchaser, but nothing was done. In August, 1888, the plaintiff put up Carswell's moiety in the equity of redemption for sale, but there was no bid. On the 10th of August Taylor wrote a letter to Kennedy to the effect that the mortgagees intended to deal with the property as they pleased without further notice to him. That letter was not answered. In November, 1888, Mr. Taylor advertised the mortgaged property for sale by tender. No tenders, however, were made. Dodson received the rents of the property, paying the outgoings and the interest on the mortgages. Subsequently to Carswell's bankruptcy Dodson applied some part of the rents in reduction of the mortgage debt, which was then reduced to £58,123 5*s*. Dodson, one of the mortgagors (without the knowledge or consent of Kennedy), then offered to buy the property for £58,806 if the mortgagee would accept from him a mortgage for £54,000. This offer was ultimately accepted, and on the 16th of May, 1889, the pro-

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

perty was conveyed to Dodson for £58,806, Dodson paying the £4,000 odd in cash and giving a mortgage for the balance.

This sale first came to the plaintiff Kennedy's knowledge in September, 1891, but from that date to May, 1895, he took no steps to impeach the transaction. During that time, however, he had brought an action against Dodson claiming, on the footing of partnership, to be entitled, as representing Carswell, to one-half of the profits made by the sale.

Kennedy now brought this action against the mortgagee to set aside the sale, and the Vice-Chancellor, being of opinion that reasonable precautions to obtain a proper price had not been taken, declared the sale to be invalid.

The defendants, the executors of Sir H. de Trafford; and Dodson, appealed.

Warmington, Q.C., and *Clarkson*, for the executors of Sir H. de Trafford. The mortgagees are not charged with want of *bonâ fides*, and there is no ground for avoiding the sale.

They referred to *Warner* v. *Jacob*, 30 W. R. 731, 20 Ch. D. 220; *Farrar* v. *Farrars (Limited)*, 37 W. R. 196, 40 Ch. D. 395; and *Davey* v. *Durrant*, 1 De G. & J. 535, 6 W. R. Ch. Dig. 45.

Astbury, Q.C., and *G. Dodson*, for the appellant Dodson.—There was no fiduciary relationship between Dodson and Kennedy. [They were stopped by the court.]

Farwell, Q.C., *P. O. Lawrence, Q.C.*, and *Maberly*, for the respondent.—The mortgagees did not take sufficient precautions to get a proper price: *Warner* v. *Jacob*; *Farrar* v. *Farrars (Limited)*; *Colonial Securities Trust Co.* v. *Massey*, *ante*, p. 212, [1896] 1 Q. B. 38. One of two co-mortgagors cannot buy the mortgaged property and so gain an advantage over the other mortgagor. This was a redemption, not a sale.

They referred to *Pearce* v. *Morris*, 18 W. R. 196, L. R. 5 Ch. App. 227; *Magnus* v. *Queensland National Bank*, 35 W. R. 752, 36 W. R. 577, 36 Ch. D. 25, 37 Ch. D. 466; *Adams* v. *Angell*, 5 Ch. D. 634, 25 W. R. Dig. 163; *Otter* v. *Lord Vaux*, 5 W. R. 188, 6 De G. M. & G. 638; *Van Horne* v. *Fonda*, 5 John's Ch. Rep. (N.Y.) 388, Kent's Commentaries, 12th ed., vol. 4, p. 371 (c); *Keech* v. *Sandford*, 1 White and Tudor, L.C., 6th ed., p. 53; *Palmer* v. *Young*, 1 Vern. 276; *Hamilton* v. *Denny*, 1 Ball & B. 199.

LINDLEY, L.J.—This is an appeal against an order made by the Vice-Chancellor of the Duchy of Lancaster, declaring a sale by mortgagees under their power of sale to be invalid, and giving consequential relief; and the question, and the only question, raised on this appeal is whether that judgment is right or whether it is wrong.

The mortgage containing the power of sale which has been exercised, was a mortgage by two tenants in common of property in Manchester for £60,000, and the sale was by the mortgagee's executors. The power of sale contained in the mortgage deed was in the usual form, and the proviso for redemption was in the usual form; there was a provision that six months' notice was to be given before exercising it, and that condition was complied with. I merely mention that to show that the mortgage contained the usual powers of sale, and there was nothing special about it.

Now, what the mortgagees did (and I will state shortly the circumstances which led to it) was this. In May, 1889, they purported to sell this property under that power of sale to one of the mortgagors for the amount of principal and interest and costs. That is the transaction complained of. Mr. Farwell has invited us to affirm a proposition, which is entirely new to me, and which, of course, we have considered—that is, that such a transaction as this cannot stand in point of law; that is to say, that if several tenants in common of property mortgage that property, and confer upon the mortgagee a power of sale, a sale to one of the mortgagors for principal, interest, and costs, cannot be maintained under any circumstances, or, at all events, without the consent of, or notice to, the other mortgagor or mortgagors. Of course, if that is right, away goes this sale, because this was precisely a sale of that description. But is that proposition right? As I say, it has the merit of novelty; there is no authority discoverable in support of it, and on principle it appears to me to be untenable. Just consider how it acts upon the mortgagee—how such a doctrine as that would fetter the mortgagee in the exercise of his power of sale. It might be, and I think this case is itself an illustration of it, that if that doctrine were enforced, the mortgagee never could enforce his power of sale at all. I am not aware of any such authority or of any principle which goes that length. The mortgagee is entitled to sell to anybody who can buy, dealing, of course, fairly and properly in the ordinary way. I see no ground whatever for excluding any mortgagor if there happen to be several. It may be one of the very best protections for the mortgagee that he should be able to sell to such a person, if he cannot find a better purchaser. Now, upon that broad point I do not think this appeal can succeed, and, so far as I can see, that broad point was not even submitted to the Vice-Chancellor. He has not alluded to it in any way, as I take it for granted he would have done, if only for the ingenuity and the novelty of it.

But now we leave that, and treat this as a possible exercise of the power of sale. I want now to see whether there is any other ground for impeaching it. Mr. Farwell has suggested that this is merely a redemption by one mortgagor in disguise. The answer to that, I think, is to be found in the facts. Of course it might be so, there is no reason why it could not. But if you look at the facts it is quite obvious that Mr. Dodson, who was the purchaser, was not redeeming, and was not in a position to redeem. The mortgagees never would have got a farthing out of him upon any theory of redemption; unless he had become a purchaser, nothing would have led him to pay off the mortgage, and it is not in accordance with the facts to say that this was a redemption. I am not prepared to say that it is impossible, in point of law, for a mortgagor, or one of several mortgagors, to buy at the particular price which would enable the mortgagee to satisfy himself. If we cannot go that length, it would be absurd, it strikes me, to say that if it was £5 more or £5 less the doctrine would not apply. If it is a sale, I do not think there is anything to compel us to say that it must be a redemption. But was it a sale? I think the evidence is conclusive that it was. Both parties intended it to be a sale, and for the best possible reason—that redemption could not have been got.

Now, upon what ground can the sale be impeached? The Vice-Chancellor begins his judgment by referring to the cases of *Warner* v. *Jacob* and *Farrar* v. *Farrars (Limited)*, which contain the principles applicable to this case, and then he says: "Now, in this case it is not suggested that the mortgagees did not act *bonâ fide*; and it is not suggested that there was any corruption or collusion on their part, or that the sale itself was at an under value so gross as to be in itself evidence of fraud." If that is so, and I believe every word of it, upon what ground can the sale be set aside? It is very difficult indeed to see; but by following the Vice-Chancellor's judgment I think I do see, what led him to set it aside. He was led,

and I think a little misled, by some language which I used in the case of *Farrar* v. *Farrars* (*Limited*), which is as follows: "If in exercise of his power he"—that is, the mortgagee—"acts *bonâ fide*, and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even though more might have been obtained for the property if the sale had been postponed." Now, the Vice-Chancellor has come to the conclusion, in the present case, that reasonable precautions to obtain a proper price were not used. I find from my colleagues who took part in the judgment in *Farrar* v. *Farrars* (*Limited*), and who approved of it, that the reason why those words were added was this. A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right or proper or legal for him, either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor—that is all. If it could be said in this case that Mr. Taylor, who was the solicitor acting for the mortgagees, had done any of those things, I can understand setting aside the sale; but upon the facts it appears to me that, instead of not taking reasonable precautions, in the sense in which those words are used, to obtain a purchaser at a good price for this property, Mr. Taylor has, from first to last, acted like an honourable, upright, and businesslike man; attending, of course, to the interests of his clients, but, in my judgment, not in the least sacrificing the interests of the mortgagors. It is impossible to read the correspondence through, beginning as it does in 1879 and running down to 1895, to nearly the commencement of this action, without seeing that Mr. Taylor gave these mortgagors every possible opportunity of transferring or reducing the mortgage, or of selling, if they could. [His lordship stated the facts, and continued:—] Accordingly, on the 16th of May, 1889, the property is conveyed to Dodson for £58,806, of which Dodson pays £4,000 odd down, and gives a mortgage for the balance, £54,000. That is the transaction impeached.

It is impeached on the broad ground which I have dealt with already; and now I will consider whether upon some narrower ground it can be set aside. It has been said that it was the duty of the mortgagees to inform Dr. Kennedy of this negotiation of Dodson for the sale. I confess I do not see that there is any such duty. It is said, and said truly, that Dodson said to the mortgagees: "Do not mention my name." Very likely, but how does that affect the *bona fides* of the mortgagees or the validity of the transaction? The real truth is, I suppose, that the creditors, or Dr. Kennedy on behalf of the creditors, have found out now that the property is worth more, and they are annoyed that Dodson, the co-mortgagor, should obtain that benefit.

No inquiry seems to have been made at the time by Kennedy; but in September, 1891—that is more than two years after the sale—Dr. Kennedy's solicitors write to Mr. Taylor making inquiries about it, and seeking to redeem, and they are told that the property was sold long ago. That is important, because in 1891 they knew all about the matter, what the sale was, and what the price was. From September, 1891, down to May, 1895, not a step is taken to impeach this transaction. Not only does Dr. Kennedy refrain from taking any step impeaching the transaction; but he brings an action against Dodson, the co-mortgagor, which is only intelligible upon the theory that the sale is affirmed. He says to Dodson: "You are the partner of the bankrupt, and I, as representing the bankrupt, am entitled to one-half of the profit you have made by that sale." So five years pass with full knowledge on the plaintiff's part of all the facts, no attempt to impeach the transaction, and a step taken which is utterly inconsistent with the invalidity of the sale. After that delay and election to abide by the transaction, with that full knowledge of the facts, I should have said this action was utterly hopeless.

But, quite apart from that, I think it only due to Mr. Taylor to say that I am distinctly of opinion that if this action had been brought a month after that sale to Dodson, the sale could not have been impeached. It appears to me that we should be throwing the greatest possible difficulties in the way of mortgagees if we were to say that Mr. Taylor, acting for these mortgagees, had done anything wrong, or had failed to take any step which was reasonable and proper in such a transaction as this. It is not only for the benefit of the mortgagees that powers of sale should be exercisable with facility. It is for the benefit of those who want to borrow money on mortgage quite as much as for the benefit of the lender. If mortgagees cannot realize their securities with comparative ease and safety, who will lend money on mortgage, and what will become of owners of property if their facilities of borrowing are destroyed by a strict, rigid application to powers of sale of principles which may possibly rest on very refined equities, but which are utterly unfit for ordinary business purposes? It appears to me that there was nothing at all amiss with this sale, and the judgment of the Vice-Chancellor must therefore be reversed, and the action dismissed with costs.

Now, as regards Dodson, it is said: Well, be it so; but you, Dodson, at all events, made some profit out of this transaction, which you ought to account for to Kennedy as owner of the other half of the mortgage. The answer to that is, I think, twofold. In the first place that claim has been based upon the theory of partnership, and partnership alone, and it has been already fought out and decided against Kennedy, in the action of *Kennedy* v. *Dodson*. In the present action to set aside the sale I cannot find that any such relief as that, was ever sought subsequent to the amendment. At first it was, but all that part of the prayer which relates to the partnership was afterwards struck out. In other words, the plaintiff has deliberately in the action of *Kennedy* v. *Dodson* stated his claim against Dodson upon the theory of partnership, and has been beaten, and no alternative case is raised upon the pleadings in this action. It appears to me, therefore, that upon this state of things no relief whatever can be given in this action against Dodson, even if the plaintiff were entitled to it. Some relief was given against Dodson in the action of *Kennedy* v. *Dodson*. There is an account, and if the plaintiff is entitled under the judgment in that action to make Dodson account for £864, or any other profits, he will be at liberty to do so. I do not say anything at all about it. I do say this, that I doubt very much whether under any conceivable theory the plaintiff can be entitled to anything more than a share of that £864. I do not believe in the theory that the sale to Dodson was a sale to him in such a fiduciary character as would disentitle him from holding the property. I do not think it was. As to that £864 I say nothing at all. There may possibly be a case about that.

But we are asked to say (and this is a very important point) that one of several tenants in common cannot get in for his own benefit an outstanding incumbrance, or an outstanding estate, or cannot be treated as otherwise than a fiduciary owner, standing in some fiduciary relation to his co-tenant. As a general proposition that appears to me not to be the law of England. It

is very true that in this case Dodson received the rents. He was appointed to receive the rents. He was the agent of his co-tenant to receive the rents, and to that extent he must account, and so he has been ordered to account in the other action. But to say that because of that he could not buy is going further than I am prepared to go. With reference to the case which Mr. Farwell cited, the American case decided by Chancellor Kent (*Van Horne* v. *Fonda*), all I can say is this: I do not believe myself that there ever was a lawyer of greater attainments and greater judgment, and greater skill in the application of principles, than Chancellor Kent; but I do not know how far the law of America and the law of England are allied in these matters. I do happen to know this, that according to the law of America it is much easier for one co-owner of real property to get a lien on the whole, than it is in this country. Whether that affected the learned judge's view I do not know; but I am not prepared on the authority of that case to say that Dodson could be compelled to account for the profit he may have made out of this sale. If such an account can be got in the action of *Kennedy* v. *Dodson*, well and good; but no such account can be ordered in the present action. Therefore my judgment in this case is that the appeal must be allowed, and the action dismissed, with costs.

KAY, L.J.—I will add only a few remarks, out of respect to the learned Vice-Chancellor, from whose decision we differ. With all deference to him, it seems to me he has put a mortgagee in a more difficult situation than any authority which I know of in our books up to this time has done. Any loan of money on mortgage is, between mortgagor and mortgagee, a simple matter of business. They contract between themselves as to what their mutual rights and obligations shall be in regard to that loan of money. The court of equity has persistently refused to find in that relation anything like fiduciary duty on the part of one to the other so long as the mortgage exists. I agree that if the mortgagee realizes the mortgage, and receives more than enough to pay what is due upon it, with respect to the balance he does become in a fiduciary position; or if he gets the mortgage paid off, and has to deal with the property, he must take great care that he reconveys the property to the person who is really entitled. But otherwise, so long as the mortgage lasts and the money is due, the mortgagee is not, with reference to his power under that mortgage, in a fiduciary position to the mortgagor in any sense. I think the learned Vice-Chancellor in this case has treated the mortgagee as being subject to obligations and duties to the mortgagors which, according to my understanding of the law, do not exist at all.

Now, Lindley, L.J., has read from the judgment a passage which I had particularly remarked. The learned Vice-Chancellor says: "Now, in this case, it is not suggested that the mortgagees did not act *bonâ fide*, and it is not suggested that there was any corruption or collusion on their part, or that the sale itself was at an under value so gross as to be in itself evidence of fraud." Beginning his judgment with that emphatic statement, he goes on to a minute examination of the valuations and the other circumstances, from which he seems to come to the conclusion that the mortgagee did not exercise all that care and precaution which the learned Vice-Chancellor thinks he ought to have exercised by reason of some duty which he owed to the mortgagor. I confess, looking at the facts in this case, which are beyond dispute and denial, and which are contained chiefly in the correspondence, I come to an entirely different conclusion from the learned Vice-Chancellor, even on that point; but I differ essentially from him in the notion, which seems to me to pervade his judgment, of what are the duties of a mortgagee towards a mortgagor. [His lordship considered the facts, and continued:—] Now, reading as I have done the words by which the Vice-Chancellor began his judgment, what other ground can there be for setting this sale aside? Of course, we know there were a large number of other points argued—first of all, that Dodson was a tenant in common of the equity of redemption of this property with the trustee in bankruptcy of Carswell, his co-mortgagor; and it was broadly argued that a sale by the mortgagees to one of two mortgagors is *ipso facto* an improper thing. There is no authority for that in any English book that I know of. I never heard the proposition before, and I cannot conceive that it should be so, and it strikes me that it would be a very great disadvantage for people who want to borrow money if it were so, because the doctrine takes from the possible purchasers of the property under the power of sale one of the persons who would be most likely to give a good price for it. One of several tenants in common of a mortgaged property would be very likely to give much more than a mere outsider, in order to purchase a property. It would be a disadvantage, instead of an advantage, if that were forbidden by law. But what law forbids it? On what ground could such an order be made? There is no fiduciary relation, nothing which makes a mortgagor unable to buy from the mortgagee, that I have heard of. It is quite true that if there be a single mortgagor he has nothing to do but redeem, and if he pays the principal, interest, and costs, he redeems; but where there are several mortgagors, if one of them agrees to buy under the power of sale, what is there to prevent him? I confess, with all deference to the authority which is cited from the American reports (*Van Horne* v. *Fonda*), I do not think that authority is consistent with any law which has been established in England. I hold distinctly that there is nothing in the position of one of several mortgagor tenants in common to prevent him from buying the mortgaged property under the ordinary power of sale contained in the mortgage deed. So much for that point.

But then it was said, and this point was strenuously argued, that this was not in fact a sale at all; that it really was a redemption by one of the mortgagors; that Dodson only paid principal, interest, and costs, and for one of the several mortgagors to pay principal, interest, and costs is merely a redemption by that mortgagor. To my mind nothing can be clearer than this, that if Dodson had been asked to redeem for this price he would not have listened. What he wanted to do was to obtain the property as his own. There is not one word about redemption in any of the correspondence—in any of the evidence as to the negotiations, I mean—about treating this as a redemption; and that the parties never intended redemption, but did intend it to be a *bonâ fide* sale under the power of sale is absolutely undeniable. The mortgagee wants to exercise the power of sale. He finds the only way in which he can possibly get his money is by selling the property out and out to one of the mortgagors. He agrees with that mortgagor to sell it to him out and out, under his power of sale, and it is made out on these terms. What turns that into a redemption which was intended by both parties to be a sale? It was admitted that if this purchase money had been slightly above or slightly below the amount of principal, interest, and costs it could not have been redemption; and can that which is intended to be, and is carried out as, a *bonâ fide* sale, be said to be a redemption because the

amount of the money which is all the mortgagee can get from anyone happens to be the same as the amount of principal, interest, and costs? I am not in the least impressed by that argument. It seems to me this was not a redemption in any sense, but it was intended to be a *bonâ fide* sale of the property under the mortgagees' power of sale.

Then another point was attempted, which was this: It was said that Dodson was in a fiduciary position, and that was sought to be made out in this way. Dodson was one of the two tenants in common of the equity of redemption. Dodson, by arrangement between himself and the representative of Carswell, received the rents, out of those rents he paid the interest of the mortgage; he also, it is said, managed the property—that is to say, he seems to have arranged with the tenants who took leases of the property, but of course he could not let it—he had no power of letting without the concurrence of the co-mortgagor. That is all, and that is the only way in which any suggestions can be made of fiduciary relation between Dodson and the representative of Carswell.

Now, is that a fiduciary relation which prevented Dodson from buying? I understand it might be pushed to this extent, though I do not agree with it, that if Dodson did buy, Carswell's representative might claim to share in the advantage of the purchase which he had made. But how can it affect the validity of the sale? To affect the validity of the sale you must show that there was a fiduciary relation between Dodson and the mortgagee. That was out of the question, as I pointed out. There was nothing like it. Therefore how any fiduciary relation between Dodson and the representative of Carswell can affect the validity of the sale I am totally at a loss to conceive. In my opinion it did not in any way, supposing that fiduciary relation to exist. I do not mean for a moment to express any opinion that a claim against Dodson by Dr. Kennedy on that ground could be supported; and the less is it probable for this reason, that, as pointed out, Dr. Kennedy did actually bring an action against Dodson claiming that they were partners, and claiming to share in the profit of this purchase upon that ground, and upon that ground only; and it was not until that suit came nearly to an end that he ever in any way raised this point of there being a fiduciary relation by reason of the receipt of the rents. That suit, so far as the claim to partnership was concerned, has been dismissed; and there, I think, is an end of it. That makes it, to my mind, utterly improbable that any claim could be maintained against Dodson upon that footing if we had to consider that. But I do not think we have to consider that, in this case at all. In this case the question is whether the sale was good or not. [His lordship then dealt with the facts as to delay and acquiescence, and came to the conclusion that the plaintiff came too late to impeach the sale. He then continued:—] However, I do not choose to rest my judgment merely upon that point, because it seems to me, looking at all the other facts, there is a very good answer indeed to this claim to impeach the sale. And, as I said before, I do not believe, if the mortgagee had at the time communicated to Dr. Kennedy the fact of the sale, that Kennedy would or could have interfered with the sale to Dodson, or that we should have heard of this litigation at all. Evidently Dr. Kennedy seeks to impeach this because the name of the purchaser was kept a secret from him at the time of the transaction, and he seems to have thought that gave him some right, either against Dodson or against the mortgagee, to obtain either the benefit of the sale, which was what he first sought, or, if not that, then to impeach the sale. I think this is not a ground at all on which any relief such as is given in this case by the learned Vice-Chancellor could be possibly granted.

Then there remains the question as between Kennedy and Dodson. Kennedy says shortly this: "Suppose this sale should stand, yet, between the time when you agreed to buy and the time when the sale was actually carried out, you went on receiving rents to the amount of £864, and those rents you applied as part of your purchase money in making this purchase, and I claim against you one moiety of that £864." That point is not raised in this action at all. This is a mere action for setting aside. If there be any such claim, which I do not for a moment wish to encourage, it may be brought in under the accounts which have been directed in *Kennedy* v. *Dodson*, of the rents received by Dodson, for which he is liable to account to Kennedy. How he can be liable to account for any other rent beyond that £864 I do not understand, because it seems to be admitted in this case that all the other rents were paid, either in keeping down the mortgage or in payment of the interest to the mortgagees. However that is a matter we have not to consider.

I end by concurring entirely in what has been already said, that Mr. Taylor acted in this case as a business man would act. He acted with very great consideration for the mortgagors—much more consideration than many mortgagees in his position would have shown—he acted as you would expect a solicitor for such a family as the De Traffords would act, with care and caution and consideration; and there is not in all that he did, to my mind, anything which can be observed upon against Mr. Taylor in any shape or way. In saying that, I am, of course, dealing with the position of the mortgagees. They acted through Mr. Taylor; his conduct was their conduct for the purposes of an action of this kind.

Therefore I think that the mortgagees are entitled to the judgment of the court. Their conduct from first to last has been entirely without any circumstance whatever which could throw the least doubt upon the validity of the sale. I therefore think that the decree which the learned Vice-Chancellor ought to have made in this case was to dismiss this action with costs.

A. L. SMITH, L.J., concurred.

Solicitors, *Taylor, Kirkman & Colley*, Manchester; *Boote & Edgar*, Manchester; *Crofton, Craven, & Worthington*, Manchester.

(1896) 2 Ch. 267.

High Court of Justice.

Chan. Div.
Chitty, J.

April 24.

BROWN v. STEDMAN. (a.)

Negligence—Lease—Surrender—Prior equitable mortgage—Notice—Priority.

A lessee who had deposited his lease by way of equitable mortgage with B. afterwards by deed surrendered the term to the lessor. The surrenderee at the time of surrender had asked the lessee to deliver up the instrument of lease, and was falsely informed by the lessee that he had left it with a friend, but that he (the lessee) had neither assigned nor charged his interest, nor pledged the instrument of lease. The surrenderee had no actual notice that the lease had been deposited by way of mortgage with B.

(a.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Held, that the surrenderee had not, under these circumstances, been guilty of gross or wilful negligence, and was consequently entitled, as the holder of the legal estate, to priority over B., the prior equitable mortgagee.

Hewitt *v.* Loosemore, 9 *Ha.* 449, *and* Espin *v.* Pemberton, 7 *W. R.* 221, 3 *De G. & J.* 547, *followed.*

Action.

This was an action asking for a declaration that a lease granted by the defendant, Mrs. Stedman, to J. Read was subsisting in favour of the plaintiffs as equitable mortgagees. The question turned on whether the defendant Stedman, who claimed to be surrenderee for value, was affected by constructive notice of the plaintiffs' charge.

In 1884 Mrs. Stedman had by deed demised certain premises to John Read for a term of twenty-one years.

In March, 1894, Read deposited the deed with the plaintiffs as security for a debt due from him to them.

In October, 1894, the plaintiffs commenced an action to enforce their security. This action was not registered as a *lis pendens*.

On the 22nd of November an order was made declaring that, the lease having been deposited with the plaintiffs by way of equitable charge, the plaintiffs were entitled to be considered mortgagees of the hereditaments comprised in the lease, and an account was ordered to be taken of what was due to the plaintiffs.

Pending such account and without the concurrence of the plaintiffs, negotiations were entered into by Read for the sale of the lease to one R. O. Friend, a co-defendant with Mrs. Stedman. Subsequently the lease was by deed of surrender surrendered by Read to Stedman, and a new lease was granted by her to Friend. Neither Mrs. Stedman nor Friend ever had actual notice of the plaintiffs' mortgage. The lease of 1884 was not handed over by Read at the time of the surrender; but the evidence of the managing clerk of Mrs. Stedman's solicitors was to the effect that, in answer to his inquiries after the deed, Read stated that he could not get it as a friend had it, but that he had not charged, assigned, or dealt with it in any way. In cross-examination, however, this witness admitted that Read appeared confused, and as if anxious to hide something. Friend was present when the surrender was signed by Read, and was represented by a separate solicitor.

Farwell, Q.C., and *Edward Ford*, for the plaintiffs.—A lessee has constructive notice of his lessor's title: *Patman* v. *Harland*, 29 W. R. 707, 17 Ch. D. 353. A surrender does not affect any derivative interest, whether by underlease or otherwise: *Great Western Railway Co.* v. *Smith*, 24 W. R. 443, 2 Ch. D. 235.

McSwinney, for Mrs. Stedman.—Mrs. Stedman's solicitors, by their managing clerk, made inquiries after the deed of 1884, and were *bonâ fide* satisfied with the answers of the lessee. There was no gross negligence on their part so as to affect my client with constructive notice of the plaintiffs' charge: *Hewitt* v. *Loosemore*, 9 Ha. 449; *Espin* v. *Pemberton*, 7 W. R. 221, 3 De G. & J. 547; *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 32 W. R. 626, 26 Ch. D. 482. [CHITTY, J., referred to the judgment of Lord Cranworth in *Perry Herrick* v. *Attwood*, 6 W. R. 204, 2 De G. & J. 21.]

Rowden, for the defendant R. O. Friend.—Friend is a purchaser for value without notice. If Mrs. Stedman succeeds, Friend succeeds. He is in rather a better position. He satisfied himself that there was a proper surrender, and was not bound to see that the actual lease was handed back to the lessor. If he had made inquiries, he could only have got the same answer that Mrs. Stedman had. I rely on the Conveyancing Act, 1882, s. 3. Friend did everything a reasonable man could.

Farwell, Q.C., in reply.—There was gross negligence within the meaning of the authorities on the part of Mrs. Stedman's solicitors in their inquiries after the deed. There was no answer given as to the absence of the deed that could satisfy a reasonable man.

CHITTY, J.—The surrender was a transaction for value. Neither Mrs. Stedman nor her solicitors had actual notice of plaintiffs' charge. She did not get the instrument of lease. The case against her is that inquiries after it had to be made, and that, although inquiries were made, the answers given were such as to render her liable on the authorities. The law is well settled. In *Hewitt* v. *Loosemore* it was laid down that the holder of the legal estate is not to be postponed to a prior equitable one on the ground of his not having got in the title deeds, unless there be fraud or gross or wilful negligence on his part; and the court will not impute fraud or gross or wilful negligence to the holder of the legal estate if he has *bonâ fide* inquired for the deeds and a reasonable excuse has been given for not delivering them to him. This principle was also acted on in *Espin* v. *Pemberton*; and Lord Cranworth lays down the law in a similar way in *Perry Herrick* v. *Attwood*. It is a matter of fact in each case what constitutes negligence of this kind. One reported case is of little value on the facts in another. But taking the facts in *Hewitt* v. *Loosemore* and *Espin* v. *Pemberton* as a guide as to what has been considered gross negligence, in my opinion I should not be applying the true principle of law to the facts of this case if I were to hold that the legal title of the surrenderee should be postponed.

Solicitors, *Learoyd, James, & Mellor; Perkins & Weston; Griffenhoofe & Brewster.*

Chan. Div. }
Chitty, J. } March 18, 19, 23, 31.

WHITWHAM *v.* WESTMINSTER BRYMBO COAL AND COKE CO. (LIMITED). (*a.*)

Damages—Measure of damages—Trespass—Injury to land—Wrongful tipping of spoil on land.

The defendants, who were colliery owners, had committed a trespass upon land to which they claimed to be entitled, but which was held at the trial of the above action to belong to the plaintiffs, by tipping or depositing thereon spoil, and they were restrained by injunction from further tipping upon the land. Part of the land had been covered by the defendants with spoil, the remainder was still available for tipping, but for no other purpose. An inquiry as to damages having been directed by the court.

Held, that the plaintiffs were entitled to damages on the basis of the value of the land to the defendants for tipping purposes in respect of so much of the land as was actually used by the defendants for tipping, and as to the rest of the land, on the basis of its ordinary value, but without any interest.

Martin *v.* Porter, 5 *M. & W.* 351; Jegon *v.* Vivian, 19 *W. R.* 365, *L. R.* 6 *Ch. App.* 742; *and* Phillips *v.* Homfray, Fothergill *v.* Phillips, *L. R.* 6 *Ch. App.* 770, 20 *W. R. Ch. Dig.* 121, *considered and applied.*

Summons.

At the trial before Romer, J., the defendants, who

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

were colliery owners, claimed title to certain land near their colliery by virtue of an alleged agreement, but it was held that there was no such agreement. By the judgment it was declared that the land belonged to the plaintiffs, and that the defendants had been guilty of committing a trespass upon the land by tipping or depositing thereon spoil or other material, and an injunction was granted restraining them from further tipping or depositing upon the land any spoil or other material. It was further ordered that the defendants should deliver possession of the land to the plaintiffs; and an inquiry was directed what, if any, sum of money was proper to be awarded to be paid by the defendants to the plaintiffs by way of damages for any injury sustained by the plaintiffs since the death of their predecessor in title by reason of the defendants' trespass by tipping or depositing spoil or other material upon the land. The form of the inquiry left open the question of the measure of damages.

In answer to the inquiry the official referee made a special report—first, that the sum proper to be paid by way of damage was the sum of £200; secondly, that the defendants had by their trespasses rendered the land belonging to the plaintiffs, 1a. 3r. 9p. in extent, valueless for any but tipping purposes; and, thirdly, that in assessing the £200 he had taken as the measure of damage the diminished value of the plaintiffs' land, in extent 1a. 3r. 9p., caused by the defendants' trespass. In arriving at the £200 the referee appeared to have taken the land at its agricultural value.

The plaintiffs had contended before the referee that the proper measure was the reasonable value of the land for tipping purposes, which was treated by the referee as £500 an acre, such being the purposes for which the defendants actually used the land, and also claimed interest by way of damages on such value from the time that the defendants commenced to trespass by tipping on the land. After referring to this contention with the claim for interest, the referee found that if the proper measure of damages were that so contended for, the sum to be paid was £963, and £141 5s. for interest, making together £1,104 5s.

The land in question was situate in a long, narrow valley to the north of the defendants' colliery, which was a short distance off. It appeared that there was no other land on the north of the colliery within a reasonable distance which the defendants could have procured for tipping purposes. Of the total area of the land 3r. 20p. had been covered by the defendants with spoil; the remaining portion, 3r. 29p., was still available for tipping purposes, but for no other purpose.

This was a summons on behalf of the plaintiffs to vary or refer back the above report.

Frederic Thompson, for the plaintiffs.—The defendants had the benefit of tipping on the plaintiffs' land, and the true measure of damages in such a case is not the ordinary value of the land, but the value for the purpose for which it was used by the defendants. In ordinary cases trespassers derive no benefit from their wrongdoing, but these defendants do. The case is analogous to the cases in reference to mining operations where trespassers have been held liable to pay on the footing of a way-leave (*Martin* v. *Porter*, 5 M. & W. 351; *Jegon* v. *Vivian*, 19 W. R. 365, L. R. 6 Ch. App. 742; *Phillips* v. *Homfray*, *Fothergill* v. *Phillips*, L. R. 6 Ch. App. 770, 20 W. R. Ch. Dig. 121), and not to the common case of injury to land, of which *Jones* v. *Gooday*, 8 M. & W. 146, which will be cited against the plaintiffs, is an example. The plaintiffs are entitled to interest by way of damages during the also time that they were kept out of their land by the defendants unlawfully tipping their spoil upon it: *Marsh* v. *Jones*, 40 Ch. D. 563, 37 W. R. Dig. 173; *Peruvian Guano Co.* v. *Dreyfus*, [1892] A. C. 166, 40 W. R. Dig. 69.

C. A. Russell, for the defendants.—The measure of damages ought to be the injury to the plaintiffs, not the benefit to the defendants: *Hosking* v. *Phillips*, 3 Ex. 168; *Jones* v. *Gooday*; Mayne on Damages, 5th ed., p. 430. The way-leave cases are very special, and offer no analogy here. Their principle does not apply to a case of innocent trespass like this. The defendants thought there was an agreement, and their acts were open and not surreptitious. There is no foundation for the claim to interest. The referee's assessment of damages is right, but the alternative assessment adopted by him is wrong, being on the footing that the defendants tipped on the whole of the land, which was not the case, and allowing interest, which ought not to be given on any view.

Thompson, in reply.—The principle of the way-leave cases is not confined to cases of guilty trespass. *Jegon* v. *Vivian* was not a case of that kind. [CHITTY, J., referred to *Merest* v. *Harvey*, 5 Taunt. 442.] Generally in cases of destructive trespass the consequent diminution in the value of the land is the limit of damages recoverable; in cases of beneficial trespass like this a different measure applies, and the referee was wrong in not taking into account the special value of the land to the defendants.

March 31.—CHITTY, J.—The question is, What is the measure of damages in the circumstances of the case?

In arriving at the £200 the referee appears to have followed the rule ordinarily applied in actions for injury to land (see Mayne on Damages, 5th ed., p. 430). In *Jones* v. *Gooday*, where the defendant in widening a ditch had cut into the plaintiff's land and carried away soil, it was decided that the plaintiff was entitled to be compensated for the loss he had actually sustained, and not for the expense of restoring the land to its original condition. The plaintiffs do not contend that the measure of damages is the expense of restoring the land to its former state, but they contend that the proper measure is the reasonable value of the land for tipping purposes, being the purposes for which the defendants actually used the land.

The question, then, is whether the value of the land for tipping purposes ought to be taken into consideration in assessing the damage. There is no authority directly in point. The plaintiffs rely on the decisions in reference to mining operations as showing the true principle. In *Martin* v. *Porter* Parke, B., directed the jury that the plaintiff was entitled to compensation for the defendant passing through the plaintiff's coal with coals gotten from the defendant's own mines, and ought to pay as for a way-leave. Under the leave given to move to reduce the damages, the point whether this direction was right might have been raised, but it was not raised on the motion made. The actual damage sustained by the plaintiff by reason of the wrongful use of the underground way would have been trifling, but the principle acted upon was that the plaintiff was entitled to be compensated upon the footing of a grant of a way-leave at a reasonable rent, which was shown to be 2d. a ton in the neighbourhood. In *Jegon* v. *Vivian* the Master of the Rolls (Lord Romilly) and Lord Hatherley held that the plaintiffs were entitled to an inquiry what ought to be paid by way of way-leave for the passage of coal through their mines. In that case the defendants were trespassers who had held over after a lease granted by the tenant

for life under a power, which lease was avoided by the plaintiffs, the reversioners. In regard to the coal which they had wrongfully gotten the defendants were ordered to pay damages, not on the more severe principle, but on the principle of their being (to use a phrase employed in these cases) "innocent trespassers"; yet in regard to the way they had to pay compensation on the footing of a way-leave. In *Phillips* v. *Homfray*, *Fothergill* v. *Phillips*, the damages were directed to be assessed on the same principle; but there the plaintiffs were treated as wilful or guilty trespassers.

Now, the question is whether the principle of the way-leave cases applies to a case of tipping. They are founded on the principle that a wrongdoer shall not make a profit out of his own wrong, and that the value of the land for the purposes for which it was actually used by the wrongdoer ought to be taken into consideration. There is this distinction between the way-leave cases and the case before me—that the use of the way for the passage of coal is underground and in some instances surreptitious, whereas in the case of tipping the user is on the surface and open; in the present case the fact appears to be that the plaintiffs were aware that the tipping was going on. But I cannot see that the distinction makes any substantial difference. I think that the principle does apply, and that the plaintiffs are entitled to damages on the basis of what would be a reasonable sum to be paid for the use of their land by the defendants for tipping purposes.

But, applying this principle consistently to the facts, I think that the plaintiffs are not entitled to the whole of the £1,104 5s. First, in regard to interest claimed, I think that all interest ought to be excluded from the computation of damages. To give interest would be to treat the plaintiffs as having invested their damages with interest in the hands of the defendants. Secondly, on the principle which I adopt, I think the plaintiffs are entitled to damages on the higher footing for so much only of the land as was actually used by the defendants for tipping. The plaintiffs at the trial obtained an injunction restraining the defendants from further tipping; the defendants cannot, therefore, use the rest of the land for tipping. To make the defendants pay the whole of the £963 would be to make them pay for the fee simple value of the land for tipping when they had used part only of the land for that purpose and are prevented by the injunction from so using the remainder. There is still an unexhausted tipping value in part of the land. It was admitted by counsel, as I understand, that of the total area of 1a. 3r. 9p. only 3r. 20p. were covered by spoil, and that the remainder—viz., 3r. 29p., or rather more than half—were still available for tipping, although valueless, as the referee finds, for any other purpose. It would be unjust to make the defendants pay for the 3r. 29p. on the principle of a tipping leave which they have not directly or indirectly enjoyed. In respect of this part of the land the defendants ought to pay on the footing of the diminished value of the land to the plaintiffs. The plaintiffs' counsel said that on the evidence it would be impracticable for the plaintiffs to sell or let the 3r. 29p. for tipping purposes to any persons other than the defendants, and that the defendants, having found land to the south of their colliery, no longer required and would not take this portion of the land for tipping. Assuming this statement to be correct, it is immaterial. The plaintiffs cannot recover any greater sum for damages than is given by the just application of the principle which they invoke. I take it the parties will be able readily to apportion the damages in accordance with this judgment. If they cannot agree, the matter must go back to the referee with a proper direction.

Solicitors for the plaintiffs, *Field, Roscoe, & Co.*, for *Evan Morris & Co.*, Wrexham.

Solicitors for the defendants, *Norris, Allens, & Chapman*, for *J. B. Pellatt*, Manchester.

Chan. Div. North, J. — April 28.

HUNT v. WORSFOLD. (*a*.)

Practice—Joinder of causes of action—Ord. 18, *r.* 2.

Appearance to a writ does not waive objection to a joinder with an action for recovery of land, of causes of action other than those specified in ord. 18, *r.* 2.

Re Pilcher, Pilcher *v.* Hinde, 27 *W. R.* 789, 11 *Ch. D.* 905, *followed.*

A claim for a declaration that a mortgage is not charged upon property and for possession, and, in the alternative, for an account of what is due and redemption, is within ord. 18, *r.* 2.

Summons to strike out the plaintiff's statement of claim, because (*inter alia*) no leave was obtained to join other causes of action with a claim for recovery of land.

The statement of claim asked—(1) for a declaration that a certain mortgage constituted no charge on certain houses; (2) for possession of the said houses and property and the deeds relating thereto; (3) alternatively, so far as the alleged mortgage deed might be held to be a charge upon the property, for an account of what was due and redemption.

The indorsement on the writ was practically identical with the prayer of the statement of claim.

Hickey raised the preliminary point that the defendant, having appeared to the writ, could not now take the objection.

He cited *Mulckern* v. *Doerks*, 53 L. J. Q. B. 526, 32 W. R. Dig. 164; *Wilmott* v. *Freehold House Co.*, 51 L. T. N. S. 552; and *Hambling* v. *Wallani*, W. N., 1889, p. 133.

Beddall cited *Re Pilcher, Pilcher* v. *Hinde*, 27 W. R. 789, 11 Ch. D. 905; *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494; *Re Derbon*, 36 W. R. 667.

NORTH, J.—I do not think that I can hold that this application is too late.

Beddall.—The claim is for two causes of action, redemption, and possession, and they cannot be joined without leave.

He referred to ord. 18, r. 2; *Re Pilcher;* and *Gledhill* v. *Hunter*, 28 W. R. 530, 14 Ch. D. 492.

NORTH, J.—I do not think that I need trouble you, Mr. Hickey. The plaintiff asks for a declaration that the mortgage is not charged upon the property, and to have the property given back to him. So far as the deed is a charge on the property, he asks to have what is due ascertained, and for redemption. These are the causes of action raised by the statement of claim, and they can be joined. In one claim the plaintiff asks for possession of the property on the footing that there is no mortgage; in the other he asks for possession if there is a mortgage, and in that case to pay it off. It seems to me that he is asking for relief to which he is entitled. He has a right to ask in the alternative.

Solicitors, *Bradley; Morrisons*, for *Morrison & Nightingale*, Redhill.

(*a*.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div. }
Kekewich, J. } March 27, 31.

Re MARGETTS (TAXATION). (*a.*)

Solicitor—Costs—Taxation—Several bills—One barred by the Statute of Limitations—Common order to tax—Vendor and purchaser—Several lots purchased—One or more bills—Solicitors' Remuneration Act, 1881, *General Order, Sched. I., Part I., r.* 8.

The taxing master ought to tax statute-barred costs, and leave the court to determine whether they ought to be paid.

Under a common order to tax obtained on application by the client, the client must pay what is found due on taxation; if the client wishes to raise the Statute of Limitations, he must obtain a special order.

Where several lots are bought for small sums, each having a separate title and separate abstract, a solicitor is entitled to the minimum scale fee in each case.

Summons.

This was an application on the part of A. M. Margetts to review the taxation of certain bills of costs. Messrs. H. C. Margetts & Son acted as solicitors for the applicant in respect of several matters, and delivered to her on the 26th of November, 1895, six bills of costs, the first of which was for work done between December, 1888, and October, 1889, though on the face of it it appeared to be for work done down to March, 1890. On the 19th of December, 1895, the client obtained the common order to tax the six bills. On the taxation, objection was taken to the first bill on the ground that it was statute-barred, and the taxing master certified that the bill was statute-barred, but nevertheless allowed it.

As regards another bill, a question was raised whether the purchase of four lots of land, all bought within a short period of time though not actually all together, really formed the subject of one transaction, or whether the solicitors were entitled to charge separately in respect of each lot. The purchase price of the several lots ranged from £10 to £105, and the solicitors had charged in respect of each lot the minimum scale fee allowed by rule 8 of Schedule I., Part I., of the general order made in pursuance of the Solicitors' Remuneration Act, 1881, on the ground that each lot had a separate and distinct title, with separate abstracts which had to be investigated, and the taxing master had held the solicitors entitled to make this charge.

J. Ashton Cross, for the applicant.—The fact that the client has obtained the common order to tax does not prevent my relying on the Statute of Limitations as a bar to one of the bills. There is no acknowledgment by the client to take it out of the statute. There is nothing on the face of the first bill as delivered to show it is statute-barred. There are no items given, it is put as a sum charged for work done from December, 1888, to March, 1890. It was only on vouching that it appeared that the whole of the work was done by October, 1889: *Budgett* v. *Budgett*, 43 W. R. 167, [1895] 1 Ch. 202; *Curwen* v. *Milburn*, 38 W. R. 49, 42 Ch. D. 424; *Green* v. *Humphreys*, 26 Ch. D. 474, 32 W. R. Dig. 120. As to the second point, the work done was substantially one transaction, and the scale fee should be on the total amount of the purchase money added together.

T. L. Wilkinson, for the solicitors, was not called on.

KEKEWICH, J.—On such questions as the first raised on this application it is the practice of the judges of this division of the High Court to refer to the taxing master to ascertain whether there is any settled practice in the taxing office in relation thereto, and I have accordingly done so, and I find there is no settled practice. In *Curwen* v. *Milburn* it was held that the taxing master ought to tax all the items of the bill without regard to the Statute of Limitations, because the object was to ascertain the amount for which a lien was claimed; and in *Budgett* v. *Budgett* the taxing master rightly taxed statute-barred costs which retiring trustees claimed the right to retain out of the trust estate, as there the question was in respect of what the trustees were entitled to be indemnified. These two cases go a long way towards deciding that the taxing master was correct. The point I have to deal with is whether the taxing master ought to tax statute-barred costs. Convenience points to their being taxed. Whether they ought to be paid when taxed is a question for the court to determine. It is only the duty of the taxing master to deal with the items and say what ought to be allowed, and not to consider whether anything ought to be recovered. If I had found on inquiry that there was a fixed practice in the office, I should have followed it; but as I find there is not, the rule I have stated appears to me is the balance of convenience. Now the question is, Ought these particular costs to be paid? The order to tax is the common order with the usual submission to pay what appears to be due. No special conditions are annexed to the order, no exception is made as to disputing the retainer or otherwise. What, then, is the right of the client under such an order. He is bound to pay all costs which have been properly incurred. There is no injustice in that. He has the bills before him, and must know what business has been done. He applies for the order with his eyes open, and submits to pay what is due. The Statute of Limitations does not bar the debt, but merely the remedy. The more convenient construction of the order is that what is found on the taxation to be due is to be paid. The client submits to pay what is due on taxation. If the client wishes to raise the statute, it must be done by a special order.

As regards the second question, if the solicitor had been instructed to complete these purchases at separate intervals, so that each was completed before the other, the argument for the applicant would be untenable. Where there is one vendor of several properties and the same solicitor acting for him, so that the purchaser's solicitor has less trouble and his work is largely reduced, such a proposition might not be unreasonable. But the rule must be applied generally, and fine distinctions are impossible. Where, as in this case, each lot has a separate title, a separate abstract, and each title is investigated, the solicitor is entitled to the minimum scale fee in each case. The summons must be refused with costs.

Solicitors, *Paterson, Snow, Bloxam, & Kinder; H. Reid*, for *H. C. Margetts & Son*, Chatteris.

Chan. Div. }
Kekewich, J. } Feb. 20, 26; March 5, 11.

MARSH v. JOSEPH. (*a.*)

Solicitor—Improper use of solicitor's name—Fund in court—Order for payment out on fraudulent petition

(*a.* Reported by F. T. DUKA, Esq., Barrister-at-Law.

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

— Dummy petitioner — Partnership — Liability to refund.

H., a solicitor, presented a fictitious petition, and thereby obtained an order for the payment out of a fund in court to a person whom he identified at the Paymaster-General's office as the supposed petitioner. H. had made use of the name of "C. & Co." (a firm of solicitors consisting of C. and G.) as if they were acting as solicitors for the supposed petitioner and had briefed counsel in their name, and had done all this without the knowledge of either C. or G.

On the 10th of August the Paymaster-General's cheque was paid into, and cleared by, a bank in which H. had caused an account to be opened in the name of the supposed petitioner. On the 12th of August a large part thereof was drawn out of the said bank by the supposed petitioner, leaving, however, a sum of £2,000 still undrawn. On the same day C. was first told by H. that he had used the name of C.'s firm as solicitors in formal proceedings now completed, and that there was a cheque at the Paymaster's Office for the costs of C.'s firm. C. thereupon went at once to the Paymaster's Office, obtained the cheque, and paid it into the account of his firm.

Subsequently to the 12th of August, part of the £2,000 remaining in the bank was drawn out by the supposed petitioner, and, although C. was then aware that his firm's name had been used without authority by H., he was ignorant of the fraud which had been committed by H. C.'s partner, G., knew absolutely nothing of the matter.

The Treasury having made good the fund,

Held, (1) *that it was the duty of C., as an officer of the court, when, on the 12th of August, he first knew that his firm's name had been used by H. without authority in proceedings in court, to have at once informed the judge of that fact, and, if he had done so, that the £2,000 then in the bank would have been saved;* (2) *that C., by accepting the cheque for costs and placing it to the account of his firm, had thereby condoned on behalf of his firm the unauthorized use by H. of the firm's name; and* (3) *that G., C.'s partner, was together with C. jointly and severally liable to make good to the Treasury so much of £2,000 as was drawn out after the 12th of August.*

Re Dangar's Trusts, 37 *W. R.* 651, 41 *Ch. D.* 178, *approved.*

This was a petition in the above action asking that an order under which the funds in court had been paid out to a false petitioner might be discharged, and that the funds might be replaced by the Commissioners of her Majesty's Treasury, who, whilst admitting liability, sought to obtain an order to refund against a firm of solicitors whose name had been used in the proceedings under the following circumstances.

Under the trusts of a post-nuptial settlement made in 1858, the proceeds of sale of certain lands conveyed on trust for sale by an indenture of even date were directed to be held upon trust, after life estates to Mr. and Mrs. John Moses Marsh respectively, for the children of John M. Marsh as he should by deed or will appoint, and in default of appointment for all the children of the said John M. Marsh attaining the age of twenty-one, or if daughters marrying under that age, equally.

An action was commenced in 1877 for administration of the trusts of the settlement, and the usual judgment obtained.

In 1882 the hereditaments settled were sold, and the proceeds paid into court to the credit of the action, and invested in the purchase of £5,629 0s. 11d. India 3½ per Cent. Stock.

The said John M. Marsh died in March, 1895, having survived his wife and married again; and as he did not exercise his power of appointment the fund in court became distributable equally amongst his children who attained a vested interest.

In July, 1895, a petition was presented to the court in the action, purporting to be presented by Joseph M. Marsh, the eldest son of John M. Marsh, and alleging that the latter had exercised his power of appointment by a deed poll dated the 31st of December, 1894, and appointed the fund in court to Joseph M Marsh absolutely. The petition purported to be served on the trustees of the original settlement and on such of the other parties who, but for the execution of the deed poll, would have been entitled to the fund, and had placed stop orders on the fund. The petitioner's solicitors appeared from the petition to be "John Clear & Co.," and the respondents were purported to be represented by one John Hales. The affidavit filed in support of the petition purported to be made by the petitioner, and the alleged deed poll (which was in fact forged by Hales) was an exhibit thereto. The petition was heard as unopposed on the 29th of July, 1895, and an order made directing the sale of the stock in court, and the payment thereout of £15 agreed costs to the petitioner's solicitor John Clear, and £10 agreed costs to the respondent's solicitor; and, after providing for succession duty, the balance was ordered to be paid to the petitioner.

The stock was sold on the 6th of August, and on the 10th of August, John Arthur Hales (a solicitor), who had been identified some months previously at the Paymaster's Office as John Hales, attended at the Paymaster's Office with a person whom he identified as Joseph M. Marsh, and obtained a cheque for £6,137 8s. 9d. as the sum payable to the latter. Joseph M. Marsh in fact knew nothing of the proceedings. Hales then accompanied the person whom he falsely represented as Joseph M. Marsh, the petitioner, to Child's Bank, where Hales was known as a former customer, and introduced him as Joseph M. Marsh; the cheque was paid in, and an account opened in that name. On the 12th of August, between one and two o'clock, £4,000 was drawn out of the bank, and subsequently other small sums, leaving a balance of £1,966, which, on the discovery of the fraud in October by the parties entitled to the fund, was brought back again into court.

On the hearing of the present petition it appeared from the evidence that Mr. Clear, of the firm of Clear & Green, had known John Arthur Hales as a friend for five years, and that in July, 1895, Hales had called at Clear's office and asked him if he would act in some business as solicitor for some formal parties, which Clear agreed to do on receiving formal instructions; but no mention was then made either of the nature of the business or of the names of the parties; nor did Clear afterwards receive any formal instructions. On the 12th of August—*i.e.*, on the day that the £4,000 was drawn out of Child's Bank, Hales called and informed Clear that the business in which he wanted Clear to act for formal parties was done, and that there was a cheque for him for the costs at the Paymaster's Office. Clear reprimanded Hales for using Clear's name without authority, but was informed it was a simple matter and was completed, and that counsel had appeared. Clear thereupon, on the same day (the 12th of August) went to the Paymaster-General's Office, obtained the cheque for £15 for costs, cashed it, and, having retained £4 5s. 6d., handed the balance to Hales for counsel's fees and out-of-pocket expenses. The £4 5s. 6d. was passed through the firm's account.

Sir R. Webster, *A.G.*, *Sir R. Finlay*, *S.G.*, and *Eagle Joyce*, for the Treasury.—The court has jurisdiction to order a solicitor as an officer of the court to make

restitution, if loss has occurred through that solicitor's misconduct. The petition of the dummy petitioner bore the name of J. Clear & Co. as solicitors. By taking his costs as solicitor, Clear ratified the transaction, and was responsible for the representations in the petition.

J. Ashton Cross, for Clear.—The solicitor cannot be liable for a fraud of which he knew nothing and all the steps in which were complete before the receipt of the cheque for costs.

Graham Hastings, *Q.C.*, and *Stewart Smith*, for the petitioners.

Renshaw, *Q.C.*, and *Rose-Innes*, for Joseph M. Marsh.

Ingpen; *Sefton Strickland*, for other parties interested.

Witt, *Q.C.*, and *De Witt*, for J. E. Green.

Cannot, for Hales.

KEKEWICH, J.—The principles on which the court exercises its jurisdiction in these matters are clear. I need only refer to *Re Dangar's Trusts*, 37 W. R. 651, 41 Ch. D. 178, and especially the passage in Stirling, J.'s, judgment on page 656, where he says that Mr. Nelson took upon himself a duty as an officer of the court, and he must be held responsible for the due discharge of that duty, which was to bring before the court all matters which were essential for the court to know in order to deal properly with the fund.

This is the principle that is to be applied to Mr. Clear in the present case; so far as he acted as a solicitor he must be held to be responsible, and this though he took no active part. I do not discredit Mr. Clear's evidence, which moreover is supported by the facts. He had no reason to believe that Hales had used or intended to use his name until the 12th of August, when Hales asked him to go to the Paymaster-General's office to receive a cheque for costs. The Paymaster-General's cheque had been handed over to some person purporting to be Joseph M. Marsh on the 10th of August, and was paid in the same day to Child's Bank; and £4,000 was drawn out on the 12th. The facts are sufficiently conclusive that £4,000 had passed beyond control before Clear knew, or had reason to believe, that his name had been used improperly. So far he is acquitted; but on the 12th he knew of the wrong action of Hales in using his name without authority, but he thought that he might condone the irregularity and receive the cheque for £15. Of course he did not know of the forgery, or that he had presented a petition in the name of Joseph M. Marsh without authority, and I do not think what had been done improperly towards himself could be said to have put him on inquiry; but as an officer of the court he had no right to condone an irregularity, or at least not without ascertaining that everything was right. In the words of Stirling, J. (in *Re Dangar's Trusts*) he ought to have seen that all that the court ought to know was before it. He was content to take the cheque without inquiry, and he is clearly liable for the amount of it.

Whether he is liable for more is a question that has given me anxious thought.

I am bound to insist on the strict performance of duty by an officer of the court. The non-contentious business of the court is probably more important than the contentious, but in order that it may be transacted properly a judge must have confidence in counsel and solicitors. That confidence I must say is very rarely abused.

Now in this case, if by reasonably prompt action on the part of Clear any part of the fund could have been saved, he must be held to be liable. If he had, when he discovered the irregularity, gone at once to Stirling, J., who was then sitting in chambers, I have no doubt that prompt inquiry would have been made, and notice then given to Child's Bank not to part with the money still there, and it would have been saved. It is reasonably clear that he knew of the irregularity before the remainder of the money then still in Child's Bank was gone, and the money in Child's Bank would have been earmarked as the proceeds of crime.

I have considered the point as to the nearness or remoteness of damage, and I have come to the conclusion that *Hadley* v. *Baxendale*, 2 W. R. 302, 9 Exch. 341, does not apply to neglect of duty as distinguished from breach of contract.

Clear must make good the £15 and so much of the £2,137 8s. 9d. as, on inquiry, is found to have been lost in consequence of his action, less the salvage costs payable out of the amount recovered from the bank.

The costs of this petition must be borne by Clear so far as they exceed what would be necessary to obtain the fund out of court and as between solicitor and client.

I acquit Mr. Green (Mr. Clear's partner in the firm of Clear & Green) of all moral delinquency, but I will have his case argued on Wednesday next.

March 11.—The case of Mr. Green was then argued.

Witt, *Q.C.*, and *De Witt*, for Green.—A partner cannot be liable for anything done by a co-partner which is not within the scope of the partnership; it is not within the scope of a solicitor partnership for one partner simply to lend the name of the firm without more.

KEKEWICH, J.—The question is one of great importance to the profession, as well as to the parties immediately concerned. The reason of my judgment against Clear was that from the time he knew that his name had been improperly used, and through his not taking the steps he ought to have taken on such knowledge, he must be taken to have condoned the improper use of his firm's name by Hales, and must be taken as having acted as solicitor in the matter from the date of the presentation of the petition, and therefore through the entire proceedings. The general principles urged by counsel on behalf of Green (Clear's partner) I agree with; but I see no reason why, with proper precautions, a solicitor should not lend his name or that of his firm in a proper proceeding. I do not say what constitutes proper precautions, but at all events the solicitor lending his or the firm's name must preserve a proper control over the use of it, and must take steps against any abuse that might be made of the permission. When Clear said in effect on the 12th of August, "What has been done in the matter has been done by my authority," and took part of the costs—the solicitor's profit of the business—he was, as from the presentation of the petition, responsible for everything that was done, and he was bound to see that everything was done properly. If Clear had authorized the use of his firm's name in the first instance with proper precautions, Green would be clearly liable; and I am unable to see why he should not be liable now. I acquit Green entirely of all personal blame, and the question against him now is merely one of law.

On that question I decide against Green, and the order will be to declare both Clear and Green jointly and severally liable. I regret I cannot make any distinction as to costs.

Solicitors, *Solicitor for Treasury*; *Mear & Fowler*; *Clear & Green*; *Roy & Cartwright*; *H. J. Lewis*; *R. F. Hill*.

Lunacy.

Lindley, Kay, and A. L. Smith, L.JJ. March 16, 21.

Re FARNHAM. (*a*.)

Lunacy—Lunatic bankrupt—Property vested in or under the control of trustee in bankruptcy—Jurisdiction of court sitting in lunacy to order transfer.

Where property of a lunatic so found who has also been adjudicated a bankrupt is vested in or under the control of the trustee in the bankruptcy, the court sitting in lunacy has no jurisdiction, upon an application made in lunacy, to order such trustee to transfer that property to the credit of the lunacy.

This was a summons taken out in lunacy by the committee of a lunatic so found against the trustee in bankruptcy of the lunatic, asking for an account of all moneys of the lunatic in the possession or under the control of the trustee in bankruptcy; and also that the trustee might be ordered to pay into court in the lunacy all such moneys.

The facts are sufficiently stated in the judgment of Lindley, L.J.

Warmington, Q.C., and *Buckmaster*, for the applicant, the committee.—These moneys are needed for the support and maintenance of the lunatic, and it follows from the decision of this court in the case of *In re Farnham*, [1895] 2 Ch. 799, that the moneys ought to be paid into court for the lunatic's benefit.

R. J. Parker, for the trustee in bankruptcy.—This court has no jurisdiction to make the order asked for. In the former case the funds were actually in the control of the court in lunacy, and the trustee wanted to get possession of them; but now the tables are turned, and the trustee cannot be required to hand it over: *Brockwell* v. *Bullock*, 37 W. R. 455, 22 Q. B. D. 567; *Re Platt*, 36 W. R. 273, 36 Ch. D. 410.

Warmington Q.C., in reply, referred to section 117 of the Lunacy Act, 1890; *In re Winkle*, 42 W. R. 513, [1894] 2 Ch. 519; and *In re Plenderleith*, 42 W. R. 224, [1893] 3 Ch. 332.

LINDLEY, L.J.—The point raised in this case is one of some importance. The case stands in this way. Mr. Farnham was found a lunatic by inquisition in August, 1893, and on the 17th of March, 1894, a receiving order in bankruptcy was made against him. In November, 1893, the sheriff seized certain goods of the lunatic, which, in February, 1894, were sold by the sheriff. The proceeds of sale were claimed by the trustee in bankruptcy, and are now in the control of the court in which the bankruptcy is pending—namely, the county court of Leicester. The proceeds of sale are not in the court in lunacy, but are standing to the credit of the bankruptcy in the Leicester County Court. In these circumstances the committee of the lunatic comes in lunacy, asking, first, for an account of all moneys in the possession or under the control of the trustee in bankruptcy, and, secondly, that the trustee in bankruptcy may be ordered to pay into court all such moneys. The master, when this summons came before him, pointed out to the parties that he felt great difficulty on the question whether he had any jurisdiction to make such an order as was asked for; and he therefore adjourned it to the judge sitting in chambers, who adjourned it to us.

On the case coming on before us Mr. Parker at once took the point that we have no jurisdiction, and we are of opinion that he is right in that contention. This case is not in the least like the case (*Re Farnham*) already decided in this lunacy (reported [1895] 2 Ch. 799), where the property which was then claimed by the trustee in bankruptcy was in the custody of this court sitting in lunacy. The trustee in bankruptcy asked us to hand it over to him. We said: "No; it is in our custody for the benefit of the lunatic, and we won't part with it." In the course of the judgment in that case there may be expressions which apply to the present question. But now the tables are turned. We are not asserting a right to retain property in our custody, as on that occasion, when we had the property (plate) ourselves and had clear jurisdiction to deal with it. Our observations were addressed to that state of things. I have looked in vain through the Lunacy Act and the Bankruptcy Acts for any section which gives us any jurisdiction over the Court of Bankruptcy. Mr. Parker has called our attention to the case of *Brockwell* v. *Bullock*, where the jurisdiction of the Lunacy Court over other courts is very carefully gone into by Fry, L.J., who in the course of his judgment discussed the cases, and pointed out that the court in lunacy has no jurisdiction to restrain proceedings against a lunatic. That is the short answer to this case. But it does not quite stop there, for though the justices of the Court of Appeal sitting in lunacy have all the powers of judges of the High Court, yet as judges of the High Court we have no power to interfere with the jurisdiction of the county courts It is true that there is a right of appeal from the county court in bankruptcy to the Divisional Court under the Bankruptcy Act of 1883; but, putting together that Act and the Judicature Act and the decision in *Re Platt*, I am of opinion that we have no power to do this, and the summons must be dismissed.

Then we are asked to sanction an application by the committee to the Court of Bankruptcy to have this money paid to her or to annul the adjudication. We have come to the conclusion that it is not for the benefit of the lunatic that such an application should be made. Our reasons are shortly these. Such an application by the committee to the Court of Bankruptcy for the payment out of this money to her would, in our opinion, be unsuccessful. The only way to succeed would be to apply to annul the adjudication. We are rather disposed to think that such an application would be successful, the bankruptcy having taken place since the inquisition; but it is anything but a clear point. If the committee made the application it might lead to an appeal to the House of Lords; and, seeing that the estate of this lunatic is not large, we are not prepared to say that it is for the benefit of the lunatic to sanction such an application. We are very much influenced indeed by the lapse of time which has expired since the bankruptcy, and under the circumstances we think that the application to annul the bankruptcy might fail upon that ground; at all events it increases the danger of the experiment. Without saying that the bankruptcy could not be successfully impeached, we do not think it would be for the benefit of the lunatic to endeavour to annul the bankruptcy. Therefore no such leave ought to be given.

KAY, L.J.—This case is so important that I will add a few words. The application is perfectly novel. It is a summons taken out by the committee asking for an account. [His lordship read the summons.] Now, no doubt, the Court in Lunacy, or the judges who are intrusted with the jurisdiction in lunacy, have gone very far indeed in this direction. For a long time past it has been recognized as within their

(*a*.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

power to apply moneys of the lunatic which are in their control in lunacy for the maintenance of the lunatic, although he may have creditors who are unpaid, and although the application of these moneys in this way may prevent these creditors from ever being paid. The court has gone as far as that. But there is no case so far as I know in which the court has gone any further than that. The court has never taken any property out of the hands of creditors in order to apply it for the benefit of the lunatic. To do so would be monstrous. Suppose that instead of being paid into the Bankruptcy Court this money had been paid to a creditor, would this court order the creditor to return it on the ground that it was wanted for the benefit of the lunatic. The court would not dream of doing any such thing. It would have no jurisdiction to do so. The jurisdiction of the court is strictly limited to property in its custody or under its control. Here the moneys in question are not in the actual custody of the trustee in bankruptcy. They are under the control of the Board of Trade, which is pretty much the same as if they had been paid into the Court of Bankruptcy, whose duty, so long as the bankruptcy subsists, is to divide it amongst the creditors. Now, what power has the court sitting in lunacy to order the trustee in bankruptcy, still less the Court of Bankruptcy, to hand these moneys over to the committee in order that they may be applied for the benefit of the lunatic. That is very nearly as strong a step as ordering a creditor who had received his debt to refund it. If not actually in the possession of the creditors, this money is in the possession of the trustee in bankruptcy for the benefit of the creditors, or of the Court of Bankruptcy for the benefit of the creditors. Unless there is an express statutory power giving the Court in Lunacy power to order a third person, who is no party to the lunacy proceedings, to hand this money back again, in my opinion it would be doing something which the Court in Lunacy has never attempted to do up to this time, and which it has no jurisdiction to do. We asked, Is there any provision in the Bankruptcy Act which confers that power? None could be found. I know of none. I should think it extremely unlikely that the Legislature would put it in the power of judges in lunacy to order third parties, who are not parties to the lunacy proceedings, without any proceeding against them to hand over money to the Court in Lunacy, money which they have received. At any rate there is no such power; I cannot conceive it possible that there should be. All that could have been done would be to direct the committee to take proceedings in bankruptcy in order that we may get the money from the trustee in bankruptcy. That would be a monstrously strong thing to do. I cannot think that the judges in lunacy would ever do such a thing as that.

It is said that the bankruptcy might be annulled. On that I give no opinion whatever. Assume that it might be; the question is, Is it for the benefit of the lunatic that we should direct the committee to embark in a litigation which must be carried on in the Bankruptcy Court to have the bankruptcy annulled on the ground that at the dates when the act of bankruptcy was committed, and when the receiving order was made, the bankrupt was a lunatic? That would be an experimental action, and I do not know what the result would be; but we do know that the property of this lunatic is very small, and in such litigation a large proportion of that small property would be swept away; and, seeing that the only object of that application would be to take away from the creditors of the bankrupt that which in any view—legal or moral—they are entitled to, it is impossible to say that it is the duty of the judges in lunacy to direct the committee to commence proceedings the result of which would be doubtful, and which would certainly injure the creditors of the lunatic, and might not benefit the lunatic at all. It would be perfectly ludicrous if we directed the committtee to take any proceedings other than proceedings to impeach the bankruptcy. If the committee were to commence proceedings and say, "I do not impeach the bankruptcy, but I ask the Bankruptcy Court to give me the money," it would be ludicrous. I can only conceive one possible answer to it—namely, that the Court of Bankruptcy will not part with property available for the payment of the creditors. I think that this application is quite misconceived. We cannot order the trustee in bankruptcy to pay this money over, nor can we, in the interest of the lunatic, direct the committee either to take proceedings to have the bankruptcy annulled or, treating the bankruptcy as valid, to take proceedings to try to induce the Court of Bankruptcy to allow this money to be paid to the committee.

The application fails, and must be dismissed with costs.

A. L. SMITH, L.J., concurred.

Solicitors, *Prior, Church, & Adams; Field, Roscoe, & Co.*

Court of Appeal.

From Chan. Div. (Lindley, Kay, & A. L. Smith, L.JJ.) } Feb. 4, 5, 6, 24.

MILLER *v.* COLLINS. (*a*.)

Married woman—Reversionary life interest in proceeds of sale of real estate—"Interest in land"—Trust funds invested on mortgage of realty—Fines and Recoveries Abolition Act (3 & 4 *Will.* 4, c. 74), *ss.* 1, 77.

A married woman's beneficial interest in a sum of money properly invested by her trustees on a mortgage of land conveyed to them, is an "estate" within the meaning of that word as defined in section 1 *of the Fines and Recoveries Abolition Act. Consequently the married woman is competent to dispose of her interest in such money by virtue of section* 77 *of the same Act.*

So held by the Court of Appeal (Kay, L.J., *dissenting*).

In re Newton's Trusts, 23 *Ch. D.* 181, 32 *W. R. Dig.* 64, *overruled.*

Appeal from Stirling, J.

The question raised was whether an assignment by a married woman of her interest in a reversionary fund invested upon a mortgage of real estate under a settlement executed before Malins' Act (20 & 21 Vict. c. 57) was valid or not.

The reversionary interest in question was that of a Mrs. Clayton, and was created by a settlement made in 1855. By that settlement land was vested in trustees upon trust for Mr. Clayton for life, with remainder to Mrs. Clayton for life, with certain remainders over. The settlement contained a power enabling the trustees to sell and invest the proceeds on mortgage; but there was no direction or power to reinvest in the purchase of land. The trustees sold the land so settled and invested the proceeds, amounting to £1,100, on mortgage. By a deed dated the 21st of July, 1869, Mr. and Mrs. Clayton sold their life

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

interest in this £1,100 to one Hardy, through whom the defendant claimed. This deed comprised some houses in which Mr. and Mrs. Clayton were interested, besides their life interest in the above-mentioned fund. The deed was duly acknowledged by Mrs. Clayton, and was enrolled as required by the Act for the Abolition of Fines and Recoveries. In 1869 Mrs. Clayton's interest in the £1,100 was a reversionary interest, and the deed of 1869, so far as her life interest was concerned, could only bind her if such interest could be bound under the Fines and Recoveries Abolition Act.

Mrs. Clayton survived her husband, and she was still living when, on the 7th of July, 1894, the defendant entered into the contract, the subject-matter of this action, for the sale of her life interest to the plaintiff.

This action was instituted in 1895; and by it the plaintiff, the purchaser under the contract of the 7th of July, 1894, claimed a declaration that the defendant, the vendor, had no title to Mrs. Clayton's life interest, on the ground that the deed of the 21st of July, 1869, could not pass Mrs. Clayton's then reversionary life interest. The defendant counter-claimed for the balance of the purchase money, and damages for breach of contract.

By section 1 of the Fines and Recoveries Abolition Act the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting lands either at law or in equity, and shall also extend to any interest, charge, lien, or incumbrance, in, upon, or affecting money subject to be invested in the purchase of lands.

By section 77 of the same Act a married woman, by deed duly acknowleged and with her husband's concurrence, may dispose of lands of any tenure and money subject to be invested in the purchase of lands, and also dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and may release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*.

Stirling, J., held that the wife's interest was not an interest in land within the meaning of the Fines and Recoveries Abolition Act, and that she could not dispose of it under section 77 of that Act; he therefore ordered the defendant, the vendor, to return to the plaintiff, the purchaser, his deposit, and to pay damages to the purchaser for the breach of the contract of sale.

The defendant appealed.

Cozens-Hardy, Q.C., and *Willis-Bund*, for the appellant.—This is an interest in land within the meaning of 9 Geo. 2, c. 36, s. 3, and the decision of the Court of Appeal in *In re Watts, Cornford* v. *Elliott*, 33 W. R. 885, 29 Ch. D. 947, is conclusive to show that it is so. See also *In re Durrant & Stoner*, 30 W. R. 37, 18 Ch. D. 106; *Briggs* v. *Chamberlain*, 1 W. R. 346, 11 Hare 69. Stirling, J., relied on *In re Newton's Trusts*, 23 Ch. D. 181, 32 W. R. Dig. 64; had it not been for that case he would have decided differently. We submit that that decision was wrong. [KAY, L.J.—Does *Re Harris, Jacson* v. *Governors of Queen Anne's Bounty*, 29 W. R. 119, 15 Ch. D. 561, touch the present case?] No.

Graham Hastings, Q.C., and *Douglas*, for the respondent.—This is an interest in a mortgage debt and not in land, and is therefore not within the statute. If a married woman has an interest in land, she can dispose of that, but she cannot dispose of her limited interest in a mortgage debt by fine unless she is also the owner of it; the authorities are all the other way.

They referred to *In re Algeo*, Ir. Rep. 2 Eq. 485, 17 W. R. Ch. Dig. 100; *Palmer* v. *Locke*, 30 W. R. 419, 18 Ch. D. 381; *In re Thackwray and Young*, 37 W. R. 74, 40 Ch. D. 34; *Re New Land Development Association and Fagence*, 40 W. R. 295, 551, [1892] 2 Ch. 138.

Cozens Hardy, Q.C., in reply.—There is no reason why the language in the Fines and Recoveries Act should have any narrower application than it has in 9 Geo. 2, c. 36. The critical period is at the date when the settlement was executed. Had the lady an interest in real property in July, 1869? The doctrine that a doubtful title should not be forced on a purchaser is because he ought not to be exposed to litigation; but here no doubt arises, because the married woman is now dead, and therefore the doctrine does not apply.

He referred to *Forbes* v. *Adams*, 9 Sim. 462; *Alexander* v. *Mills*, 19 W. R. 310, L. R. 6 Ch. App. 124.

Cur. adv. vult.

Feb. 24.—LINDLEY, L.J., read the following judgment, in which A. L. SMITH, L.J., concurred:—This is an appeal from a decision of Stirling, J., declaring that a vendor of a certain life interest could not make a good title to it, and ordering him to return to the purchaser his deposit, and to pay damages to the purchaser for breach by the vendor of the contract of sale. [His lordship stated the facts, and continued:—] The whole question therefore is whether a married woman's beneficial interest in a sum of money properly invested by her trustees on a mortgage of land conveyed to them is within section 77 of the Fines and Recoveries Abolition Act. On reading that section, the above question will be found to turn on whether that interest is "an estate" within the meaning of that word as defined in section 1 of the same Act. Stirling, J., has held that it is not, and he has done so on the authority of a decision by Chitty, J. (*Re Newton's Trusts*), to which I will refer presently; but I gather from his judgment that had it not been for that decision he would have decided this case the other way. [His lordship read the two sections 1 and 77, and continued:—] Now, I confess I am quite unable to see the impropriety of describing the interest of a person beneficially entitled to money invested on mortgage held by his trustee as an interest in land. The interest of the *cestui que trust* is not confined to the money, but extends to the security for it—*i.e.*, to the land held by his trustee. Such land is vested in the trustee; but upon trust for whom? The only possible answer is, upon trust for those persons who are beneficially entitled to the money. If there is only one such person, and he is *sui juris*, the trustee can be required to transfer the security to him—*i.e.*, to assign the debt and convey the land to him. If there are several such persons, and they are all *sui juris* and absolutely entitled to the money, and they agree, they can also require the mortgage debt to be assigned, and the land to be conveyed to them. These are only illustrations which lead me to say that a *cestui que trust* of a mortgage debt has an interest in the land. If the debt is so settled that the *cestuis que trust* have not the right to call for an assignment of the debt to them, they are nevertheless *cestuis que trust* of the whole security—debt and land—and each of them has an interest, though possibly a limited interest, in the one quite as much as in the other. It is true they can only reach the mortgagor or the land

through their trustee, but this does not show that they have no interest in the land, the legal estate in which is in their trustee.

It was contended before us that the words "interest in land" in section 1 of the Fines and Recoveries Abolition Act were used by way of contrast to "charge, lien, or encumbrance on or affecting land," and that Mrs. Clayton's interest was only an interest in a charge or encumbrance, and neither an interest in land nor a charge or encumbrance. But this criticism of the language is, in my opinion, unsatisfactory and unsound. The word "encumbrance" is wide enough to include "charge" and "lien," and yet all three words are used. Further, I can find no indication of any intention in this Act to make any distinction between a charge or an encumbrance, and a partial interest in a charge or in an encumbrance. The object of the Act does not require any such distinction to be drawn, nor does the language of the Act. On the contrary, such a distinction would defeat, and not promote, the object to attain which the Act was passed. The truth is that, in defining "estate," no contrast is made, or intended to be made, between one interest in land and another, but the sentence is framed so as to include all interests, legal or equitable, in land, or money charged upon it or to be invested in its purchase or to arise from its sale, and several words are used by way of precaution to emphasize the meaning and to make sure that nothing intended to be included should inadvertently be omitted. This is how the matter appears to me to stand on principle and on the construction of the Act.

I pass now to consider the authorities, and first I will refer shortly to the decisions on the Act itself. In *Hobby* v. *Collins*, 4 De. G. & Sm. 289, Knight Bruce, L.J., certainly held that the Act did not enable a married woman to dispose of her reversionary interest in money charged on land, or subject to a trust for investment in land. But this case has not been followed, and it has been disapproved by Lord St. Leonards (see his Real Property Statutes, pp. 232, 233). In the following cases such interests have been held to be within the statute: *Briggs* v. *Chamberlain*, where the married woman's interest was a reversionary interest in money to arise from the sale of land. *Tuer* v. *Turner*, 3 W. R. 583, 20 Beav. 560, was a similar case. *Williams* v. *Cooke*, 11 W. R. 504, 4 Gif. 343, is another decision in accordance with these. In that case a wife's equity to a settlement turned on the effect of her acknowledged deed on her reversionary interest in a sum of money charged on land. *Re Durrant & Stoner* was another case of a reversionary interest in money. The money there had been improperly invested in land, but a married woman's interest in it was held bound by a deed executed and acknowledged according to the Act. These cases can, no doubt, be distinguished in their details from the present, but not, I think, in principle. They are all alike in being reversionary interests in money, and in my opinion it is immaterial whether the money is charged upon, or is to arise from, or is subject to be invested in, land. In *Briggs* v. *Chamberlain* Wood, V.C., emphatically stated: "The question does not turn on the difference between an interest in possession and an interest in reversion. The question is whether it is an interest in land which can pass by a fine or by a deed having a like effect."

In *Re Newton's Trusts*, Chitty, J., appears to have decided the exact point which arises in the present case, and to have decided that the reversionary interest of a married woman in money invested by her trustees on mortgage was not within the Fines and Recoveries Abolition Act. I confess I have great difficulty in understanding that case. It seems to have turned on the fact that the married woman had a reversionary interest in only two-thirds of the mortgage debt, and that the owner of the other third did not join in the assignment. The decision appears to me to be opposed to those which I have mentioned, although, no doubt, it is consistent with *Hobby* v. *Collins*. I feel compelled to say that I think *Re Newton's Trusts* was decided on too narrow a view of the Act.

On the more general question, whether an equitable interest in a mortgage debt is an "interest in land," the decisions on the Mortmain Act (9 Geo. 2, c. 36) are important, for the language of that Act is almost precisely the same as that of the definition of "estate" in the Act for the Abolition of Fines and Recoveries. In *Brook* v. *Badley*, 16 W. R. 947, L. R. 3 Ch. App. 672, Lord Cairns pointed out that a person could not be said to have no interest in land simply because he could not himself actually obtain possession of it, nor because it could be conveyed by trustees without his concurrence. Again, in *Re Watts*, Cotton and Fry, L.JJ., expressed their clear opinion that an equitable interest in a mortgage debt was an "interest in land" in the proper sense of that expression, and within its meaning as used in 9 Geo. 2, c. 36. These decisions confirm the opinion which I entertain myself, and I can discover no reason for holding that the language of the one Act ought to be construed differently from that of the other.

Mrs. Clayton's interest in the £1,100 in question might, in my opinion, be properly regarded either as an interest in land or as an encumbrance upon or affecting it. Her deed affected not only her interest in the land, but also her interest in the money which formed the encumbrance upon it, and which, in truth, was the foundation and the measure of her interest in the land. Her interest in the land and in the money secured on it is well within the words used to define "estate," and I see no justification for construing those words narrowly, even if the result may be to enable married women to do more by an acknowledged deed under the Fines and Recoveries Abolition Act than they could have done by a fine before the Act passed, or can be done even now under Vice-Chancellor Malins' Act, which excepts money to which married women are entitled under their marriage settlements.

Something was said about the vendor's title being too doubtful to force on the purchaser. But there is no risk of eviction or disturbance, and, as was pointed out when the case was argued, there is really nothing in this point. The vendor is entitled to the balance of his purchase money, which is practically the real question in dispute. For these reasons I am of opinion that the appeal should be allowed, the judgment below reversed, and judgment be entered for the defendant both on the claim and on the counterclaim, with costs both here and below.

KAY, L.J., read a written judgment, in which he stated the facts, and continued:—The question is whether the equitable life estate in reversion to which Mrs. Clayton was entitled in the income of the £1,100 was, at the date of the assignment by her in 1869, an "interest in land" within the meaning of those words in the Fines and Recoveries Act, so that, with her husband's concurrence, she could convey it by an acknowledged deed. If it was, this somewhat peculiar result follows: If the sum had been variously invested, part on mortgage and part in Consols, so much income as was derived from the part secured by the mortgage only, would pass; the rest would not pass. The £1,100 lent to the mortgagor was a debt due from him. That he gave a security on land for payment of that debt, in addition to his personal liability, could not make the personal debt

of £1,100, land or an interest in land. Formerly a mortgagor had to give a bond for the debt. Now he covenants in the mortgage to pay it. But, in either case, at the time of the passing of the Fines and Recoveries Act all that the mortgagee could do as to the debt was to make an assignment of it which was only a contract in equity, and give a power of attorney to use the transferor's name to recover it. Could a married woman assign the debt under the Fines and Recoveries Act? If she could, the Act enabled her to make a legal assignment of a debt which no one else could do. What she attempted to assign in this case was the income during her life in the reversion of the £1,100, not the mortgage security or any interest in it. When a question arises as to the meaning and effect of words used in an Act of Parliament, the ordinary mode of solving it is to consider the object of the statute, and to see whether the case comes within the real meaning and purpose of it. The object of the Fines and Recoveries Act was, so far as married women were concerned, to facilitate the transfer of real estate by providing a simpler mode of conveying their interests in it, than the somewhat cumbrous device of a fine. Would it facilitate the transfer of real estate to hold that the deed of 1869 passed the married woman's reversionary life estate in the £1,100? Her concurrence was not necessary to enable the trustees to deal with the mortgaged estate. They could convey it, transfer, or release it from the mortgage debt without her, and, supposing such acts to be done in the due performance of the trust, she had no power to interfere. Could the Fines and Recoveries Act have been intended to enable her to dispose of her reversionary life interest in equity in the income derived from a debt which was collaterally secured by a mortgage so situated? I asked during the argument whether there was any authority for saying that such an interest could have been transferred by a fine. None was produced, and my impression is that such an interest could not have been so transferred. This would be another reason for presuming that the case did not come within the Act. Mr. Hastings called attention to the words of section 1 defining "estate." Section 77 enables a married woman to dispose of any estate in land. Section 1 says that "the word 'estate' shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or encumbrance in, upon, or affecting lands, either at law or in equity." It was suggested that that must be read "any interest in lands, or any charge, lien, or encumbrance upon or affecting lands," and I think that it is so. It is correct to speak of an interest in land, but hardly to say an "interest upon or affecting land." Those words "upon or affecting" are rather applicable to "charge, lien, or encumbrance." Then it was argued that "interest in land," as there used, must mean something other than "charge, lien, or encumbrance." If it included them, those words would be superfluous. It is not a sweeping clause following those words. I do not rely upon this argument. However the words are read they do not seem to me to express any interest in a debt which is also secured by a charge, lien, or encumbrance on land. The word "mortgage" does not occur in the definition, probably because the Act was only dealing with land, and the word "mortgage," as popularly used, includes both the personal debt and the charge. The words seem to contemplate dealing with the land so as to free it from a charge, lien, or encumbrance, when such an encumbrance is vested in a married woman or her concurrence is necessary to deal with it, but not to an assignment of a reversionary interest in equity in money which happens to be secured by a collateral charge or encumbrance, and least of all to an assignment of an equitable reversionary interest for life in such money.

I will now refer to the cases which seem to approach most nearly to the question we have to consider. In *Goodrick* v. *Shotbolt*, Prec. Ch. 333, a married woman was entitled in equity to a bond and warrant of attorney given before her marriage by her intended husband to her father to secure £300 to her on the death of her husband, if she survived him. Judgment was entered by her father on the warrant of attorney, which thus created a charge upon all the real estate of the husband. The wife joined with her husband in conveying his land by deed and fine in order to extinguish her equitable interest in this charge. She survived both her husband and her father, and took out administration to her father, and then, as his administratrix, sought to extend the judgment against her husband's land, and it was held by Lord Keeper Sir Simon Harcourt (afterwards Lord Chancellor Harcourt) that the fine extinguished her equitable right to the charge created by the judgment, and that therefore she could not extend the land under the judgment, but must enter satisfaction upon it. This seems to show the true operation of a fine in such a case. To extinguish the charge upon the land was a very different thing from assigning the reversionary interest in the £300 to a third person. The fine did not affect the right to the bond debt, nor could it transfer the bond debt. But a fine might be used to effect a transfer of money which was solely an interest in land. For instance, in *May* v. *Roper*, 4 Sim. 360, it was held that a fine by a married woman did pass her share of the proceeds of sale of real estate, which was devised in trust to sell and to pay part of the proceeds to her; and this was again held in *Forbes* v. *Adams*. In these cases the share of the proceeds, until the sale had actually taken place and the real estate was completely converted, was an equitable interest in the land, and nothing else. So in *Briggs* v. *Chamberlain* land was held in trust for sale, and a *cestui que trust* of a share in the proceeds, being a married woman, mortgaged her interest, with the concurrence of her husband, by a deed duly acknowledged. This was solely an interest in land, and therefore bound by the mortgage. In *Williams* v. *Cooke* a woman, before her marriage, had a debt due to her secured by a deposit of deeds with her, and, with the concurrence of her husband, she, by acknowledged deed assigned this charge by way of mortgage. This was not a reversionary interest; the husband and wife could assign the debt in equity, and under the Act could also make a valid conveyance of the security. In *Re Durrant and Stoner* trustees improperly invested the trust moneys in the purchase of land, and the *cestuis que trust*, who were married women, joined with the trustees in selling and conveying the land by acknowledged deed. In that case the married women had a lien on the land, and the trustees could not have conveyed it without their concurrence; so that it came within the words and within the object and purpose of the Act. In *Re Newton's Trusts* trustees of personal estate invested part of it on mortgage. A married woman was entitled to one-third of such personal estate in reversion after a life estate. She and her husband by a deed, in 1854, before Vice-Chancellor Malins' Act, purported to concur with the tenant for life and the other *cestuis que trust* in reversion, in assigning the mortgage debts and all other the personal property by way of mortgage, and the married woman acknowledged this deed under the Fines and Recoveries Act. Chitty, J., said that the question turned upon the construction of the Fines and Recoveries Act, and that the deed was not sufficient to pass the interest of the married women in

the mortgage debts. The learned judge afterwards referred to the non-concurrence of one of the *cestuis que trust* in remainder—I suppose because the other *cestuis que trust* could not alone require a transfer to themselves of the mortgage. But I understand the main reason of the decision to be, that what the married woman purported to assign was an equitable interest in a debt secured by mortgage, and not merely an "interest in land" within the meaning of those words in the Fines and Recoveries Act.

But great reliance was placed upon *Re Watts*. That was a case under the Mortmain Act (9 Geo. 2, c. 36). A testator had bequeathed such part of his personal estate as could by law be so given to charities. Three items were in question—(1) a mortgage to the testator of an equitable life estate in personal property, which was invested on mortgage in the names of trustees; (2) a mortgage of another equitable life interest and half the reversion in personal property, which was invested on mortgage in the names of trustees; (3) a similar mortgage of the other half. Pearson, J., held that the first was pure personalty and passed to the charities, because the testator did not in that case take any real interest in the original mortgage, all he took was the income of the money invested on mortgage. But as to (2) and (3) he decided that these were interests in land, because by foreclosing both, the testator (the mortgagee of these interests) would become entitled to call upon the trustees to transfer the original mortgage to him, and would thus become entitled to the land. There was no appeal as to (1), the mortgage of the life interest; but as to (2) and (3) the case was appealed, and the decision of Pearson, J., was affirmed, on the ground that these mortgages gave to the mortgagee an interest in land; Cotton, L.J., saying that "a mortgage by some of the *cestuis que trust* of their interests under a settlement, the funds subject to which are invested on mortgage of land, confers an interest in land, and therefore cannot be bequeathed to a charity"; and Fry, L.J., expressed an opinion that the charge need not be direct to create an interest in land under the Act. So far as direct authority can be found, the decision of Chitty, J., in *Re Newton's Trusts* and that of Pearson, J., in *Re Watts* are against the view that a married woman could transfer her reversionary interest in personal property, which is invested on mortgage in the names of trustees by acknowledged deed under the Fines and Recoveries Act. The decision of the Court of Appeal in *Re Watts* was under a different statute, and was a case in which the testator was or might become absolutely entitled to the debt and to the mortgage security, and it does not seem to me to govern the present case.

My opinion is that the equitable life interest in reversion of the married woman in the £1,100 in the present case, could not be transferred by an acknowledged deed under the Fines and Recoveries Act, and consequently, that the vendor's title was bad, and that the plaintiff should recover his deposit, and that this appeal should be dismissed.

Since Vice-Chancellor Malins' Act (20 & 21 Vict. c. 57), which expressly authorizes assignments by acknowledged deeds of personal property to which married women are entitled in reversion under an instrument made after the 31st of December, 1857, not being a settlement made on marriage, this question will not often arise. But it may be that under a marriage settlement a married woman is entitled to a reversionary interest for life in personal property which happens to be invested on mortgage. She cannot assign this under Vice-Chancellor Malins' Act. Can it be that, though expressly prohibited by that Act, it can be disposed of under the Fines and Recoveries Act?

Appeal allowed.

Solicitors for the appellant, *Kennedy, Hughes, & Kennedy*, for *J. A. Hughes*, Wrexham.

Solicitors for the respondent, *Atkinson & Dresser*, for *Truman*, Nottingham.

From Chan. Div. (Lindley and Kay, L.JJ.) Jan. 20, 21.

In re NEWTON (INFANTS) (*a*.)

Infant—Religious education—Rights of father—Abdication by course of conduct.

Where a father had acquiesced in his two daughters being educated as Protestants until they had attained the ages of fifteen and eleven respectively, the court refused the father's application to have them educated as Roman Catholics, being of opinion that such a resumption of the father's authority would be contrary to the interests of the children.

This was an appeal from the decision of Kekewich, J.

The infants were two girls, aged respectively fifteen and eleven, the only surviving children of John Newton. The father had originally been a Roman Catholic, but had married a Protestant wife, and had allowed all the children of the marriage to be brought up in the Church of England. The mother died in 1888. Up to that time the father had been for a long period a teetotaller, but after his wife's death he fell into habits of intemperance, and was on several occasions convicted upon charges of being drunk or drunk and disorderly. He also neglected his two surviving children, who were found by their half-brother in a state of destitution. The father, however, produced evidence to show that, since the occasion of his last conviction, in August, 1894, he had reformed his habits and become a sincere Roman Catholic.

The infants were wards of court, an aunt of their mother having provided each of them with an annuity of £50, and were being educated at a Protestant school to which they had been sent by an order of the court. The father took out a summons that they might be removed from the school at which they were being educated, to some suitable Roman Catholic school.

Kekewich, J., having interviewed the children, and being of opinion that it was not for the benefit of the elder child to be removed from the school, and that it was inadvisable to separate the two children, refused the application.

The father appealed.

Costelloe, for the appellant.—In this case the court has no jurisdiction to interfere with the father's parental authority. The fact that the father is alive makes the case still stronger. Habits of intemperance alone will not give the court jurisdiction: *Re Goldsworthy*, 2 Q. B. D. 75, 25 W. R. Dig. 169.

He also referred to *D'Alton* v. *D'Alton*, 4 P. D. 87, 27 W. R. Dig. 97; *Re Meades*, 19 W. R. 313, 5 Ir. Rep. Eq. 98; *Barnardo* v. *McHugh*, 40 W. R. 97, [1891] A. C. 388; *Re Scanlan*, 36 W. R. 842, 40 Ch. D. 200; and *Davis* v. *Davis*, 10 W. R. 245. [LINDLEY, L.J., referred to *Re Agar-Ellis*, 27 W. R. 117, 32 *ibid.* 1, 10 Ch. D. 49, 24 *ibid.* 317. KAY, L.J., referred to *Reg.* v. *Gyngall*, [1893] 2 Q. B. 232, and *De Manneville* v. *De Manneville*, 10 Ves. 52.]

Hopkinson, Q.C., and *Ryland*, for the respondents.—It is for the benefit of the infants that they should

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

not be removed, and that is the chief consideration. The father has forfeited his rights.

They referred to *Re Nevin*, [1891] 2 Ch. 299, 39 W. R. Dig. 90; *Hill* v. *Hill*, 10 W. R. 400, 8 Jur. N. S. 609; *Lyons* v. *Blenkin*, Jac. 245; *Re McGrath*, 41 W. R. 97, [1893] 1 Ch. 143; and *Stourton* v. *Stourton*, 5 W. R. 418, 8 De G. M. & G. 760.

Costelloe replied.

LINDLEY, L.J.—Nothing will be gained by looking further into the authorities. The case is a curious one, and not free from difficulty. [His lordship stated the facts.] *Re Agar-Ellis* and *Re McGrath* show that the court has jurisdiction to disregard the wishes of the father, but a strong case must be shown. In no other case has the father been alive except when he has been so ill-conditioned as to be deprived of all right to the custody of his children. Looking at *Re Agar-Ellis* and *Re McGrath* we have to consider the father's rights, and whether any circumstances have arisen curtailing them. I am of opinion that on the whole Kekewich, J., was right. The elder girl is old enough to choose for herself, and it would be a pity to separate the two.

KAY, L.J.—There is no doubt about the law which is applicable to this case, but the peculiarity is that the father is still living. He now, when his children are fifteen and eleven respectively, desires that their religion should be suddenly changed. What is the law applicable to such a case? It is found in *Re Agar-Ellis* in the judgment of James, L.J., than whom no judge ever placed the rights of a father on a higher level. He said (10 Ch. D., at p. 71): "It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt the law may take away from him this right, or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all, or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children." In that case the mother had, without the father's knowledge, caused the children to be brought up in the Roman Catholic religion. It was not a case where the children had imbibed views. This case is different. The children have always been brought up as Protestants without the slightest objection on the father's part. If the father had died after in this way assenting to the education of his children as Protestants, it is impossible to conceive that any court would have interfered. Then does the father being alive make any difference? The father has "abdicated" his right, and it would be "capricious and cruel towards the children" to change their religion.

There is a little difficulty about the younger girl; but they have always been together, and should not now be separated.

The case falls within the exception mentioned by James, L.J., and I think Kekewich, J., took the wise, proper, and legal course.

Appeal dismissed.

Solicitors, *Charles Steele; Woodcock, Ryland, & Parker*, for *Greenhalgh & Cannon*, Bolton.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) Feb. 20.

TOMLINSON *v.* BROADSMITH AND ANOTHER. (*a*.)

Partnership — Managing partner — Authority — Action against firm — Instructions to solicitor — Entering appearance in names of partners—Duty of solicitor—Information to partners of progress of action—Negligence.

The managing partner in a trading firm has authority to defend an action brought against the firm.

A solicitor employed by the managing partner in a firm to defend an action brought against the firm has authority to enter an appearance in the names of each of the partners.

Judgment was recovered in an action against a firm. The solicitor for the firm communicated this fact to the partner who had instructed him to act, but not to the other partners.

Held, that there was no evidence of negligence on the part of the solicitor.

Appeal of the defendants from the judgment of Kennedy, J., at the trial of the action with a special jury at Manchester.

The defendants were a firm of solicitors, and the action was brought by the plaintiff to recover damages on the ground that the defendants wrongfully and without the plaintiff's authority entered an appearance on his behalf in an action against a firm in which the plaintiff was said to be a partner, by reason of which judgment was obtained against him without his knowledge, and an execution was put into his house. Alternatively the plaintiff alleged that if the defendants had acted with his authority, they had been guilty of negligence in not informing him that judgment had been obtained against him.

In 1893 the plaintiff, in conjunction with Preston, advanced £1,000 to one Horton for the purpose of assisting him in a business then carried on by him. A deed was entered into by the parties by which the plaintiff was to have 10 per cent. interest on his loan, and one-third of the profits of the business; but it was expressly stipulated in the deed that the plaintiff and Preston were not to be partners with Horton. The deed further provided that Horton was to manage the business, and that he was not to hold out the plaintiff and Preston as his partners.

The learned judge at the trial, and the Court of Appeal, held that the effect of the deed was to constitute the parties partners.

In 1894 an action was commenced against the firm for goods supplied. Horton instructed the defendants to act as solicitors on behalf of the firm, and to defend the action. The defendants thereupon entered an appearance in the names of each of the partners as required by ord. 48A, r. 5. Judgment was obtained in the action under order 14, and execution was levied upon the plaintiff's goods. The plaintiff paid out the execution and then brought this action.

In answer to the allegation of negligence, the defendants proved that they had informed Horton that judgment had been recovered against the firm.

The jury, in answer to questions left to them, found that the defendants had no authority from the plaintiff to enter an appearance in his name, and that the defendants had also been guilty of negligence in the performance of their duty as solicitors. The jury assessed the damages at £200, for which sum the learned judge gave judgment.

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The defendants appealed.

Joseph Walton, Q.C., and *W. F. Taylor*, Q.C., for the defendants.—There was no evidence to go to the jury on either question. It is within the scope of authority of a managing partner to defend an action brought against the firm; and that being so, he has authority to employ a solicitor to defend the action in the manner provided by ord. 48A, r. 5—*i.e.*, by entering an appearance for each of the partners. Secondly, there was no negligence on the part of the defendants in not informing the plaintiff of the progress of the action; it was sufficient for them to communicate with Horton, from whom they had received their instructions.

Pickford, Q.C., and *E. Acton*, for the plaintiff.—This was a trading business, and one partner had no implied authority to act for the others in matters of litigation: *Hambidge* v. *De la Croúe*, 3 C. B. 742; *Adams* v. *Bankart*, 1 C. M. & R. 681. It is true that in Lindley on Partnership, 6th ed., p. 280, it is stated that "one partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing if he acts against the will of the other partners"; but that shows that there is not an absolute authority, and the cases cited (*Goodman* v. *De Beauvoir*, 12 Jur. 989; *Harrison* v. *Jackson*, 7 T. R. 207; *Morley* v. *Strombom*, 3 B. & P. 254; and *Goldsmith* v. *Levy*, 4 Taunt. 299) do not support the proposition laid down. There was negligence on the part of the defendants in not informing the plaintiff that judgment had been signed against the firm, and that he was liable to have his goods taken in execution.

W. F. Taylor, Q.C., in reply, cited *Whitehead* v. *Hughes*, 2 Cr. & M. 318.

Lord ESHER, M.R.—In this case an action was brought against a firm of solicitors by the plaintiff, who alleged that the defendants had without authority entered an appearance for him in an action against a firm, and that in consequence of that act of the defendants, an execution was put into his house. The plaintiff further alleged that even if the defendants had authority to act on his behalf they had been guilty of negligence. The case was tried before Kennedy, J., and a jury, and the jury found that the defendants had no authority to enter an appearance for the plaintiff, and that the defendants had acted negligently towards the plaintiff in the conduct of the action. Kennedy, J., on these findings gave judgment for the plaintiff. The defendants have appealed, and contend that there was no evidence on either head, and that judgment ought to be entered for them.

The facts were these. The plaintiff Tomlinson, and Preston and Horton were partners in a trading business. The plaintiff and Preston, it is true, contended that they were not partners, but the question whether they were or were not depended on the construction of the deed entered into by the three, and that was a question for the judge. The judge held that the true effect of the deed was to make the plaintiff and Preston partners with Horton, and we agree with his ruling on that point. The plaintiff and Preston did not desire that it should be known that they were in the business, and stipulated that their names should not appear; but nevertheless they were in fact partners with Horton. The three partners agreed that Horton should manage the business. Horton, as manager, was empowered to do everything in the ordinary course of a trading business. The partnership required goods, and Horton, as manager, had authority to order goods and to bind his partners to pay for them, although as a matter of fact he ordered the goods without disclosing that the plaintiff and Preston were partners with him.

Now, it cannot be doubted that an action by creditors for goods supplied to a firm, is a transaction in the ordinary course of business of the firm. Horton therefore had authority to deal with the action which had been brought, and to defend that action in the ordinary manner. One mode of defending such an action is under ord. 48A, r. 5, by which an appearance is entered in the name of each partner; Horton in his capacity of manager having the right to defend the action, had authority to instruct a solicitor to enter an appearance for the other two partners, and he instructed the defendants to do so and to defend the action. The plaintiff contended that he was not a partner, but if so, the rules provide that he might have appeared under protest. Some criticisms have been made on a note in Lindley, L.J.'s, book on Partnership, where several cases are cited as instances of the matter referred to. Although the authorities cited may not be very pertinent, still Lindley, L.J., lays down the principle that a managing partner has authority to enter appearance for his partners in an action against the firm. The rule which has been referred to of not citing text-books in the lifetime of the author is not a hard and fast rule, and a book by so high an authority as Lindley, L.J., may certainly be referred to as an authority. Moreover, I think that the case of *Goodman* v. *De Beauvoir*, 12 Jur. 989, cited in the note, is an authority for the principle enunciated by Lindley, L.J. Therefore when Horton exercised his authority by instructing the defendants to act as solicitors for the firm they were authorized to act as they did in entering an appearance for the plaintiff. It is contended for the plaintiff that he put an end to Horton's authority by forbidding him to enter an appearance in the plaintiff's name. Even if the plaintiff had expressly done so, but had not taken away Horton's authority as managing director, I am strongly of opinion that Horton was still right in acting as he did, but it is not necessary to decide that point, for there is no evidence that the plaintiff did forbid Horton to enter an appearance for him. The plaintiff merely said that he would not appear at all because he was not a partner. That did not take away from Horton his authority to act as managing partner. Therefore on that part of the case the learned judge ought in my opinion to have directed the jury that, so far from there being no evidence that Horton had authority to act as he did, there was conclusive evidence that he had authority.

Then it is said that the defendants acted with negligence in the course of the litigation. It cannot be suggested that there was negligence on their part in the conduct of the case up to the point when judgment was obtained. Judgment was entered against the plaintiff as a matter of course, as, indeed, was inevitable. But it is alleged that the defendants were negligent because they did not inform the plaintiff that judgment had been entered against him. It would, in my opinion, be a very dangerous application of the principle of negligence to say that, however many partners there might be, and although the solicitors were acting under the authority of the managing partner, they were bound to send separate notice of the judgment to each partner. In this case the defendants were instructed by Horton, and when judgment was obtained they did, in fact, inform him, and, in my opinion, they had a right to assume that Horton would do his duty, and would inform the plaintiff of the progress of the action.

I come to the conclusion that there was no evidence on which the jury ought to have been asked to say that the defendants had been guilty of negligence. The plaintiff's case therefore fails on both heads for

want of evidence, and the judge ought therefore to have held that there was no case to leave to the jury, and to have entered verdict and judgment for the defendants.

LOPES, L.J.—There are certain facts in this case which are not in conflict. It is admitted that the plaintiff, Preston, and Horton were partners, that Horton was appointed managing partner, and that he was never displaced from that position. Two actions were brought against the firm for goods supplied. It is not disputed that Horton gave directions to the defendants to enter an appearance in the actions, and that the defendants did enter individual appearances in the names of each partner under ord. 48, r. 5. Those being the facts, the plaintiff brings this action.

The first question is as to Horton's authority to act as he did. It is good law to say that the managing partner of a business has an implied authority to direct a solicitor to enter an appearance in an action against the partnership: see *Goodman* v. *De Beauvoir*. There being that implied authority the plaintiff must show that the authority was negatived by him. Whether the authority could be negatived except by removing the managing partner it is unnecessary to decide, but it is clear that the plaintiff must show that the authority was expressly negatived. There does not appear to me to be any evidence of that in this case. The most that can be said in favour of that view is that at the interview which has been referred to, the plaintiff said that the matter had nothing to do with him because he was not a partner. The defendants, however, knew that the plaintiff was a partner, and in what the plaintiff said there was nothing approaching a withdrawal of the implied authority of the managing partner. In these circumstances I think the judge ought to have held that Horton had authority to instruct the defendant to enter an appearance on behalf of the plaintiff and to have so told the jury, and to have decided in favour of the defendants.

As to the second point I can see no evidence of negligence. I do not think that the defendants, in acting as they did, were guilty of even an error of judgment. The defendants communicated to Horton the fact that judgment had been entered against the plaintiff, and I do not think that the fact that the defendants did not communicate direct with the plaintiff is evidence of negligence.

RIGBY, L.J.—I agree entirely. I have no doubt that the agreement entered into by the plaintiff and Preston with Horton constitutes a partnership between the three, although the whole conduct of the partnership was to be left to Horton. He ordered goods for the purpose of the business, and a writ was issued for the price of the goods against the firm in the firm name. Horton instructed the defendants to defend the action. I have no doubt whatever that Horton, by reason of the relationship existing between himself and the other parties, had authority to do that. I do not think that it makes any difference even if it had been clearly expressed at the interview which took place—which I do not think that it was—that the plaintiff and Preston would not do anything to defend the action. I do not think they had a right to say that the action should go undefended or that it should be defended otherwise than in the way in which actions against partnerships are properly defended. If it had been a case of an action against one of the firm's customers, the managing partner would have had the right to take the proper steps to recover the debt, although one of the partners might have objected to the name of the firm being used. The same thing may be said with regard to a defence. One partner has no right to say that his name shall not be used if the proper course in defending an action is to use the names of the individual partners, and it makes no difference that the plaintiff in this case contended that there was no partnership. That was an assertion which, however sincerely made, he had no right to make.

As to the alleged negligence I concur in the view that there was none. The action therefore fails, and judgment must be entered for the defendants.

Appeal allowed.

Solicitors for the plaintiff, *Pritchard, Englefield, & Co.*, for *Charles Costeker*, Darwen.

Solicitors for the defendants, *Le Riche & Stevens*, for *J. O. Twemlow*, Manchester.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Feb. 5.

CUBISON *v.* MAYO. (*a*.)

County court—Costs—Remitted action—Costs incurred before and after remittal—Taxation—Right of solicitor to recover—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 118.

Where an action had been remitted for trial to the county court under section 65 *of the County Courts Act*, 1888, *and tried there, and the solicitor for one of the parties delivered his bill of costs to his client, and no application was made within the proper time to tax the costs;*

Held, that, in the absence of such an application to tax, section 118 *of the Act did not apply so as to prevent the solicitor from recovering on the untaxed bill of costs.*

Held, also, that section 118 *did not in any way affect the costs incurred in the High Court before the action was remitted.*

Boydell *v.* Millar, 39 *W. R.* 335, *approved.*

Appeal by the defendant, and cross-appeal by the plaintiff, from the judgment of Day, J., at the trial of the action without a jury.

The action was by a solicitor upon his bill of costs, incurred when acting as solicitor for the defendant in an action of *Sales* v. *Mayo*, which was originally commenced in the High Court, and remitted for trial to the county court under section 65 of the County Courts Act, 1888. The defence was that the bill had not been taxed in accordance with section 118 of the County Courts Act, 1888. No application was made to tax the bill, and this action was commenced more than twelve months after its delivery. Day, J., held that under section 118, in the absence of taxation, the plaintiff could not recover the costs in the county court subsequent to the order of remittal, but that that section did not affect the costs previously incurred in the High Court, and he accordingly gave judgment for these latter costs.

Moresby, for the defendant.—By the order of remittal under section 65 of the County Courts Act, 1888, the action became a county court action, as if it had been originally commenced in the county court. Therefore all the costs come within section 118 of the County Courts Act, 1888, as county court costs, and, though the scale for the taxation of the costs before and after the order of remittal is different, that section makes the absence of taxation a bar to the plaintiff's right to recover.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

He referred to *Harris* v. *Judge*, 41 W. R. 9, [1892] 2 Q. B. 565; *Boydell* v. *Millar*, 39 W. R. 335; *Duke* v. *Davis*, 41 W. R. 673, [1893] 2 Q. B. 260; *Bowles* v. *Drake*, 30 W. R. 333, 8 Q. B. D. 325.

H. Dobb, for the plaintiff.—Section 118 only applies to costs incurred in the county court. It has no application to the costs incurred before the remittal of the action. Remitted actions are not for all purposes the same as actions commenced in the county court: *White* v. *Cohen*, 41 W. R. 396, [1893] 1 Q. B. 580. Further, as regards the costs in the county court, section 118 does not make taxation a condition precedent to the right to recover those costs. There must be an application to tax the costs within the twelve months, otherwise the section does not prevent the solicitor from suing on his bill.

Lord ESHER, M.R.—An action was brought in the High Court against the present defendant, and in that action the present plaintiff acted as her solicitor. That action was remitted to the county court and tried there, and the present plaintiff continued to act as solicitor for the defendant. The plaintiff sent in his bill of costs in respect of that action, and after waiting a considerable time he brought this action in the High Court upon his bill of costs. The bill was delivered more than a year before this action was commenced, and the right to have it taxed was therefore lost, in the absence of special circumstances. No special circumstances were alleged to exist in this case. The defendant had in fact never asked to have the bill taxed.

With regard to the costs incurred in the High Court before the action was remitted, the case of *Boydell* v. *Millar* was authority for holding that those costs could be recovered in an action in the High Court. I agree with the decision in that case, and therefore the defendant's appeal fails.

As regards the cross-appeal of the plaintiff, in my opinion the true construction of section 118 of the County Courts Act, 1888, is that costs and charges in the county court shall, if the solicitor or client makes an application to that effect, be taxed, and no solicitor shall be entitled in such a case to recover the costs unless they are first taxed. But the section only applies when there is an application to tax, and the provision that a solicitor shall not recover the costs unless they are taxed only comes into operation if an application is made to tax the costs within the proper time. In the present case there was no application made to tax the costs, and the plaintiff has a right to bring his action on his bill in the High Court. The cross-appeal must therefore be allowed.

LOPES and RIGBY, L.JJ., concurred.

Appeal dismissed; cross-appeal allowed.

Solicitor for the plaintiff, *Cubison*.

Solicitor for the defendant, *E. Chester*.

High Court of Justice.

Chan. Div. }
Chitty, J. } April 14, 15.

In re POLLARD'S SETTLEMENT. (*a*.)

Married woman—Restraint on anticipation—Discretion of court to remove restraint—Debt to moneylender—Costs of defending criminal proceedings—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.

The court in exercising its discretion under section 39 *of the Conveyancing Act*, 1881, *to bind the interest of a married woman in any property notwithstanding that she is restrained from anticipation, has to consider all the circumstances and to balance the undoubted benefit of the restraint against the alleged benefit of its removal.*

Married women who have got into debt through extravagance or have gone to moneylenders will not, as a rule, be relieved from the restraint on anticipation.

It is for the benefit of a married woman to defend herself against legal proceedings involving an imputation on her character.

Summons.

This was a summons by a married woman for an order under section 39 of the Conveyancing Act, 1881, releasing her interest under a settlement made on her marriage, in 1882, from restraint on anticipation. The whole of the property to the income of which the applicant was entitled, subject to restraint on anticipation, was stated to be worth £30,000, and the net income to amount to about £1,067.

In April, 1892, an order was made under section 39 enabling her to raise £2,000.

In November, 1894, a second order was made enabling her to raise a further £1,000. The result was that her present income was about £830 per annum. There were five children of the marriage.

The applicant having obtained, in January, 1893, a divorce from her husband on the ground of his cruelty and adultery, had remarried in the following May. Her second husband was stated to be an undischarged bankrupt and absent abroad. There were no children of the second marriage.

The present summons, being her third application, was for an order enabling her to raise some £600 in order to pay off a debt of £500 and interest contracted with a moneylender, for which debt her stepfather, a clergyman, had joined as surety. The creditor had signed judgment and put an execution into the surety's rectory.

Chitty, J., having made an order in chambers refusing the summons, the applicant now moved in court to vary the order in chambers by giving her liberty to charge her interest to the extent of £800. The additional £200 was asked to enable the applicant to meet the costs of a pending prosecution of the applicant for the alleged offence of stealing furniture, under which she had been remanded by the magistrate on her own recognizances.

Farwell, Q.C., and *Johnston Edwards*, for the married woman.

Eyre Thompson, for the trustees of the settlement.

CHITTY, J.—Applications like the present are usually heard in chambers. That is more convenient, as the judge can inquire and ask many questions which had better not be asked before the public.

The courts of equity established the doctrine with reference to restraints on anticipation, considering that it was for the protection of the married woman, and that it was for her benefit that a provision should be secured to her which she was incapable of anticipating during coverture. Such cases, however, as *Robinson* v. *Wheelwright*, 4 W. R. 427, 6 De G. M. & G. 535, where it was clearly for the benefit of the married woman that the restraint should be removed, but where the court had held that it could not remove the restraint, had led to the passing of section 39 of the Conveyancing Act, 1881. This enactment confers a discretionary jurisdiction on the court, which ought not to be exercised unless for the benefit of the married woman. The court

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

must take into consideration all the circumstances, and it has to balance the undoubted benefit of the restraint against the alleged benefit of its removal, and to see whether the benefit of removal preponderates. It is not necessary to serve the trustees of the settlement, but the usual practice is to serve them. These applications being practically *ex parte*, the court has to look at the evidence with some jealousy. The trustees frequently do not wish to oppose. There are many cases where it is thought advisable to pay what are called the married woman's debts. These are not infrequently the debts of her husband. Even then it might be for her benefit to relieve her from difficulties in which the whole family is placed. There are other cases where the debts are incurred through no extravagance, but extra expenses have been incurred for doctors, nurses, and the like, or the family has got into a state of indebtedness through no fault of the married woman, or even of her husband. Recently, however, attempts are being made by married women who have got into debt through extravagance to endeavour to obtain in chambers, orders for the removal of the restraint. If judges in chambers yield to applications like the present, the result can easily be forecast by solicitors. The married woman has only to involve herself in difficulties and make piteous affidavits. Directly such a system should get into vogue the married woman would be able to force the hands of the court, and, in effect, destroy the restraint on anticipation.

The applicant now comes with her third application—namely for £600 and another £200. I have to consider what is for the benefit of the married woman within section 39 of the Act. That it is honest for debts to be paid is not a leading consideration in applications like the present. I desire to state that as a rule I cannot relieve married women from the restraint on anticipation in those cases where they have gone to moneylenders. I will not allow the hand of the court to be forced in this way. If I grant the present application I shall be establishing something like a precedent. The application in chambers has been refused, and the result which I have arrived at in court is the same as that come to in chambers. No case here has been established which would justify me in exercising my discretion by acceding to the application. I regret the circumstances which have occurred, but they are not to be judicially taken into consideration. The lady herself can set aside a sum out of her income if she thinks fit to do so. This is the third time she has come to the court, and I cannot remove from my mind the circumstance that she had recourse to a professional moneylender.

There is another point in this case. A prosecution has been instituted against the lady for stealing furniture, and it is further asked that the restraint should be removed so as to enable her to defend herself. Curiously enough I had a similar case in principle before me in chambers, where divorce proceedings had been instituted against the married woman, who was desirous of defending herself against the imputation on her character. It is undoubtedly for the benefit of the married woman to defend herself under such circumstances. I will let this part of the application stand over, giving leave to amend the summons, and I will listen to an application in chambers in the event of her being committed for trial, and if it comes before me in chambers I will consider the matter, but I must not be understood as saying that I will accede to the application.

Application dismissed.

Solicitors, *Hood Barrs & Co.*

Chan. Div.
North, J.

April 28.

In re HELLARD. (*a*.)

Solicitor—Costs—Taxation—Long lease not at rack rent—Money premium as well—Solicitors' Remuneration Act, 1881—*General Order—Schedule I., Part I., rr.* 7, 8—*Schedule I., Part II., r.* 5.

Where a long lease, not at a rack rent, is granted in consideration of a money payment or premium, the lessor's solicitor is entitled to be paid both the scale fee payable under Schedule I., Part II. (2*nd scale*), *in respect of the rent, and the scale fee payable under Schedule I., Part I., on sales, purchases, and mortgages, in respect of the money payment or premium.*

Summons to review taxation.

A lease for ninety-nine years was granted at a rent of 12s. 1d. and a premium or fine of £12 1s. 8d.

The solicitors' costs were taxed by the taxing master, who allowed £5 under Schedule I., Part II. (2nd scale), in respect of the rent, and £3 under Schedule I., Part I., r. 8.

F. Thompson, for the client.—The taxing master is wrong in allowing two minimum fees in respect of the same transaction and the same title. *In re Onward Building Society*, 41 W. R. 107, [1893] 1 Q. B. 16; *In re Russell*, 33 W. R. 815, 30 Ch. D. 114; *In re Field*, 33 W. R. 553, 29 Ch. D. 608. The proper course is to take the scale fee on the rent, and add in respect of the fine the amount payable on a sale, purchase, or mortgage; but the solicitor is not entitled to a minimum fee of £3 in addition to the scale fee on the lease, but to 15s. only.

Upjohn, for the solicitor, was not called upon.

NORTH, J.—The taxing master is right. This is a case in which there is a conveyance of a lease for ninety-nine years at an annual rent of 12s. 1d. and a fine of £12 1s. 8d., and the solicitor is to be paid according to the scale.

The conveyance comes under Schedule I., Part II. (2nd scale), "or other long leases not at a rack rent," and accordingly, as the rent is less than £5, the solicitor's remuneration is £5. But there are further rules. By rule 5 "where a conveyance or lease is partly in consideration of a money payment or premium and partly of a rent, then in addition to the remuneration hereby prescribed in respect of the rent there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." That carries us back to Part I. of the schedule, the scale on sales, purchases, and mortgages. The scale on the first £1,000 is 30s. per £100, which would make the fee here 30s. But by rule 7 "fractions of £100 under £50 are to be reckoned as £50," so this premium would be reckoned as £50, and the remuneration would be 15s. But by rule 8 "where the prescribed remuneration would but for this provision amount to less than £5, the prescribed remuneration shall be £5, except on transactions under £100, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor, or mortgagee is to be £3." That amount then is payable upon the fine. So we have the remuneration payable in respect of the rent £5, and in respect of the fine of £12 1s. 8d. £3, which added together make £8 in all. Mr. Thompson says that only 15s. should be added to the amount payable under the second schedule, and that the title is the same. But rule 8 has to be applied as in the case of sales, purchases,

(*a*.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

and mortgages, and I think that the taxing master is right in allowing £8.

Solicitors, *Law & Worssam*, for *Bond, Pearce, & Bickle*, Plymouth; *Bell, Brodrick, & Co.*, for *Hellard & Bewes*, Stonehouse.

Chan. Div. }
North, J. } March 4.

DENNISON *v.* JEFFS. (*a.*)

Building society—Instrument of dissolution—Signatures—Infants—Joint holders—Agents—Curing invalidity by adding names to duplicate instrument—Building Societies Act, 1874 (37 & 38 *Vict.* c. 42), *ss.* 32 (3), 38, 39.

In counting the three-fourths of the members required by section 32, *sub-section* 3, *of the Building Societies Act*, 1874, *to consent to the dissolution of a building society* (1) *infants may be counted unless prohibited by the rules from assenting to the dissolution;* (2) *joint holders of shares must all sign, but only count as one;* (3) semble, *a member signing by his duly authorized agent may be counted.*

An instrument of dissolution which is invalid through not containing the requisite number of signatures, and which has been registered, is not cured by adding names to the duplicate of the instrument returned to the society by the Registrar of Building Societies.

Action.

This was an action by an advanced member of the Second Watford Starr-Bowkett Building Society seeking to restrain the society, and the defendants Jeffs and two others, who were trustees of a deed purporting to dissolve the society, from acting on the same, on the ground that the deed had not been signed by the requisite majority of members as required by the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 32, sub-section 3, because (1) some of the signatures were those of infants; (2) others were only those of one of two joint holders, whereas both ought to have signed; (3) signature by a member did not imply consent in respect of all his shares; (4) the names of some members were affixed by their agents. The defendants contended that, assuming the deed to be invalid, it had been cured by signatures which had been added to the duplicate deed returned to the society by the Registrar of Building Societies, although that deed was not registered. The facts appear more fully from the judgment.

Swinfen Eady, Q.C., and *MacSwinney*, for the plaintiff.

Vernon Smith, Q.C., and *Dunham*, for the defendants.

NORTH, J.—This is a building society incorporated under the Act of 1874 and the subsequent Acts, and which was formed in September, 1888. The plaintiff is a mortgagor to the society and an "advanced" member, the mortgage being dated the 3rd of March, 1893. On the 21st of March, 1894, the society by a meeting duly convened passed a resolution of winding up. Then on the 20th of April, 1894, the instrument of dissolution was prepared and signed by a considerable number of members of the society, and on the 4th of July, 1894, that instrument was registered. On the 13th of February, 1895, this action was commenced by Mrs. Dennison suing in respect of her separate estate on behalf of herself and other members of the society except the defendants, and she seeks to have it declared that the instrument of dissolution to which I have referred was an invalid instrument. In that instrument the number of members is said to be 151 and the number of shares 447, and the only objection to the instrument of dissolution is that it is alleged to have not been signed by the proper majority of the members of the society. It purports to be signed by 115 members out of 151.

The 32nd section of the Act of 1874 provides for the mode of dissolution and winding up of building societies. It is not being wound up under the supervision of the court, and therefore we are thrown on to sub-section 3 of that section, which provides for a society being wound up by dissolution with the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society testified by their signatures to the instrument of dissolution. Now it is not disputed that the number of signatures obtained represented in fact two-thirds of the number of shares; therefore we may leave that out of consideration. The only question is whether the consent of the proper number of members—namely, three-fourths—has been obtained. The section provides that alterations may be made in an instrument of dissolution with the like consent of the same number of persons testified in the same manner, and the alterations made are to be binding on the members. Now, in the present case there have been, I think, five objections suggested upon which it is said the instrument was not signed by the proper proportion of members.

The first objection is this, that some of the members who signed consent, did so only in respect of some of the shares which they held, and that being so, it is said they did not sign a consent in respect to the other shares, and that therefore the number is to be reduced accordingly. The number of 115 has been calculated upon the footing that every member who has signed his consent did so with respect to all his shares, and in my opinion that is the true effect of the signatures. I do not know how a member can give a half consent and not an entire consent. We are not embarrassed with the case of a person who has signed with respect to a number of his shares and has refused his consent to the rest. We have the simple fact testified to by those signatures of the consent to the dissolution. In my opinion the members who consent by signing generally are not consenting in respect of any particular shares, and therefore that point is one which I decide in favour of the defendants.

The second point raised is as to Mrs. Franklin. She did not sign the deed herself, but her name appears in the proper place. There is no question about her consenting, but her signature was placed there by her husband. It is her own name he has signed, it was signed by him in her presence at her request and by her authority, and the question is whether that is sufficient or not. The plaintiffs relied upon a case (*The Second Edinburgh and Leith 493rd Starr-Bowkett Building Society* v. *Aitken*, 19 Court of Sess. Cas., 4th series, p. 603) which was decided in the Court of Session, Edinburgh; that case, of course, is no authority here in any way, but it is no doubt a decision upon the construction of the same Act of Parliament that I have to deal with and deciding the point I have to deal with, and as it decided that an agent could not sign, if there was nothing before me except that case I should simply follow that decision. But there are other cases in the Court of Appeal in England, among others *Re Whitley*, 34 W. R. 505, 32 Ch. D. 337, which indicate that an agent can sign a memorandum of association. If I had to decide the point here, I should follow the English cases.

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

The point really is not material, for the reason that there are 115 signatures, and, assuming all the rest are good for this purpose, even if you take away this one from the 115, there are sufficient signatures, 114, for the dissolution. The case is altogether immaterial.

The next point is this: There are several cases of signatures in which the consent was signed by persons who were infants. As to that it is necessary to consider what the positions of these persons signing are, to see if they are competent to sign. The 38th section of the Act says that any person under the age of twenty-one may be admitted a member unless the rules of the society specially prohibit it. He shall not vote, however, or hold any office in the society. One would have expected in a clause like that to have some explanation given as to what the position of an infant might be, but nothing further is contained in that section. Then we turn to the rules. Now this is clearly a case in which the rules of the society do not prohibit such an admission, therefore minors may be members. The third rule says expressly that "a minor may take shares and may transfer the same, but cannot hold office, vote, nor act as substitute for any officer." Infants, however, can (it has been decided) do a great many things, among other things they can sign a memorandum and articles of association. Then, again, an infant if he is a member of a company may be a contributory, and every contributory may present a winding-up petition. Of course an infant can only do that by his next friend responsible for costs, but still it is the infant's petition, and the company may be dissolved. It is true, under the latter part of sub-section 4 of the 32nd section, the winding up by the court can only be on the petition of a member authorized by the consent of three-fourths of the members; but if he had that, an infant might present a petition. I mention that for the reason that it was suggested that it was a strong thing to say that an infant can take the step of consenting to a dissolution of the society, but it is clear under that clause that he can do that very thing in another way, with the proper authority. Nor can it be said that the prohibition as to an infant's voting prevents him from consenting to a dissolution. I confess I do not think that is the meaning of the word voting, and I do not think voting includes giving such a consent as this. There is no voting in the ordinary sense, and if it had been intended that an infant was to be disqualified from consenting to a dissolution, I think there would have been some provision providing for it. The fact that certain infants signed does not make the instrument invalid, because I see nothing to prevent an infant from giving such a consent.

Then the fourth point is this: There are five cases where shares are held in the names of two persons jointly, one only of whom has signed. Now this raises a different question altogether. Section 39 provides for the case of joint holders of a share; but that appears to be an interpolation that does not quite fit in with the Act. Perhaps it was intended to leave to the rules of the society to point out what was the position of joint holders of shares. If that was the intention, it has not been carried out by the rules in this case, for I find nothing in the rules dealing with the position of such members. Looking at the third rule, however, I find that a member has to pay an entrance fee of one shilling per share. If there are half a dozen members holding one share, however, it would be strange to say that six separate entrance fees are to be paid by six persons who among them only hold one share. That seems to be the view the society have taken, and the rules do not say that the number of members is to be limited by the number of shares. No member, however, is to have more than one vote whatever number of shares he has. Yet if six persons, holding between them one share, were all treated as members they would have six votes. That seems an extremely unlikely provision to have made. The confusion that would arise would present insuperable obstacles in the working of the society. I do not think it necessary to go through the rules of the society in detail, but it seems to me it would be impossible to work them unless the joint holders of shares were considered as one person. I think that view is the correct one, and therefore you cannot have a consent given in respect of a share unless it is given by all the joint holders of that share. I do not see how a person who holds one-sixth of a share can give a consent which in any way affects the other joint holders. It was suggested that one might sign as agent for the rest, and I am not prepared to say that he might not so sign in a proper way as agent for the others, but there must be evidence to show that he has authority, and there is not the slightest evidence here that the persons who did sign here had the authority of the other joint holders. That reduces the number of signatures on the deed to 110 instead of 115, and the original deed of dissolution is therefore invalid.

Then the defendants raise another point. It was said, assuming the deed to be invalid, it has been cured by what has taken place since that time. I am sorry to say I do not see my way to uphold the deed of dissolution by reason of the signatures that have been subsequently put to the duplicate. It appears that seventeen new signatures have been added, which would raise the 115 to 132, and it was admitted that although certain persons who originally signed had since ceased to be members, yet if these seventeen were added the change produced would make the new deed a good one in point of numbers. The question is whether these new signatures can be allowed. I do not think that there is any other instrument of dissolution than that which has been registered. If that was to be altered in any way, it might be altered under section 32 by the same proceeding which the Act requires for the original deed, but it does not appear that anything of that sort has actually taken place. Then as regards the instrument itself. The Act says the instrument shall be registered, and shall be binding upon the members of the society. It was said that the provision for registration did not make registration a condition precedent. It can only be binding upon the members if it is an instrument complete and capable of being registered. How does it stand at present? Originally the instrument was perfectly regular in that respect—it was prepared in duplicate and was registered in the manner provided by the Treasury regulations. One of these duplicates was sent back to the trustees, and has had the additional signatures placed on it. That is a document which cannot be registered at present, because the parties are not in a position to do so. It is not executed in duplicate. As regards the fresh signatures, they appear on that copy only, and there is no second deed upon which they appear. It seems to me it is not an instrument of dissolution which the society is capable of registering at the present time and in the present form. In my opinion they cannot register it at all now. The trustees, who seem to me to have acted very fairly and properly in the matter, subject only to the mistake of having acted on a deed which has not been properly executed, would find themselves in a very difficult position if I were to hold that the deed was good, because they would have laid themselves open to serious penalties under the Act of 1894 for not registering within the proper time. In my opinion, however, they are free

from any such penalties, because the instrument is one that is not capable of being registered by them as it now stands. I do not say there is anything to prevent the society from appyling to its present members and proceeding to pass and approve a new deed of dissolution, if they can get the proper persons to consent to it. As far as this instrument goes in my opinion it is not valid.

Then the question is as to the relief to be given. The plaintiff asks for an account of all the dealings of the three trustees with the assets of the society since the date of the dissolution. In my opinion that is not a relief which the present plaintiff is entitled to. At present there is no dissolution, and it is for the society to take proper steps to settle accounts with these persons who turn out not effectually to be appointed trustees. The society are the persons to whom they must account, and it is for them to consider what steps ought to be taken. If the plaintiff, as one of the members of the society, wishes the society to move, she may take such steps as the rules allow; but I cannot at her instance direct such an account as this. The next claim is for an injunction to restrain the defendants from selling or offering for sale the property comprised in the plaintiff's mortgages. I think it follows from the deed not being valid that the plaintiff is entitled to an injunction restraining these trustees from offering her property for sale, but it must be qualified in this way. It must be to restrain them as trustees under the instrument of the 20th of April, 1894, from proceeding to do so. I cannot do anything that would have the effect of preventing their selling the property if they should be appointed trustees under a valid instrument of dissolution that may hereafter be executed. Therefore, holding that the deed must be set aside, I hold that the defendants cannot proceed to sell the plaintiff's property by any authority derived from that deed.

The plaintiff then claims an injunction to restrain the defendants from intermeddling with the society's assets, and I propose to grant that.

Solicitors, *T. A. Dennison & Co.*; *George Reader & Co.*, for *Broad & Riggall*, Watford.

Q. B. Div.
(Pollock, B., and Bruce, J.)

April 20.

SMITH *v.* HAMMOND. (*a*.)

Practice—Writ—Defendant's address—Mistake in writ—Ord. 2, r. 3.

The defendant resided and carried on business in Ireland. He was served in England with a writ of summons in which he was described as "of L., in the county of Lancaster."

Held, that the mistake as to the defendant's address did not invalidate the writ.

Application to set aside the service of a writ.

The defendant was incorrectly described in the writ as "of Lytham, in the county of Lancaster," whereas, in fact, he resided and carried on business at Londonderry, in Ireland.

The writ was served upon the defendant in this country, and he entered an appearance under protest.

Loehnis, for the defendant, in support of the application.—Ord. 2, r, 3, requires that "the writ of summons for the commencement of any action" shall be in one of the forms in Appendix A, Part I. The form given is as follows: "To C. D., of in the county of ." If the defendant's address is wrongly given, the writ does not comply with the rules, and is invalid. In *The W. A. Sholton*, 36 W. R. 559, 13 P. D. 8, Butt, J., held that the omission of the address of the defendant invalidated a writ. In *Sedgwick* v. *Yedras Mininy Co.*, 35 W. R. 780, the defendant company, which had no place of business in this country, was described as of an address in the city of London, and the court, on that ground, set aside the writ.

He also referred to *The Helenslea*, 30 W. R. 616, 7 P. D. 57, and *Zuccato* v. *Young*, 38 W. R. 474.

Carver, for the plaintiff.—Ord. 4, r. 1, expressly provides that the address of the plaintiff shall be given in the writ, but there is no such rule in the case of a defendant; and *Fry* v. *Moore*, 37 W. R. 565, 23 Q. B. D. 395, *The Helenslea*, and *Zuccato* v. *Young* are decisive that an incorrect address given for the defendant is immaterial. In *Fry* v. *Moore* the writ was issued in the ordinary form applicable to a defendant within the jurisdiction, the defendant being out of the jurisdiction; and Lindley, L.J., said: "In the form in which it was issued it cannot be said that the writ was irregular, because the plaintiff might have kept it with the view of serving it on the defendant if he should come within the jurisdiction. The writ therefore cannot be set aside for irregularity." *Fry* v. *Moore* was followed in *Wilding* v. *Bean*, 39 W. R. 40, [1891] 1 Q. B. 100.

Loehnis, in reply.—In *Wilding* v. *Bean* the only question was as to substituted service. In *Fry* v. *Moore* the irregularity was waived by asking for a statement of claim.

POLLOCK, B.—I think that Mr. Carver's contention is the right one in this case. I have no doubt that this is a good writ. There is nothing in the rules to show that the words in the form in the appendix to the rules, "To C. D., of in the county of ," are anything more than a description of the defendant, and therefore, if the address is wrongly given, it is, in the words of North, J., in *Zuccato* v. *Young*, the same as if a defendant named John had been sued as James. The mistake is not one which substantially affects the defendant, and, in my opinion, this application fails.

BRUCE, J.—I am of the same opinion. There is no express provision in the rules requiring a defendant's address to be stated in the writ, whereas in the case of a plaintiff the rules explicitly direct that the address shall be given. I think the distinction was made purposely; and in my opinion we ought not, unless bound to do so, add to the very elaborate formalities required by the rules with regard to the issuing of writs. It is true that, according to the forms, the address of the defendant is to be given; but it is really only part of the identification of the defendant, and a mistake as to that does not, in my opinion, invalidate the writ.

Application dismissed.

Solicitors for the plaintiff, *Ince, Colt, & Ince*, for *Rigby*, Liverpool.

Solicitors for the defendant, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.)

April 17.

REYNOLDS v. PRESTEIGN URBAN DISTRICT COUNCIL. (a.)

Local government—Highway—Encroachment on—Obstruction—Right to abate nuisance—No previous conviction—Urban district council—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26 (1).

An urban district council may remove any obstruction to or encroachment on any highway vested in them by section 149 *of the Public Health Act*, 1875, *without previously taking any proceedings, either by indictment or summarily, against the person who is alleged to have caused the obstruction or encroachment, but they do so at their own risk, and the* onus *is on them of showing that an obstruction or encroachment did in fact exist.*

Appeal by the defendants from the decision of his Honour Judge Lewis, sitting in the county court of Radnorshire, holden at Presteign.

The plaintiff was the owner in fee simple of a cottage and garden called Paradise Cottage, Green End, in the parish of Presteign, within the district of the defendants, the Presteign Urban District Council. The action was for damages for trespass alleged to have been committed by the defendants in grubbing up a hedge bounding the side of the cottage, and by cutting the hedges round the garden, and by removing a post and wire railings round the garden, and posts erected for the support of walls round the garden, and also by grubbing up a flower border growing under the projecting roof of the cottage, all of which said hedges, posts, railings, and flowers were the property of the plaintiff. The property consisted of a cottage and garden bounded on three sides admittedly by three highway roads. In front of the cottage was a small garden, and beyond that a triangular piece of open land bounded on two sides by two of the said highways, and ending at a point.

The defendants contended that across this piece of land was a highway road, upon part of which the plaintiff had placed a hedge. On the 5th of January, 1896, they gave the plaintiff notice of encroachments upon, and obstructions to, the highway under section 65 of the Highway Act, 1835, and on the 4th of March they gave him notice to remove projections under section 160 of the Public Health Act, 1875, and section 69 of the Towns Improvement Clauses Act, 1847. On the 9th of April, the plaintiff not having complied with the last notice, the defendants did the acts complained of. The plaintiff brought an action to recover damages for the alleged trespass. The jury found, as facts, that the hedges did encroach upon the highway when the defendants cut them, that the rails removed were encroachments, that there was a highway by the original fence across the triangular piece of land, and that the fences removed from the triangular piece were upon the highway. The learned county court judge, however, held that the defendants had no authority at common law to do what they had done, and that not having complied with ord. 10, r. 18 (*a*), of the County Court Rules, they were not in a position to rely upon any supposed statutory right under the Towns Improvement Clauses Act, 1847, and that even if they had such statutory right they were not protected by the statute, inasmuch as they had acted without having first obtained the conviction of the plaintiff, either by summary proceedings or by indictment, and he therefore gave judgment for the plaintiff.

From this judgment the District Council now appealed.

W. D. Benson, for the appellants.—The jury found that there were encroachments on the highway, but the judge held that the appellants had no power to abate except by summary proceedings or indictment. All the three highways were repairable by the defendants, the roads being vested in the District Council, and therefore the defendants were entitled to abate the nuisance without taking summary proceedings before justices: *Keane* v. *Reynolds*, 2 E. & B. 748, 2 W. R. Dig. 203; see remarks of Campbell, C.J., where he says that a surveyor of highways is not bound to wait for a conviction before he pulls down encroachments, but that if he acts without a conviction he acts at his peril: *Turner* v. *Ringwood Highway Board*, 18 W. R. 424, L. R. 9 Eq. 418; *Bagshawe* v. *Buxton Local Board of Health*, 24 W. R. 231, 1 Ch. D. 220. There is a common law right, independent of any right by statute, to protect the public way and remove encroachments. By section 26 of the Local Government Act, 1894, it is the duty of the District Council to remove all obstructions from the highways vested in them. The Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 69, does perhaps seem to imply that a conviction is necessary first; but section 69 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34, which is incorporated by section 160 of the Public Health Act, 1875, must mean that in default of the occupier removing the encroachment the commissioners may do so, and may recover the costs of doing so, as damages.

[The court stopped counsel.]

Corner (*A. Bertram* with him), for the respondent.—The District Council is a body created by statute, and it has no power except what is given it by statute. The statute does not give it the right of deciding what is or what is not an obstruction on a highway. Where there is an obstruction on the highway to a private individual he may, if special damage is done to him, remove it. The District Council has only the same right in regard to the public as the private individual has in regard to himself: *Dimes* v. *Petley*, 15 Q. B. 276; see judgment of Campbell, C.J., at p. 283; *Bateman* v. *Bluck*, 21 L. J. Q. B. 406. The District Council had no right to remove the alleged obstruction without giving the occupier the opportunity of proving that it was not an obstruction: *Hopkins* v. *Smethwick Local Board*, 38 W. R. 499, 24 Q. B. D. 713; *Cooper* v. *Wandsworth District Board*, 11 W. R. 646, 32 L. J. C. P. 185. Section 69 of the Towns Improvement Clauses Act, 1847, does not apply.

Lord RUSSELL OF KILLOWEN, C.J.—This appeal must be allowed. I wish to make clear the data on which our judgment rests. The plaintiff complained of certain acts of trespass on the part of the defendants. They answered: "We did not commit any trespass, all we did was to remove certain encroachments on our property which you placed thereon." The questions left to the jury exclude the supposition that the defendants did any unnecessary or excessive acts in removing the alleged encroachments, and the jury, in answer, found that the hedges were encroaching upon the highway when the board cut them, that the posts and wires taken away were encroachments, and that the fences removed from the triangular piece of land were upon the highway.

The first fact of importance to note is that each one of these highways was a public highway repairable by the inhabitants at large within the urban

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

district. It would appear that up to the year 1875 there was no Act vesting the highways in any local board, but no doubt they were under the control of a highway board or some other authority. The soil was vested in the adjoining owners. However, by section 149 of the Public Health Act, 1875, it was provided that all streets being, or which at any time become, highways repairable by the inhabitants at large within any urban district shall vest in, and be under the control of, the urban authority. Under the Local Government Act, 1894, the defendants as district council succeeded the urban authority. By section 26 (1) it is provided that it shall be the duty of every district council to protect all public rights of way, and to prevent as far as possible the stopping or obstruction of any such right of way, where the stoppage or obstruction thereof would in their opinion be prejudicial to the interests of their district, and to prevent any unlawful encroachment on any roadside waste within their district.

I do not at all mean to say that there is not something in the contention of the learned counsel for plaintiff as to the nature of the right of the District Council to abate. The authorities ought not to act act in a high-handed manner, especially in cases where there is an element of doubt. In such cases they should be circumspect, and obtain a judicial decision in their favour before taking the law into their own hands. If they do not do so, they run the same risk that a private person runs who removes such an obstruction; and the burden would be upon them to show that there was an obstruction. If they, however, are able to show that an obstruction did exist on property vested in them under the Public Health Act of 1875 they would have the same right to abate as is possessed by a private owner under similar circumstances.

A private owner has the right, if any special damage is done to him, to remove the obstruction, and in the case of trees it is not necessary, as was decided in the case of *Lemon* v. *Webb*, [1895] A. C. 1, 43 W. R. Dig. 125, to give the owner notice before cutting away any branches overhanging his property. These highways were vested in the defendants, and the right to remove obstructions follows in consequence. I therefore come to the conclusion that the defendants did no more in this case than they were justified in doing.

It seems to me that the sections which apply to this case are section 149 of the Public Health Act, 1875, and section 26 of the Local Government Act, 1894.

I do not base my judgment in any way upon section 69 of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), and therefore it is not necessary for me to touch upon that section.

WRIGHT, J.—I entirely agree, and for the same reasons. I will only add that, while I agree that as a general rule it is not desirable that a district council should take the law into their own hands, I think it is doubtful whether under the special circumstances of this case any other remedy was open to the defendants, for I am not at all sure that all these obstructions could have been the subject of an indictment or summary proceedings, and therefore I think the defendants were entitled to take the law into their own hands.

Appeal allowed.

Solicitors, *Norris, Allens, & Chapman*, for *Clifford Jones*, Presteign; *Meredith, Roberts, & Mills*, for *E. L. Wallis*, Hereford.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.) April 14

KIRKWOOD *v.* SMITH AND ANOTHER. (*a.*)

Promissory note—Unnecessary provisions—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 83, *subsection* 3.

A document provided for the payment of a certain sum by instalments with interest, the whole to become due on default of one instalment, and that "no time given to, or security taken from, or composition arrangements entered into, with either party hereto shall prejudice the rights of the holder to proceed against any other party."

Held, that the document was not a promissory note.

Appeal of the plaintiff from the county court of Hampshire.

The action was brought on a document, as a promissory note, under the provisions of the Summary Procedure on Bills of Exchange Act, 1855 (which Act is by section 7 of the Statute Law Revision and Civil Procedure Act, 1883, in force as to county courts).

The document in question provided for the payment of certain money by instalments with interest, the whole to become due on default in payment of one instalment. The document contained the following proviso: "No time given to, or security taken from, or composition arrangements entered into, with either party hereto shall prejudice the rights of the holder to proceed against any other party."

The county court judge held that the document was not a promissory note, and gave judgment for the defendants.

The Bills of Exchange Act, 1882, s. 83 (1): "A promissory note is an unconditional promise in writing made by one person to another and signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer." (3) "A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof."

Daldy, for the plaintiff.

J. E. Bankes, for the defendant.

Davies v. *Wilkinson*, 10 A. & E. 98, was cited.

Lord RUSSELL OF KILLOWEN, C.J.—In this case the point is a small one. It is not alleged that this document was not an agreement upon which the plaintiff had a right to sue. The sole point is whether the instrument was one of a certain character, and one which entitled the plaintiff to the benefit of the summary procedure. That procedure is restricted to bills of exchange and promissory notes, including cheques. On the whole, though with some doubt, I come to the conclusion that the county court judge was right in his view that this instrument is not a promissory note. The Act of 1882 is undoubtedly in its main character a codification of the existing law, and when we find that the Act introduces into the definition of a promissory note additions which may be made to a note without destroying its negotiable character, I think the prudent view is, to take the Act as saying definitely what additions may and what may not be introduced into a promissory note. Having regard to the provisions of section 81 (3) of the Act, I come to the conclusion that this instrument is not a promissory note, and therefore is not within the Act under which these summary proceedings were taken.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

WRIGHT, J., concurred.

Appeal dismissed; leave to appeal refused.

Solicitors for the plaintiff, *Carthew & Wheeler*, for *Buckwell*, Brighton.

Solicitors for the defendants, *Prior, Church, & Adams.*

House of Lords.

From C. A. (England). } March 24.

HOOD BARRS *v.* HERIOT (No. 1). (*a*.)

Married woman—Separate estate—Restraint on anticipation—Arrears of income accrued before judgment—Execution.

Where a married woman was entitled to the income of property for her separate use without power of anticipation,

Held, that arrears of income which had accrued due before the date of a judgment against the married woman, although such arrears had not, at the date of the judgment, actually reached her hands, were liable to be taken in execution.

Decision of the Court of Appeal *in* Loftus *v.* Heriot, [1895] 2 *Q. B.* 212, 43 *W. R. Dig.* 112, *reversed.*

Hood Barrs *v.* Cathcart (No. 2), 42 *W. R.* 631, [1894] 2 *Q. B.* 567, *and* Pillers *v.* Edwards, 71 *L. T.* 788, 43 *W. R. Dig.* 111, *overruled on this point.*

This was an appeal by Mr. Hood Barrs from a decision of the Court of Appeal in *Loftus* v. *Heriot*, [1895] 2 Q. B. 212, 43 W. R. Dig. 112 (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.), reversing that of Day, J.

The facts and the whole course of the proceedings will be found in Lord Herschell's judgment.

The Appellant in person.—Until *Hood Barrs* v. *Cathcart (No. 2)*, 42 W. R. 631, [1894] 2 Q. B. 567, and *Pillers* v. *Edwards*, 71 L. T. N. S. 788, it was never held that the time at which the restraint on anticipation ceased was the actual receipt by the married woman. The restraint ceases when the money is due: *Rennie* v. *Ritchie*, 12 Cl. & Fin. 204, 234; *Rowley* v. *Unwin*, 2 Kay & J. 138, 4 W. R. Dig. 86; *Cox* v. *Bennett*, 39 W. R. 401, [1891] 1 Ch. 617; *Fitzgibbon* v. *Blake*, 3 Ir. Ch. Rep. N. S. 328; Davey, L.J., in the unreported case of *Hulbert* v. *Cathcart* (Feb. 26, 1894); *Pybus* v. *Smith*, 3 Bro. C. C. 340; *Tullett* v. *Armstrong*, 1 Beav. 1; *Hulme* v. *Tenant*, 1 Bro. C. C. 16; *Moore* v. *Moore*, 1 Coll. 54; *Stogdon* v. *Lee*, 39 W. R. 467, [1891] 1 Q. B. 661; *Chassaing* v. *Parsonage*, 5 Ves. 15; *Baggett* v. *Meux*, 1 Ph. 627; *Harman* v. *Richards*, 22 L. J. Ch. 1066; *In re Glanvill*, 34 W. R. 309, 31 Ch. D. 532; *Claydon* v. *Finch*, L. R. 15 Eq. 266, 21 W. R. Dig. 146; *Butler* v. *Cumpston*, 17 W. R. 24, L. R. 7 Eq. 16; *Pike* v. *Fitzgibbon*, 29 W. R. 551, 17 Ch. D. 454.

The respondent did not appear.

The House took time for consideration.

Lord HERSCHELL.—In this case a Mrs. Loftus obtained judgment, on the 15th of November, 1892, for £39 9s. debt and £4 12s. costs, for goods sold and delivered to the respondent, a married woman. Upon the respondent's marriage certain property was transferred to trustees in trust to pay the annual income to her for life for her separate use, and without power for her to anticipate the same.

Before the date of the judgment there were arrears of annual income, to which the respondent was entitled, which had not been paid to her by the trustees. On the 10th of May, 1894, Lawrance, J., made an order appointing the plaintiff in the action receiver, to receive so much of the accrued interest as would satisfy the debt and costs, and further ordered that the receiver should receive so much of the property only, as was the separate property of the defendant, not subject to any restriction against anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882, the property should be liable to execution notwithstanding such restriction. On the 1st of April, 1895, Day, J., ordered that the receivership order just referred to should be discharged and set aside, except as to the income of the defendant accrued due and payable at or before the date of the judgment sufficient to satisfy the plaintiff's debt and costs. On the same day he continued an *interim* injunction of Wright, J., restraining the defendant from receiving such income.

The Court of Appeal allowed an appeal by the defendant from these orders and discharged the orders of Day, J. (see the report of *Loftus* v. *Heriot*, [1895] 2 Q. B. 212).

The present appellant, having paid the debt and costs of the plaintiff, and obtained an assignment from her, was, prior to the hearing of the appeal, substituted for her in all future proceedings.

The ground of decision in the Court of Appeal in *Loftus* v. *Heriot* was that the appellant was not entitled to enforce payment of his judgment out of the arrears of income which were due to the respondent at the date of the judgment, inasmuch as, not having come into her hands, they were within the restraint upon anticipation. In arriving at this conclusion they followed the views expressed in the judgment of the Court of Appeal in the case of *Hood Barrs* v. *Cathcart* (*No.* 2). The question in that case arose with regard to rents of property to which the defendant was entitled, subject to a restraint upon anticipation, which had accrued due after the date of judgment. But the reasoning of Kay, L.J., who delivered the judgment of the court (42 W. R. 631, [1894] 2 Q. B. 567), applied also to a case where the income had become due to a married woman before the date of the judgment, but had not yet reached her hands. In the subsequent case of *Pillers* v. *Edwards* the decision was treated as governing a case of that description, though Lindley, L.J., said: "I confess that, but for the decision referred to of *Hood Barrs* v. *Cathcart*, I should have thought that the restraint on anticipation was over the moment that the money settled to the married woman's separate use had become due and payable to her. That was my impression, founded on what one may call tradition. Moreover, on looking into the cases, I think that there is considerable authority in support of that view."

The introduction of a restraint on anticipation in settlements of property to the separate use of a married woman is of comparatively modern origin. It was decided in *Pybus* v. *Smith*, in 1791, and other cases that, though property was settled upon trust to pay the income to a married woman for her separate use, free from the control of her husband, this did not prevent her from assigning her interest in such income, or charging it with the payment of her husband's debts. The object of settling it to her separate use became thus defeated. It is stated in a note to *Pybus* v. *Smith* that these decisions suggested to Lord Thurlow, in a case where he was trustee, the intro-

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

duction of a clause in restraint of anticipation. As far as I have been able to ascertain, the earliest form of the clause against anticipation provided that the trustees should, from time to time, pay the income to such person or persons, and for such intents and purposes, as the married woman, by writing signed with her own hand, should, notwithstanding her coverture (but so as the same was not by way of anticipation), direct or appoint, and in default of appointment, and in the meantime, pay the same into her proper hands—see *Chassaing* v. *Parsonage*, where it is stated that a clause of this nature had been introduced into these settlements, in consequence of the decision in *Pybus* v. *Smith*. A clause in substantially the same form certainly continued in use for a considerable time. It will be observed that it expressly empowered the married woman to alienate the income after it became due, and authorized the trustees to pay it to her appointee. It was only when the appointment was by way of anticipation that it was prohibited. Such a provision was regarded as a sufficient protection for the wife by those who devised the restraint on anticipation. At all events, it is clear that they did not regard an assignment after the income became due as made by way of anticipation, I am therefore unable to agree with the view entertained by Kay, L.J., that a restraint on anticipation by its nature forbids an alienation before the fund reaches the wife's hands, although the income be due to her when the alienation is attempted. In more recent times the clause restraining anticipation has assumed different forms, but its purpose and effect have, I think, always been the same. That effect was well expressed by Lord Cottenham in *Rennie* v. *Ritchie*, where he said that it prevents the person entitled to the income for her separate use "having the dominion till it becomes due." The restraint on anticipation does not, in my opinion, prevent her disposing of it as she pleases after that date. However she may then deal with it, she does not, I think, do so by way of anticipation any the more when it is in the hands of a trustee, than if it were in her own hands. In considering whether there is anticipation, this circumstance appears to me wholly immaterial. If she persuaded the trustee to pay the income to herself before it became due, she would be anticipating it, and the trustee would be guilty of a breach of trust, just as much as if she then gave a charge upon it, and the trustee recognized the charge, and paid the money accordingly. So, too, after the money becomes due, I think she is not anticipating it, whether she receives it herself or transfers her right to it to another. Such an act does not, in my opinion, fall, on any reasonable construction of them, within the words of the prohibition. I should have arrived at this conclusion had there been no authority on the point one way or the other, but there is, I think, ample authority to support it.

In *Harnett* v. *M'Dougall*, 8 Beav. 187, the very question arose before Lord Langdale. In that case the trust of a settlement was to pay the dividends of the settled property during the life of Mrs. A. to such person and for such interests and purposes as she by any writing should "from time to time when, and as the same became due, and not by way of assignment, charge, or other anticipation," direct or appoint, and in default of appointment, into her proper hands, for her sole and separate benefit. Mrs. A. purported to charge the dividends then and thenceforth to accrue, with certain debts. A petition was presented for the purpose of giving effect to this charge upon a fund in court. The Master of the Rolls said that to give effect to such a charge would be in direct contradiction to the language and intention of the settlement, and he must therefore refuse the petition "except so far as it seeks to dispose of dividends already accrued due."

In *Pemberton* v. *M'Gill*, 8 W. R. 290, 1 Dr. & Sm. 268, a testatrix bequeathed the residue of her estate to trustees on trust to pay an annuity of £300 to a married woman, for her separate use without power of anticipation, and appointed her executrix. She misappropriated assets of the testatrix. The question was whether her annuity could be applied to making good these misappropriations. The arrears of the annuity due amounted to a considerable sum. Kindersley, V.C., said that he has no hesitation in coming to the conclusion that the arrears of the annuity, "which, of course, were not affected by the restraint on anticipation," must be applied in making good the misappropriations. Kay, L.J., in his judgment in *Hood Barrs* v. *Cathcart* (*No.* 2), observed that the restriction in that and other cases must have been peculiarly worded. Your lordships have been furnished with an extract from the will which created the annuity, the arrears of which were in question, in *Pemberton* v. *M'Gill*. In that case, at all events, there was nothing peculiar in the wording of the restriction. The trustees were directed to pay the annuity by four equal quarterly payments into the hands of S. M., or empower her to receive the same during her life for her own sole and separate use, free from the control of her present or any future husband, but so that she shall not have any power to alienate or anticipate the same. There is certainly no distinction between those words and the language used in the settlement upon the present respondent's marriage.

In the case of *In re Brettle* 12 W. R. 562, 33 L. J. Ch. 471, the trust was to pay the income of the trust moneys from time to time, when and as the same should be due and received, but not by way of anticipation, into the proper hands of the beneficiary for her sole and separate use and benefit, and it was declared that her receipts in writing should alone be effectual discharges for the same. The beneficiary having executed an assignment by way of charge, it was held by Knight-Bruce and Turner, L.JJ., that it was only operative "as to any arrears which had accrued due" at the date of the assignment.

In *Fitzgibbon* v. *Blake* the Lord Chancellor of Ireland held that a married woman could dispose of and charge the arrears of income settled to her separate use without power of anticipation, on the ground that the clause against anticipation did not apply to such arrears.

Other cases might be cited, and notably *Rowley* v. *Unwin* before Wood, V.C., in which the same view of the law has been acted upon. And I am not aware of any decision until a quite recent date which is in conflict with it. It was assumed to be correct in *Cox* v. *Bennett* in the Court of Appeal. And, indeed, that court, previous to the decision in *Hood Barrs* v. *Cathcart* (*No.* 2), and when it was differently constituted, appears to me, in *Hulbert* v. *Cathcart*, to have laid down the law in complete accordance with the view which I am asking your lordships to adopt. Unfortunately, that case was not reported, and it does not appear to have been brought to the notice of the learned judges before whom the case of *Hood Barrs* v. *Cathcart* (*No.* 2) came for decision.

If the restriction against anticipation be, as I think it is, inapplicable to the arrears of income now in question, the 19th section of the Married Women's Property Act, 1882, obviously does not affect them.

I move your lordships that the judgment appealed from be reversed. The effect of this will be to restore the orders thereby discharged. They have, however, become quite ineffectual, inasmuch as the arrears to which they applied have been received by the

respondent, there having been, unfortunately, no stay pending this appeal. The respondent must be ordered to repay to the appellant all costs paid by him, and to pay the costs of this appeal.

Lord MACNAGHTEN.—The order under appeal depends upon the proposition that it is not competent for a married woman, entitled for her separate use without power of anticipation, to dispose of income accrued due unless and until it reaches her own hands or the hands of her agent. This proposition was laid down for the first time in 1894 by the Court of Appeal in *Hood Barrs* v. *Cathcart* (*No.* 2). There is nothing to suggest it in the circumstances which orginally gave rise to the restraint on anticipation. Nor can it, I think, be supported on principle or on any grounds of convenience, or on authority.

In early days, when the effect of placing a married woman in the position of a *feme sole* with regard to her separate property came to be understood, there was an inclination to treat separate income as a purely personal provision intended for maintenance. Arguments more or less plausible were founded on the various expressions employed in the copious style of conveyancing to limit or develop "separate use." Where the direction was that the income was to be paid "from time to time," it was argued that the prescribed mode of payment was inconsistent with an absolute power of disposition. But the authorities the other way were too strong, and that attempt failed. The usual direction that the income was to be paid "into the proper hands" of the married woman, and that "her receipts alone were to be a good discharge" was not more efficacious. The court always said that a married woman might dispose of her separate estate, "and her assignee," to use Lord Eldon's words in *Brandon* v. *Robinson*, 18 Ves. 429, "would take it; as if there was a contract entitling the assignee, this court would compel her to give her own receipt, if that was necessary to enable him to receive it." Nor did words requiring payment to be made on "personal appearance and receipt" carry the matter any further, for no payment, as Lord Cranworth observed in *In re Ross's Trusts*, 1 Sim. N. S. 199, could be made into her proper hands without her personal appearance. In fact, these and such like expressions, however stringent they appear at first sight, were regarded as "only an unfolding of all that is implied in a gift to the separate use."

It is important, as it seems to me, to bear this in mind, because the error into which the Court of Appeal appears to have fallen comes, I think, from treating words which are no more than the unfolding of the separate use, and which were known and well understood before the clause in restraint of anticipation was invented, as belonging to and forming part of that clause, or, at any rate, as having acquired some new force or efficacy by reason of their connection with it.

The clause which Lord Thurlow introduced into Miss Watson's settlement, and which soon came into general use, was intended to prevent married women dealing with their income in advance. It was designed to prevent the mischief which happened in *Pybus* v. *Smith*, where a lady who was a ward of court and had the protection of a settlement framed in the master's office, made away with all her property in less than three months. The clause has no application to arrears of income actually accrued due. Indeed, if it had the effect which the Court of Appeal attributed to it, it seems to me that the result would be mischievous. Everybody, I suppose, would concede that in limiting income to the separate use of a married woman without power of anticipation the primary intention is that if things go wrong she may have a sure and certain provision for her maintenance. But what is to happen if things do go wrong, and her income is in arrear? Tenants are sometimes behindhand; mortgagors are not always prompt. If the Court of Appeal is right, it might well happen that a married woman with an ample provision, and striving honestly to live within her income, would be brought into great straits. If her income fell into arrear, she would be unable to procure an advance; she could make no contract even for the necessaries of life. It is all very well to prevent a married woman from gathering the fruit, which will be hers in time, before it becomes ripe. When it is ripe, why should she be forbidden to touch it? Why should she have to wait until it falls into her lap? Why should the court, in its zeal for the security of her property, place it out of her reach when it ought to be in her pocket, and when, perhaps, she wants it most, and all for fear it should come into her husband's hands? So long as things go well, there is no reason why a married woman should not let her husband have her income if she knows what she is about. If things go amiss, there is the restraint on anticipation ready for use, and as useful for all practical purposes as if it had the effect attributed to it by the Court of Appeal, and without the disadvantage of bringing with it liability to a most inconvenient embargo.

Take another case. There is no doctrine, I suppose, better settled than this, that when husband and wife are living together the wife's separate income, received by the husband with her permission, to be inferred merely from conduct and circumstances, cannot be recalled. The rule, according to Lord Cottenham in *Caton* v. *Ridout*, 1 Mac. & G. 599, is founded on broad grounds of convenience, and is necessary for the peace of families. Now, a clause restraining anticipation is a usual clause. In marriage settlements it is rarely omitted. And it is not an uncommon thing to pay the wife's income to the husband, or to his account with his bankers. The practice prevails equally, whether there is a restraint against anticipation or not, and rightly too, as the law stood before the decision in *Hood Barrs* v. *Cathcart* (*No.* 2). But if the Court of Appeal is right, every payment where there is a clause restraining anticipation would be open to question, and it would be "impossible," if I may use Lord Cottenham's words, "to tell what confusion might not be introduced into a family." Your lordships may remember that this doctrine was lately considered and approved in this House in the case of *Edward* v. *Cheyne*, 13 App. Cas. 385, 36 W. R. Dig. 173, and applied to a case of a Scotch alimentary provision, where a claim was made by the representatives of the deceased wife against the representatives of her deceased husband.

So the case stands apart from authority. Is there any authority to be found for the proposition which has commended itself to the Court of Appeal? I have read all the cases referred to by Kay, L.J., but I cannot find in any one of those cases, or in any text-book of authority, even a casual expression supporting the view of the Court of Appeal, or tending to show that the question has ever been regarded as an open question. In most of the cases which were cited the point was noticed incidentally and arose without argument. But the stream of authority when uniform and unbroken is not less weighty and powerful on that account. There are, however, at least two reported cases, one in England and one in Ireland, where the point was raised directly, argued, and decided. Those two cases have stood unchallenged and undoubted for forty

years. Neither the one or the other seems to have been referred to in *Hood Barrs* v. *Cathcart* (*No.* 2).

In *Rowley* v. *Unwin*, which was decided by Wood, V.C., in 1855, the plaintiff, a married woman, was entitled to the income of £1,000 for her separate use without power of anticipation. In January, 1845, the trustees allowed the husband to receive the principal, on the understanding that it should be secured by a mortgage of some real estate which he had contracted to buy. The mortgage was not actually executed until February, 1849. The lady separated from her husband in the following September. Soon afterwards she filed a bill against the trustees and her husband, claiming, among other things, interest on the £1,000 from the time when the sum was received by the husband to the date of the execution of the mortgage, and claiming also a lien on the mortgaged property in respect of such interest. The case was argued for the plaintiff by Mr. W. M. James and Mr. G. M. Giffard. Everything was disposed of at the conclusion of the argument, except the claim to interest on the £1,000. "If that point is to be pressed," said his honour, "I must look into the authorities." In his judgment on a later day the Vice-Chancellor pointed out that the wife could not beforehand consent to the husband receiving the interest, and that during the period in question the husband had had the use of the money, for which he was bound to pay interest. The case, he said, was the same as if the husband had given a mortgage for it; he would then have been indebted for interest to the wife *de anno in annum*, and if the wife's trustees had appointed a receiver who had paid the rents of the mortgaged property to the husband, it would fall within the ordinary rule which precludes a wife from recovering the past income of her separate estate upon the ground of a supposed gift by her of such income to her husband. He could, he added, draw no distinction between moneys in the hands of the husband, the interest of which the wife might have claimed, and moneys out on mortgage. His honour therefore declared that the plaintiff was not entitled to the arrears of interest which she claimed. I cannot imagine a case raising the question more directly, or in a manner more favourable to the claimant.

In Ireland, Blackburne, L.C., came to a similar decision, after argument, in the case of *Blake* v. *Fitzgibbon*.

I have not said anything about the form or extent of the order which was discharged by the Court of Appeal. The point was touched upon in the course of the argument. But, as it is immaterial for the present purpose, it seems better to leave it for future consideration.

I cannot help expressing my regret that, under the circumstances, the Court of Appeal did not think it proper to hold the fund *in medio* pending the appeal to your lordships' House, and to put the respondent's solicitors on terms to repay the costs in the event of the appeal being successful.

The appeal, in my opinion, ought to succeed, but I am afraid success will be only a barren victory.

Lord MORRIS and Lord SHAND concurred.

Judgment appealed from reversed. The respondent to pay the appellant all costs paid by him, and to pay the costs of the appeal.

Solicitors for the appellant, *Hood Barrs & Co.*

Court of Appeal.

From Chan Div. (Lindley, Lopes, and Kay, L.JJ.) [and Chan. Div.] (North, J.)

May 8.

In re WARD. (*a*.)

Solicitor — Costs — Taxation — Several bills — Order of course to tax one only.

A solicitor to whom a balance of £101 15*s. was due upon seven bills gave up the client's documents upon payment of* £50, *undertaking to return any sum found due from him upon taxation. He afterwards wrote accepting the* £50 *in full discharge of all claims. No answer was given to this letter, but a common order of course to tax one only of the bills was obtained by the client.*

Held, that the order of course was right under the circumstances.

Appeal from North, J.

In the month of March, 1895, R. H. Ward was instructed by the Hand-in-Hand Investment and Mortgage Co. (Limited) to act as their solicitor, and he acted as their solicitor accordingly up to the 16th of November, 1895, when he received notice of change of solicitor in a pending action and a retainer of another solicitor. Seven bills, amounting to £261 15s. in all, were due to Mr. Ward, and payments on account of £160 had been made. A balance of £101 15s. was due, and the papers were handed over on payment of £50 more on the 31st of December. On the 1st of January, 1896, Mr. Ward wrote offering to accept the £50 instead of the £101 15s. The letter is set out in the judgment.

On the 27th of January, 1896, an order of course to tax only one of the seven bills was obtained, and it was now sought to set this order aside.

Cordery, for the motion.—The order is irregular, being a common order to tax part only of one large bill, or at all events one only of the bills delivered by Mr. Ward. The other bills have not been paid or settled, Mr. Ward's offer to accept £50 in full settlement has not been accepted, and a balance may be found due to him. On payment of one bill the solicitor is ordered to give up papers upon which he has a lien for unpaid bills.

He cited *Holland* v. *Gwynne, In re Byrch*, 8 Beav. 124; *Law* v. *Gould*, 21 Beav. 481; *In re Wavell*, 22 Beav. 634; *In re Yetts*, 33 Beav. 412, 12 W. R. Ch. Dig. 101.

Beddall, for the client.—The other bills have all, in fact, been paid, and the common order is right. The cases cited have no application to the present case.

Cordery replied.

NORTH, J.—In my opinion this order was properly obtained. There are two objections made to it. First, that it is one large bill of costs, and that the client who applied to tax has got an order that part of that only is to be taxed. I do not think that that is a correct statement of the facts. If there were seven bills delivered by the solicitor to the client, all relating to totally different matters, they might possibly have been all included in one bill, but as a matter of fact they were not. They were kept quite distinct, and, although to a considerable extent they were treated as one, they were in fact at the time kept separate because they were different bills. In

(*a*.) Reported by R. C. MACKENZIE and G. B. HAMILTON, Esqs., Barristers-at-Law.

my opinion it is impossible to say that these seven bills are one bill, or are merely chapters or leaflets forming part of a bill. They are seven bills, and therefore, that being so, it is open to the client to proceed by order of course to tax one of them; unless, indeed, the second objection is well founded, and that is this.

It is assumed that there were seven bills due from the client to the solicitor, and it is said it is not open to the client to proceed to tax one of these bills without taxing the others, especially when the order of course obtained contains at the end of it an order that "upon payment by the petitioners to the said solicitor of what may be certified to be due to him as aforesaid, or in case it shall appear that there is nothing due to him, he, the said solicitor, shall deliver to the petitioners upon oath all deeds, books, papers, and writings in his custody or power belonging to the petitioners." A certain sum is found due upon it, and upon payment of that certain sum the solicitor, it is said, is ordered to deliver up all deeds, books, papers, and writings, although he has a lien upon many of them which are held by him in respect of other bills he has against the client.

It is said there is authority on the point. I think it right to say that there are authorities showing that when there are several bills open and unsettled between a solicitor and client you could not by an order of course get one taxed without the others. But in the present case the circumstances are very peculiar. The seven bills amounted together to the sum of £261 15*s*. There were three payments on account, amounting altogether to £160, and the cash account shows a balance due of £101 15*s*. The client wanted to have the papers, and got them from the solicitor on the terms of paying him £50 more, and he handed them over to the client, and gave this note: "In consideration of your handing to me a cheque for the £50 deposited with you, I hereby undertake to return to you any sum that may be found due from me on taxation of my bills delivered.—Dated this 31st day of December, 1895." So that we have it contemplated that there was a possible taxation of the bills, and this was an undertaking to hand back any excess, that might turn out on such taxation to have been received by the solicitor. Then the next day the solicitor writes this: "Referring to my clerk's interview with you yesterday, it is not my intention to take any further trouble to obtain payment of any balance that might be found to be due to me in the event of a taxation of my bills of costs, and I therefore accept the £50 in full discharge of all claims by me against the company so far as I am concerned, and you will therefore please treat the £50 as the balance due on the cash account, and not the £101 15*s*. as appears by the said account." So that then he said: "I accept £50 in full. I shall then have received £210, and I accept that in full satisfaction of all these bills." That, of course, did not prevent the client taxing the bills if he liked; but the client proceeded to tax one and not the rest—that is to say, the client accepted the offer that had been made, subject to the taxation of the bill which the client did not choose to accept at the amount at which it was delivered; so if acceptance were necessary it is acceptance enough of the offer made there.

The result is this—that one bill only is being taxed; but all the bills have been paid in full, subject to the solicitor repaying to the clients any sum which he has received in excess of his claim, and upon the solicitor being paid in full the right of the client to have the deeds handed up is a matter of course, and I see no impropriety therefore under the present circumstances in the order being made in that shape when, in point of fact, the client is to say which bill shall be taxed, and the only one selected is taxed.

It cannot be said, and the solicitor cannot complain, that he is ordered to deliver up the deeds when there is something due to him, when the only question between the parties is whether he has been exactly paid or overpaid. If anything might happen to be found the other way as due to him, then I would agree that it would be wrong to obtain an order of course containing terms that on the taxation of one bill all documents should be given up. Having regard to the question between the parties, it seems to me that the order of course was right in this case. The cases referred to by Mr. Cordery clearly establish the propositions there contended for, but this case is outside them altogether.

From this decision the solicitor appealed. The appeal was heard on the 8th of May, 1896.

Cordery, for the appellant, relied on the same authorities as in the court below, and on *In re Johnson and Weatherley*, 36 W. R. 374, 37 Ch. D. 433.

Beddall, for the respondent, was not called upon.

LINDLEY, L.J.—I do not think that, after that explanation as to the letter of the 1st of January, 1896, there is anything whatever in this application. There were several bills, and not one only, and there is no difficulty about the matter except possibly the suggestion that the other bills might be taxed. But after that letter it is plain that none of them could be taxed on the application of the solicitor, and that no injustice is done by this common order to tax. I think North, J., was quite right in refusing the motion to discharge that order. There is really nothing more in it. The appeal must be dismissed with costs.

LOPES, L.J.—I agree.

KAY, L.J.—I also agree.

Appeal dismissed.

Solicitors, *R. H. Ward; G. B. Crook.*

From Q. B. Div. (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.) [and Q. B. Div.] (Day and Lawrance, JJ.)

March 31; May 6.

REG. *v.* JUSTICES OF LONDON. (*a*.)

Poor law — Rating — Appeal — Assessment committee appearing by their clerk—Right of clerk to be heard—Order of the County of London Quarter Sessions, 1890, *r.* 10—*Valuation* (*Metropolis*) *Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 27, 62.

Under section 62 *of the Valuation* (*Metropolis*) *Act*, 1869, *which provides that "an assessment committee may appear on any appeal by their clerk," the clerk is not entitled to be heard in court for the purpose of signifying his consent to an agreed order.*

Rule *nisi* directed to the justices of the county of London to show cause why a writ of *mandamus* should not issue commanding them to allow the assessment committee of the parish of St. Mary, Islington, to appear by their clerk upon the hearing of an appeal against an assessment of certain premises, and to give the necessary consent to the alterations in the valuation list according to agreed terms.

A notice of appeal to the County of London

(*a*.) Reported by ERSKINE REID and W. F. BARRY, Esqs., Barristers-at-Law.

Quarter Sessions had been served under the Valuation (Metropolis) Act, 1869, by Messrs. T. R. Roberts (Limited) against an assessment of their premises in the parish, and the assessment committee appeared by their clerk as respondents to the appeal.

Before the date fixed for the hearing of the appeal terms had been arranged between Messrs. Roberts and the assessment committee, by which it was agreed that a reduction in the assessment should be allowed, and that the necessary alterations should be made in the list.

In pursuance of instructions from the assessment committee their clerk, who was not a solicitor or a barrister, appeared before the Court of Quarter Sessions to give consent on their behalf to the alterations in the valuation list, when the chairman refused to hear him or to accept his consent on behalf of the committee, upon the ground that by rule 10 of the Orders of the County of London Quarter Sessions, 1890, consents must be signified by counsel.

On the application of the assessment committee the court granted a rule *nisi* for a *mandamus* as above.

By section 62 of the Valuation (Metropolis) Act, 1869: "An assessment committee may appear on any appeal by their clerk."

By section 27: "The justices in assessment sessions" (now the Quarter Sessions for the County of London under the Local Government Act, 1888, s. 42, sub-section 10) "may, with the approval of one of her Majesty's principal Secretaries of State, make orders from time to time for the purpose of regulating the proceedings on appeals to them under this Act."

By rule 10 of the Orders of the County of London Quarter Sessions, 1890, made and approved under section 27: "Consents shall be signified by counsel in open court."

Sir E. Clarke, Q.C. (*H. Avory* with him), showed cause against the rule.—The clerk to the assessment committee has no right under section 62 of the Valuation (Metropolis) Act, 1869, to be heard on an appeal. That section merely gives the assessment committee the right to "appear," that is, enter an appearance, by their clerk, but it gives the clerk no right to be heard in court. Rule 10 of the Orders of the County of London Quarter Sessions, 1890, regulates the proceedings on an appeal where consent to an agreed order must be given. That rule is therefore authorized by section 27. If the clerk were permitted to appear in this case he would also be entitled to claim the right to appear and be heard upon the argument of any case. *Reg.* v. *The Assessment Committee of St. Mary Abbott, Kensington*, 39 W. R. 278, [1891] 1 Q. B. 378, is not an authority in support of the right of the clerk to be heard at quarter sessions, because in that case it was only held that there was nothing in the Act of 1869 to prevent a ratepayer being heard by his agent before an assessment committee. In *Collier* v. *Hicks*, 2 B. & Ad. 663, it was decided that no person had by law a right to act as an advocate on the trial of an information before the justices of the peace without their permission. In *The London Engineering Co.* v. *Cowan*, 16 L. T. N. S. 573, it was ruled at *nisi prius* that an attorney could not consent to a verdict on the part of his client, and that counsel must be instructed. The giving of consents is not a mere formality, for it does not follow as a matter of course that the court will make the consent order, for a party might consent to something contrary to the provisions of the Act. Further, independently of any statute, there is an inherent jurisdiction vested in all courts by common law to determine whom they shall give audience to. There is ample authority for saying that the courts have power to regulate their own procedure.

The following Acts were also referred to: County Courts Act, 1888, s. 72; Public Health (London) Act, 1891, s. 123; Poor Law Act, 1844, s. 68.

T. W. Chitty, in support of the rule.—Section 62 of the Act of 1869 gives the clerk to the assessment committee the right to be heard upon an appeal to signify their consent. All the cases cited are cases in which someone has claimed the right to appear as advocate or otherwise for somebody else. The clerk does not claim to appear for the committee as either counsel or advocate; he claims simply that he is entitled to give formal consent to an action which has been settled, as representing the assessment committee. Rule 10 is *ultra vires*, because no court can have a right to say that a litigant may not appear before them in person. The assessment committee is a public body, and can appear before any court (as other public bodies) individually or collectively by representation. The clerk to the committee is, under the circumstances, in the position of an ordinary individual who desires to appear in person. There are similar provisions to be found in the Public Health (London) Act, 1891, s. 123; Local Government Act, 1894, Schedule I., Part II., rule 16. The consent to an order on appeal, agreed to out of court, is a mere formality, and it would be unreasonable to require the committee to incur the expense of instructing counsel merely to consent.

DAY, J.—This rule must be discharged. Independently of the authorities cited, the justices have a right to say whether they will give audience to the clerk of the assessment committee or not. The right to decide that question is an inherent right vested in all courts by common law, and it has not been shown that the right has been taken away from the court of quarter sessions by any statute.

It was contended that section 62 of the Valuation (Metropolis) Act, 1869, limited the power of the Court of Quarter Sessions by providing that the assessment committee could appear by their clerk, but that section is satisfied by saying that the assessment committee need not attend individually, but may be brought before the court by their clerk, who is also empowered to receive service on their behalf. The statute provides, for the convenience of all parties, that the clerk should represent them and act on their behalf. For the same reason he may appoint a solicitor or counsel, but he has no power to appear himself in court as their counsel or advocate. He is not the assessment committee, he is not a suitor in person; and cannot claim, as he might otherwise, the right of arguing in open court his appeal in person.

Rule 10, it was contended, was *ultra vires* and unreasonable because it directed that counsel must be instructed to give consent—that the consent being merely a formality, the cost of counsel is a waste of the ratepayers' money. In my opinion the rule is a very wise one, and calculated to benefit all parties. It is most important that consents should be given by persons who know what they are consenting to; otherwise litigation would constantly arise. Counsel are responsible for the consents they give in open court, and therefore mistakes are less likely to occur, and expenses, instead of being increased, are in fact probably greatly reduced by the wise provision of this rule.

LAWRANCE, J., concurred.

Rule discharged.

The assessment committee appealed.

May 6th.—*T. W. Chitty*, for the appellants, argued as in the court below.

Sir E. Clarke, Q.C., and *H. Avory*, for the respondents, were not called upon.

Lord ESHER, M.R.—The language of section 62 of the Valuation (Metropolis) Act, 1869, which is obviously technical, is applied to the everyday circumstances of litigation. Litigants must appear before the court which has to deal with their case. After the parties have appeared there are always several proceedings to be taken before the court can determine the matter brought before it. The language of section 62 is perfectly clear. When are the assessment committee to give the security mentioned in that section? Clearly after they are in court. When are they in court? Clearly after they have appeared. They may appear by their clerk. Whether or not the clerk can instruct counsel is not now before us, and I express no opinion upon it. Instead of calling upon each member of the assessment committee to appear, that is, to do what is ordinarily covered by the word "appear," their clerk may appear for them. Then there are proceedings to be taken after the assessment committee have appeared. Section 27 of the Act of 1869 gives the justices power to make orders for the purpose of regulating the proceedings on appeals. Those proceedings take place after appearance. Rule 10 was made under that section for regulating the proceedings on appeal. One of the proceedings on an appeal would be, where necessary, to signify consent to an agreed order in court. The rule says that consents shall be signified by counsel in open court. That rule therefore deals with a proceeding on an appeal, and is not *ultra vires*. The consent, therefore, can only be given by counsel. The judgment of the court below was therefore right.

A. L. SMITH, L.J.—I am of the same opinion. The quarter sessions have made rules under section 27 of the Act of 1869 for regulating the proceedings on appeals, and the rule in question, rule 10, comes within the very words of the section. It is contended that that rule is *ultra vires* because, it is said, under section 62 the assessment committee may appear on any appeal and be heard by their clerk. That is not my reading of section 62. It provides how the assessment committee may get into court on an appeal. There was a difficulty about their getting into court, as they might all have to be served and to appear. Section 62 provides a mode in which this numerous body may get into court—they may appear by their clerk. Section 27 deals with what is to be done after they have appeared by their clerk, and rule 10 is made under the powers of that section. Rule 10 is therefore not *ultra vires*, and under it the assessment committee, after they have appeared by their clerk, must be represented by counsel to signify their consent on an appeal.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitor for the applicants, *A. M. Brunall.*

Solicitor for the justices, *E. W. Beal.*

From Q. B. Div. (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.) — Jan. 13.

BARRY *v.* THE PERUVIAN CORPORATION (LIMITED). (*a*.)

Practice—Commercial cause—Entering cause in commercial list—Appearance of defendant—Power to deal with costs.

After the writ in an action has been served the plaintiff may, before the defendant has entered an appearance, apply to the judge to whom commercial causes are assigned to enter the cause in the commercial list, and the judge may direct the costs of the application to be costs in the cause.

The defendant can, after entering an appearance, apply to have the order rescinded, but only on the ground that the cause is not a commercial cause.

Application by the defendants for leave to appeal from chambers.

The writ was issued in the Queen's Bench Division, the claim being for demurrage. With the service of the writ the plaintiff gave the defendants notice that he was going to apply to Mathew, J., who was hearing summonses in commercial causes at chambers, that the cause should be entered in the commercial list. The plaintiff applied accordingly, and Mathew, J., granted the application, and ordered the costs to be costs in the cause, the defendants to have liberty to apply. The application was heard before the defendants had entered an appearance, and they were therefore not heard upon it. The defendants subsequently entered an appearance, and applied to the learned judge to rehear the plaintiff's application, which was refused.

The defendants thereupon applied for leave to appeal from this refusal, and also from the order entering the cause in the commercial list.

Lauriston Batten for the defendants.

Lord ESHER, M.R.—We have to state what is the rule of practice in such questions as this, and for that purpose we have consulted the Lord Chief Justice and Mathew, J. A cause in the Queen's Bench Division is not attached to any particular judge, and the judges of that division, and not the parties to the cause, can direct by what judge the action shall be tried. A cause entered in the commercial list still remains in the Queen's Bench Division. The judge to whom commercial causes are assigned has power to place any commercial cause in the Queen's Bench Division in the list of commercial causes, and in our opinion he can do this the moment the writ has been served. He has also power to order the costs to be costs in the cause. The defendant need not be heard upon that application. But if the cause is not a commercial cause, the defendant will be entitled to object to the order upon that ground, and that is the only ground upon which he can object to the order. The present cause is admittedly a commercial cause, and the order of Mathew, J., was right.

A. L. SMITH and RIGBY, L.JJ., concurred.

Application refused.

Solicitors, *Smiles, Ollard, Yates, & Ollard.*

Original Motion. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — April 20.

HOOD BARRS *v.* HERIOT (No. 2). (*a*.)

Solicitor—Costs—Payment of costs to solicitor—Judgment reversed on appeal—Order on solicitor to repay the costs—Jurisdiction.

Where the Court of Appeal allowed an appeal with costs, and after notice that a petition of appeal to the

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

House of Lords had been lodged, the solicitors for the successful party obtained payment of the costs from the other party under threat of execution, and the House of Lords subsequently reversed the order of the Court of Appeal with costs,

Held, that the solicitors could not be ordered to refund the costs so received by them.

Semble, *that the Court of Appeal had no jurisdiction to entertain the application.*

Fitzmaurice *v.* Jordan, 32 *L. R. Ir.* 112, 41 *W. R. Dig.* 189, *dissented from.*

Application by the plaintiff for an order that Messrs. Crossman & Prichard, the London agents for John Dunlop, Berwick-on-Tweed, the defendant's solicitor, should repay to the plaintiff £66 4s. 2d., being the taxed costs of the defendant's appeal against an order made at chambers.

On the 15th of November, 1892, Mrs. Loftus recovered judgment for £44 1s., debt and costs, against the defendant, a married woman.

Upon the defendant's marriage certain property was transferred to trustees upon trust to pay the annual income to her for life for her separate use without power of anticipation. At the date of the judgment there were arrears of income accrued due which had not been paid to her by the trustees. On the 1st of April, 1895, the judge at chambers made an order appointing a receiver of the income of the defendant accrued due and payable at or before the date of the judgment sufficient to satisfy the debt and costs. The defendant appealed from this order, and while the appeal was pending Mr. Hood Barrs, to whom Mrs. Loftus had assigned the judgment debt, obtained an order that he should be substituted for her in all future proceedings. The Court of Appeal discharged the order made at chambers, with costs, holding that the income was protected by the restraint on anticipation until it actually reached the hands of the married woman: see *Loftus* v. *Heriot*, [1895] 2 Q. B. 212, 43 W. R. Dig. 112.

On the 5th of July, 1895, a petition of appeal to the House of Lords was lodged, and an application to stay proceedings pending the appeal was refused by the Court of Appeal. On the 29th of July the plaintiff paid to Messrs. Crossman & Prichard, the London agents for the defendant's solicitor, the taxed costs of the appeal, amounting to £66 4s. 2d., under a threat of execution.

The House of Lords subsequently reversed the decision of the Court of Appeal in *Loftus* v. *Heriot*, with costs, and restored the order made at chambers, holding that the arrears of income which had accrued due, though not actually paid to the married woman, could be made available to satisfy the judgment: see the report of *Hood Barrs* v. *Heriot* (*No.* 1), *ante*, p. 481.

The plaintiff thereupon applied for an order for the repayment of the costs as above.

According to the affidavit of Dunlop, the defendant's country solicitor, his London agents applied the £66 4s. 2d., with his consent, towards payment of the amount which he owed them in their cash account with him, and on the 29th of July, 1895, the defendant was indebted to him in a sum in excess of the £66 4s. 2d., and he thereupon, with her consent, applied such sum to the credit of her account with him, and delivered to her a bill of costs showing a balance due to him of over £30.

Oswald, Q.C. (*Bartley Denniss* with him), for the plaintiff.—An order similar to that asked for here was made by the Court of Appeal in Ireland in *Fitzmaurice* v. *Jordan*, 32 L. R. Ir. 112, 41 W. R. Dig. 189. The effect of that decision is that where, after notice of appeal has been served, there being a fair ground for the appeal, the solicitor obtains payment of the costs from the unsuccessful party under a threat of execution, the court will order him to repay the costs if the appeal succeeds, in default of his client repaying him. The plaintiff is content to take a similar order here. The London agents have these costs in their possession, as they have applied the money in liquidation of their costs against the country solicitor.

Sylvain Mayer, for the solicitors.—This court has no jurisdiction to entertain this application, as there has been an appeal to the House of Lords. The House of Lords alone could have entertained the application. Next, assuming that this court has jurisdiction, the practice is not to make an order on the solicitors to repay the costs. *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 34 W. R. 749, 33 Ch. D. 85, shows that in such circumstances the solicitors receive the costs as the agents of their client, and not for their own benefit, and that the client alone is liable to refund the money.

Oswald, Q.C., replied.

Lord ESHER, M.R.—This is an application for an order against certain solicitors to repay the costs of an appeal to this court which had been paid to them by the plaintiff. The case was carried to the House of Lords, who reversed the decision of this court, with costs. I very much doubt whether, after that, this court has any jurisdiction at all to entertain this application. But it is not necessary to base our judgment upon that ground. We will deal with this case apart from any such consideration, and will assume that this court has jurisdiction. The case stands thus. This court gave judgment for the defendant, with costs. The costs were paid by the plaintiff to the London agents, who were the solicitors on the record for the defendant's country solicitor. The costs were paid to them as solicitors for the defendant. Therefore the costs were paid to the defendant through the hands of the solicitors. They were not paid to the solicitors in their own right, but simply to them as agents for the client. The application is now made that the solicitors should be ordered personally to repay to the plaintiff the costs so received by them. No such order has ever been made by any court in England. In *Lydney and Wigpool Iron Ore Co.* v. *Bird* the registrars reported to the court that there was no precedent for such an order. In that case Cotton, L.J., thought such an application could not succeed, and he gave strong reasons to show that such an order would be wrong. There is, on the other hand, a decision of great authority in Ireland—*Fitzmaurice* v. *Jordan*—which seems to me to be in point. But I must decline to follow that decision. I have carefully read the judgment of the court as delivered by Fitzgibbon, L.J., and I cannot find that he gave any reasons for the order which was made.

I agree with the reasons given by Cotton, L.J., in the *Lydney case*, and in my opinion this application must be refused.

A. L. SMITH, L.J.—I am of the same opinion. This is a perfectly novel application. It is for an order that the solicitors should repay out of their own pockets the costs paid to them, though they have been guilty of no impropriety, and have not given any undertaking to repay the costs. I have grave doubts whether this court can entertain this application after the case has gone to the House of Lords, and that House has not remitted the case to this court. But I pass that point by, and I assume that this court has jurisdiction. I cannot remember having ever heard of such an application. There is, however, a case in the Court of Appeal in Ireland which seems to me to be in point, and which is an authority in support of

the order now asked for, and we must take it that that case lays down the practice in Ireland. On the other hand, the case of *Lydney and Wigpool Iron Ore Co.* v. *Bird* goes to show that where the solicitor has properly obtained the costs, the court, apart from an undertaking given by him to return them if the appeal succeeds, will not order him to repay the costs. That seems to me to be the true view. The application therefore fails.

RIGBY, L.J.—I am of the same opinion. This application is altogether novel. I can see no ground upon which it can be said that we have any jurisdiction to deal with this application, the House of Lords not having remitted the cause to this court. I agree that on every ground the application fails.

Application dismissed.

Solicitor for the applicant, *Hood Barrs.*

Solicitors for the respondents, *Crossman & Prichard.*

High Court of Justice.

Chan. Div. North, J. March 26.

In re WEBBER.
GRIBBLE *v.* WEBBER. (*a.*)

Inland Revenue—Estate duty—Settlement estate duty—Settled legacies—Duties payable out of residuary estate—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 4, 5 (1) (*a*), 6, 8, 9.

Testator, who died after the Finance Act, 1894, *came into operation, gave a pecuniary legacy to persons by way of succession, and bequeathed his residuary personal estate in shares, some of which were given absolutely and others to persons in succession.*

Held, that under the Finance Act, 1894, *settlement estate duty as well as estate duty in respect of both classes of the settled legacies should be borne by, and was payable by the executors out of, the general residuary estate.*

Adjourned summons.

By his will, dated the 27th of February, 1890, Thomas Webber gave and bequeathed the sum of £2,000, free of legacy duty, unto his executors and trustees upon trust to permit Matilda Ann Webber to receive the income thereof during her life for her sole and separate use, and after her death the testator directed his trustees to hold the said sum or the investments representing the same "in trust for such one or more of the children of the said Matilda Ann Webber by Thomas Richard William Webber as being sons or a son shall at my death have attained or shall thereafter attain the age of twenty-one years, or being a daughter or daughters shall at my death have attained that age or married or shall thereafter attain that age or marry; and if more than one in equal shares." The testator also gave a legacy of £800 to Emily Leach Kersley and her issue upon similar trusts; and, after giving certain legacies absolutely, the will proceeded: "And I direct that the residue shall be considered as divided into thirty equal parts," and held by the trustees upon trust as to six parts for the children of R. J. Webber; as to five parts for Matilda Ann Webber for life or widowhood, with remainder to her children; and the testator gave the remaining shares in some cases absolutely, and in some cases directed them to be settled.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

The testator died on the 7th of March, 1895.

This summons was taken out to decide whether (1) estate duty, and (2) settlement estate duty, on the respective legacies of £2,000 and £800 to Matilda Ann Webber and Emily Leach Kersley, and their respective children, ought to be paid out of the legacies or out of the residue.

A. Adams, for the executors.

J. G. Butcher and *A. Read*, for persons interested in the settled legacies and settled shares of residue.

Austen Cartmell, for the persons interested in the unsettled shares of residue.

NORTH, J.—In this case the testator's will was made before, but he died after, the coming into operation of the Finance Act, 1894. By it, two pecuniary legacies are given, and the residuary estate is divided into thirty shares, which are given to different persons, some being given absolutely and some shares being settled. The question is how estate duty and settlement estate duty should be borne. As regards the shares given absolutely—and, indeed, all the shares—it is clear that estate duty must be paid.

The legacies of £2,000 and £800 would before the Finance Act have to pay 1 per cent. duty, which they now escape. The testator intended that the legacies should be free from duty, although this does not affect the construction of the Act. The Act imposes duty on the personal estate the executor receives, and the executor has to pay this duty. I find nothing in the Act to allow him to recoup himself in any way. By section 1 of the Act estate duty is imposed; and section 5, sub-section (1) (*a*) deals with settlement estate duty. [His lordship read sections 1, 2, 4, and 6.] The executor is bound to pay the estate duty in respect of all personal property of which the deceased was competent to dispose at his death; and the executor is at liberty to pay the estate duty in respect of any other property passing on the testator's death which by virtue of deceased's will is under the control of the executor. The Act does not ignore the fact that the executor often cannot tell exactly what the property is at the time the affidavit is carried in; section 6 (4) provides for the case of a person accountable for duty who is not the executor. Section 8 (3) provides that the executor is to state everything on which duty is payable, not because he has to pay it, but because such a course is convenient.

Section 6 deals with the recovery of estate duty. Is settlement estate duty included in estate duty? It seems to me that it is: (see section 5, sub-section (1) (*a*)). If not, there is no provision in the Act as to settlement estate duty being paid by any person at all. Turning to the interpretation clause (section 22, sub-section (1) (*e*)), the expression "estate duty means estate duty under this Act." This seems absurd, but Mr. Cartmell points out that the expression "estate duty" is also used in other Acts. Settlement estate duty is part of the burden the executor has thrown upon him. Is there anything to show that he can throw it upon any particular share? Section 9, sub-sections (1) and (4), do not apply where the whole property has passed to the executor as such. The duty devolving upon the executor, it has to be borne out of the general residuary estate. It is said that it is unfair that the duty caused by the settlement of a share has to be borne by a share which is not settled; but that is a matter for the Legislature, and not for me. In my opinion the executor cannot get back the duty paid.

Solicitors, *Surr, Gribble, & Co.; Carr & Sons*, or *Battams & Hutchinson*, Ealing.

Chan. Div. }
Stirling, J. } March 26; April 28.

BULKELEY v. STEPHENS. (a.)

Apportionment—Tenant for life—Trust for distribution after death of tenant for life—Sale by order of the court—Apportionment Act (33 & 34 *Vict. c.* 35), *ss.* 2, 3, 4, 5.

Where stock is sold by trustees after the death of a tenant for life the Apportionment Act, 1870, *will apply as to any dividends actually received by the trustees. But if the stock be sold* cum *dividend, so that no dividend actually comes to the hands of the trustees, the Apportionment Act*, 1870, *will not apply directly.*

As a general rule the court will not order apportionment in respect of the increase of price caused by the prospect of a dividend, for the reasons laid down in Scholefield *v.* Redfern, 11 *W. R.* 453, 2 *Dr. & Sm.* 173, *and* Freeman *v.* Whitbread, 14 *W. R.* 188, *L. R.* 1 *Eq.* 266.

In special cases, however, apportionment will be directed. So where the court was of opinion that on the construction of the will the trust for distribution ought to have been performed by handing over the trust investments in specie *on the death of the tenant for life, apportionment was directed in respect of the enhanced price of certain stock which had been sold* cum *dividend under order of the court.*

Lord Londesborough *v.* Somerville, 19 *Beav.* 295, 3 *W. R. Ch. Dig.* 5; *and* Bulkeley *v.* Stephens, 3 *N. R.* 105, 10 *L. T. N. S.* 225, 12 *W. R. Ch. Dig.* 3, *followed.*

Summons.

This was an application by the trustee of the estate of the late Mr. Lyne Stephens for liberty, out of funds in his hands representing income of the testator's residuary estate, to pay to the legal personal representative of Mrs. Lyne Stephens, deceased, the late tenant for life of such residuary estate, a proportionate part of certain dividends in a sum of £130,000 Bank Stock, and upon a sum of £12,000 Royal Exchange Corporation Stock.

As to the Bank Stock, it was admitted that the said proportionate part of the dividends was payable to Mrs. Lyne Stephens' estate.

The facts as regards the Royal Exchange Corporation Stock were these.

The testator, who died in 1860, by his will dated 1851, gave his residuary estate to trustees upon trust for his wife for life, and after her death to pay, transfer, and assign his residuary estate, and the stocks, funds, and securities upon which the same should be invested, unto and among such of the issue of four of the testator's uncles therein named as should be living at his decease.

Mrs. Lyne Stephens died on the 2nd of September, 1894, and the £12,000 Royal Exchange Corporation Stock was, in pursuance of an order of court dated the 12th of November, 1894, sold on the 29th of January, 1895.

On the 31st of December, 1894, an *interim* dividend of 4 per cent. was declared on this stock, and in June, 1895, a 10 per cent. dividend was declared for the year ending the 31st of December, 1894.

The question now arose whether the legal personal representative of the tenant for life was entitled to participate in these dividends.

Hastings, Q.C., and *Methold*, for the summons.—The legal personal representative of Mrs. Lyne Stephens is apparently entitled to share in the dividends. The Apportionment Act of 1870 is applicable to such a case, as the word "dividends" occurs in section 5. They ought to be divided between the tenant for life and the remainderman in the usual way. The Royal Exchange Stock rose and fell considerably in 1894-95.

They referred to *Freeman* v. *Whitbread*, 14 W. R. 188, L. R. 1 Eq. 266; *Bulkeley* v. *Stephens*, 3 N. R. 105, 10 L. T. N. S. 225, 12 W. R. Dig. 3; *Bostock* v. *Blakeney*, 2 Bro. C. C. 653.

Buckley, Q.C., and *Baines*, for the remaindermen.—The Apportionment Act does not apply: *In re Clarke, Barker* v. *Perowne*, 29 W. R. 730, 18 Ch. D. 160. The words of the Act are not exhaustive, and only apply to dividend-paying investments. The Act does not apply to a case where a dividend is paid in the purchase money, and the trustee never receives it, in fact, at all. *Lord Londesborough* v. *Somerville*, was a very special case. [STIRLING, J.—The Act introduces the difference that it deals with these things on the principle of interest for money lent. That is what the Vice-Chancellor called the abstract principle.]

They referred also to *Scholefield* v. *Redfern*, 11 W. R. 453, 2 Dr. & Sm. 173.

Hastings, in reply.—[STIRLING, J.—It is clear from *Scholefield* v. *Redfern* that in case of a mortgage there would be apportionment, but not on a change of investments. It was to meet that, that the Act was passed. *Freeman* v. *Whitbread* is exhaustive, and during the twenty-five years the Act has been in operation has never been departed from.] The Act now gives me a right which before was only an equity.

Cur. adv. vult.

April 28.—STIRLING, J., after stating the facts as above set out, continued:—As regards the Bank Stock the dividends came to the hands of the trustees, and it is not disputed that the legal personal representative of Mrs. Lyne Stephens is entitled to a proportionate part of what came to the hands of the trustees. Neither is it disputed that the Royal Exchange Corporation is a public company within section 5 of the Apportionment Act of 1870, and that the *interim* dividend actually came to the hands of the trustees, so as to make it apportionable under the Act, and therefore that a proper share ought to be paid to the legal personal representative of the tenant for life.

Then as regards the dividend which was declared in June, 1895, it is contended on behalf of such legal personal representative that the price received by the trustees includes that dividend, and that as much thereof as represents that dividend down to the death of the tenant for life ought to be paid to him. From an abstract point of view there is much to be said in favour of this contention; but there is considerable difficulty in its practical application. This is not the first time the point has been considered by the court: at least, a similar one as to apportionment of income on change of investment has been twice considered, first in *Scholefield* v. *Redfern*, and secondly in *Freeman* v. *Whitbread*. In the former case the Vice-Chancellor says (2 Dr. & Sm., at p. 182): "There is another question of a peculiar kind, and one which is novel to me. The point will be best explained by putting an example. Suppose part of the testator's property to consist of certain American stock, bearing interest or dividends payable at half-yearly periods, say January and July, and the trustees sell it in order to invest the proceeds in Consols. If they sell it at any other time than precisely the period at which a dividend had just accrued, the money realized by the sale is so much more in proportion to the time which has

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

elapsed since the last dividend day. Therefore the amount realized by the sale is compounded partly of the value of the stock itself and partly of the value of that proportionate part of the current half-year's dividend which may be considered to have accrued since the last dividend day. It is contended that the tenant for life ought to have this latter portion as income. Now, it is certain that in the multitude of cases of administration of estates in modern times, when similar directions have been given by testators, the court has never been in the habit of administrating any such equity. When we consider a little further it is obvious that if the tenant for life is to have something out of the sale money as representing income when the trustees invest the money, unless they invest it on the very day on which the dividend has just accrued due, the same equity ought to be administered the other way and we ought to take from the tenant for life something of his next dividend on the Consols and add that to the capital, in order to make things equal as between him and the remainderman. It is clear that if there is an equity one way, there is an equity the other way. It is obvious that the reason why such equity on either side has never been administered habitually by this court is that by attempting it a grievous burthen would be imposed upon the estates of testators by reason of the complicated investigation which it would lead to. The gain to either party would be far more than counterbalanced by the expense which might be incurred in a complicated case, and for that reason, no doubt, the thing has never been done. I will not be the first to introduce the practice."

In the second case of *Freman* v. *Whitbread* the Vice-Chancellor delivered a long and elaborate judgment in which the subject may be said to be exhausted. I simply refer to it because it amplifies the reasoning contained in the first case. Both these decisions were before the Apportionment Act, 1870, and it is necessary therefore to consider the effects of that Act.

Section 2 provides, among other things, that dividends "shall, like interest on money lent, be considered as accruing from day to day and shall be apportionable in respect of time accordingly." So far as that is concerned, I think the judgment of the Vice-Chancellor is not affected, because at the conclusion of *Scholefield* v. *Redfern* he says: "But it was suggested that, though this may be so with regard to stock the dividends of which are payable at the end of each successive half-year, a different rule is applicable to the case of railway debentures and other property of that description, yielding interest *de die in diem*. If anything is received as interest, that interest will belong to the tenant for life; but if the debenture is sold for a given sum, that sum must be treated as capital." But the matter does not stop there. The Act not merely declares that they shall be apportionable, but provides for the time of payment and the remedies for their recovery. Section 3 runs: "The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before;" and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before," Section 4: "All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively . . ."

Now, it is said that the trustees have received the dividends within the meaning of those sections, so that they are liable to account to the legal personal representative of the tenant for life for a proportionate part. But in point of fact they were received by the purchaser, and it is admitted by the applicant that the stock having been sold with the dividend the legal personal representative has no rights against the purchaser. What the trustees have received is purchase money. The stock was sold *cum* dividend. This is not an actual dividend. These sections therefore do not apply directly, and therefore the legal personal representative is entitled to insist as against the trustees on an equity merely, which is what the Vice-Chancellor declined to enforce in the cases before him. The reasons given by him were, first, the absence of any practical scheme for giving effect to it, and, second, the great burden it would put on trust properties. The first applies here, and no case has been cited in which the effect has been so given. I have inquired as to the practice in the registrar's office, and I am informed by Mr. Lavie that no such practice is recognised in dealing with ordinary funds directed to be sold on the death of the tenant for life. As to the second reason, the burden is not so great as it would be on a change of investment, because, first, the alleged right would arise on re-investment and both as to the original investment and the re-investment, and, secondly, because a change of investment is different from the distribution of the trust fund. Still the burden would be considerable. If the legal personal representative were to receive so much of the purchase money as represents the value of the proportionate part of the dividend, it would mean that the dividend would have to be treated as if it were actually paid. This might in many cases entail considerable labour, and the evidence of stockbrokers and other experts would be necessary in order to ascertain the price at which the stock would be sold *ex* dividend, and the difference between that and the actual price would represent the dividend. It would become necessary to obtain and to preserve such evidence. And if, as in this case, the tenant for life were dead and had a legal personal representative, other difficulties might possibly arise. The consequence is that in many cases they would have to come to the court for protection. Again, in cases of companies payment would almost always be delayed or the amounts might not in certain circumstances be payable for a long time.

Looking at all these circumstances, I am not prepared to introduce any novel practice on the sale of shares consequent on the death of the tenant for life. It is, however, upon the whole clear that in some cases, such as those dealt with by the Vice-Chancellor, effect has been given to such a scheme under special circumstances—*e.g.*, as in *Lord Londesborough* v. *Somerville*, and *Bulkeley* v. *Stephens*. I think here that it is a material circumstance that the trust is on the death of the tenant for life "to pay, transfer, and assign my ordinary residuary estate, and the stocks, funds, and securities upon which the same shall be invested unto and amongst" a particular class of beneficiaries. There is also a trust for sale, but that is varied by a power to retain in existing investments for so long as his trustees in their absolute discretion shall think fit.

But it occurs to me that the trust or power for sale is not exerciseable at the death of the tenant for life, but that the proper mode then for exercising the trust is to transfer *in specie* the stocks, funds, and securities to the beneficiaries. The Apportionment Act would have applied directly if that had been done on the death of the tenant for life, and the legal personal representative would have been entitled to a proportionate part. But it so happened in this case that the beneficiaries were very numerous, the estate being divided into ninety-thirds, and consequently the trust cannot be carried out in that way. If, however, it had been so carried out, the duty of the trustees was to transfer, so that the legal personal representative of the tenant for life should be able either directly or through the intervention of the trustees to obtain payment of the proportionate part of the dividend to which he is entitled.

Now, the order of the 12th of November, 1894, was made, and I doubt not properly made, for the sale and division of the proceeds of the estate. It was made in the interest and for the benefit of the persons who then became entitled to receive that estate. But it was made in the absence of the legal personal representative of Mrs. Lyne Stephens. If he had been present, it seems to me it would have been urged by him that her estate ought not to be placed in a worse position than if the trust had been carried out in the proper mode by transfer. That being so, I do not see why, as the estate is not finally wound up, he may not still assume the same right; and under these circumstances I have come to the conclusion that the application ought to be acceded to, assuming that the parties are all satisfied that the proper sum which would have been allowed on such an application is that which is mentioned in the summons.

Order accordingly.

Solicitors, *Tatham & Pym; Robins, Billing, & Co.*

Q. B. Div. (Hawkins and Kennedy, JJ.) Jan. 27; March 28.

REG. *v.* SMITH AND KERR. (*a.*)

Justices—Jurisdiction—Adulteration—Milk sold with a false warranty—Prosecution of offenders—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 61), *ss.* 6, 10, 13, 20, 27—*Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.

K., a Rutlandshire farmer, contracted to sell milk to a dairy company whose premises were situate at Finchley-road, London, but not within the district of the C. metropolitan police court. K. consigned a churn of milk with a written warranty attached to the churn, at Oakham to the dairy company in the Finchley-road. The dairy company resold the churn of milk to a London hospital whose premises were situate within the district of the C. police court. An inspector of that district procured (under section 3 of the Food and Drugs Act, 1879) at the premises of the hospital, a sample of the milk, and obtained an analysis of it by the analyst of that district, who certified that it was adulterated with water. Proceedings were instituted by the inspector in the C. police court against K. for an offence under section 27 of the Sale of Food and Drugs Act, 1875, by reason of his having given a false warranty as to the milk.

Held, that the magistrate of the C. police court had no jurisdiction, as the offence alleged against K. had not been committed within the district of that court.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Fortune *v.* Hansom, ante, *p.* 431, [1896] 1 *Q. B.* 205, *commented on.*

This was a rule *nisi* for a *mandamus* calling upon Horace Smith, Esquire, one of the metropolitan police magistrates, sitting at Clerkenwell Police Court, to show cause why he should not hear and determine the matter of two summonses taken out by Patrick Meruagh, an inspector of nuisances for the parish of St. Mary, Islington, against David Kerr, for giving a false warranty on the 14th and 26th of June, 1895, in respect of two churns of milk sold by him to the Manor Farm Dairy Co. (Limited), contrary to the provisions of section 27 of the Sale of Food and Drugs Act, 1875.

The facts were these. The prosecutor on two occasions procured, under section 3 of the Sale of Food and Drugs Amendment Act, 1879, samples for the purpose of analysis of milk in course of delivery by the Manor Farm Dairy Co. (Limited) to the Great Northern Central Hospital, at their premises in the Holloway-road, in the parish of St. Mary, Islington. The samples were taken at the premises of the hospital in the Clerkenwell police district, and the analyses were made by the analyst for that district. On analysis it was found that the two samples were adulterated with 5 per cent. and 14 per cent. respectively, of added water; and the analyst so certified.

Upon this certificate proceedings were instituted at the Clerkenwell Police Court, under section 6 of the Sale of Food and Drugs Act, 1875, against the Farm Dairy Co.

At the trial the company proved that the milk was as received by them at East Finchley-road Station from their vendor, Kerr, a farmer living at Oakham, Rutlandshire, who supplied it to them under a contract with a written warranty attached to each churn as to the purity of the milk. The magistrate (Mr. Bros) dismissed the summons against the Dairy company, and granted one against their vendor, Kerr, for selling milk with a false warranty, contrary to the provisions of section 27 of the Act of 1875, which provides that "every person who shall give a false warranty in writing to any purchaser in respect of an article of food, shall be guilty of an offence and be liable to a penalty." This summons came on for hearing before Horace Smith, Esquire, the sitting magistrate at Clerkenwell Police Court, on the 20th of July, and he refused to hear and determine the charge, on the ground that he had no jurisdiction to do so, because (1) the warranty was attached to the churn at the farm in Rutlandshire, and the milk delivered by the farmer Kerr to the company at East Finchley-road Station, both being places out of the jurisdiction of that court; and (2) the person prosecuting was not a person competent to take out a summons under section 20 of the Act of 1875, which provides that "when the analyst, having analyzed any article, shall have given his certificate of the result, . . . the person causing the analysis to be made may take proceedings for the recovery of the penalty . . . before any justices having jurisdiction in the place where the article was actually delivered to the purchaser."

A rule *nisi* to compel the learned magistrate to hear and determine the matter having been obtained:

Toller, in showing cause against the rule being made absolute, submitted that the certificate of the analyst was no evidence against Kerr. To decide who was the "purchaser," sections 20 and 21 of the Act of 1875 must be read together.

He cited *Reg.* v. *Titterton*, 43 W. R. 603, [1895] 2 Q. B. 61, and *Buckler* v. *Wilson*, [1896] 1 Q. B. 83.

Macnorran, Q.C., in support, referred to *Harrison*

v. *Richards*, 45 J. P. 552, which was followed in *Rouch* v. *Hall*, 29 W. R. 304, 6 Q. B. D. 17, and *Rolfe* v. *Thompson*, [1892] 2 Q. B. 196, 40 W. R. Dig. 6.

Cur. adv. vult.

The judgment of the court was delivered by

HAWKINS, J., who, after stating the facts, said:—It is beyond doubt that, in fact, neither the sale nor warranty nor the delivery to the dairy company was made within the limits of the Clerkenwell Police Court's district, and it was not suggested that any sample was taken of the milk at the place or during the course of delivery to the dairy company. Unless some enactment can be found altering the general rule of law that an offence must be prosecuted before a tribunal having jurisdiction to entertain it within the county or place in which it has been committed, the magistrate at the Clerkenwell Police Court had no jurisdiction over it. It is said, however, that such an enactment is to be found in section 20 of the Act of 1875. We are not of that opinion.

Before I discuss that enactment I desire to point out one or two matters essential to be borne in mind—namely, the offence charged against the dairy company was of a totally different character from that preferred against Kerr; that against the dairy company was framed under section 6 of the Act of 1875 for selling to the prejudice of the hospital committee, milk which was not of the nature, substance, and quality of the article demanded by the purchasers. Under the circumstances stated, no such offence could possibly be charged against Kerr, for he neither sold nor delivered any milk to the hospital committee. The information against Kerr was framed under section 27 of the same Act, for giving a false warranty in writing to his purchasers, the dairy company, in respect of the milk sold by him to them.

Let me now call attention to the words of section 20 of the Act of 1875: "When the analyst, having analyzed any article, shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act"—I think this section must be read as if the words "or of section 3 of the Act of 1879" were inserted here—"has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence before any justices in petty sessions assembled having jurisdiction in the place where an article or drug sold was actually delivered to the purchasers"—I think that this part of the Act must be read as if the words "or the sample of milk was procured as mentioned in section 3 of the Act of 1879" were inserted here—"in a summary manner." It has been held that the certificate of the analyst is a condition precedent to a prosecution under this section (see *Peart* v. *Barstow*, 44 J. P. 699, and *Smart* v. *Watts*, 43 W. R. 379, [1895] 1 Q. B. 219), and it seems to me not open to question that the words "When the analyst, having analyzed any article," at the commencement of the section, must be interpreted to mean the official analyst appointed under section 10 as analyst of all food and drugs sold within the district for which he is appointed; and the inspector of nuisances appointed for any district or place can only require the analyst (if there be one) for that district, to analyze the suspected samples and give his certificate under section 13. We take it, therefore, that an inspector of nuisances could neither insist upon procuring a sample in a district for which he is not appointed, nor could an analyst not appointed to act for such district give any valid and effectual certificate of the result of his analysis under section 13. Section 18, which, with reference to the schedule to the Act, prescribes the form of the certificate, evidently contemplates an analysis by the local analyst, of the article analyzed as it is at the time it is delivered to him. Then comes section 20, the section under discussion, and, immediately following it, section 21, which enacts that at the hearing of the information in such proceeding (*i.e.*, the proceedings mentioned in section 20) the production of the certificate of the analysis shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness.

All these provisions point, in our opinion, to the intention of the Legislature to provide local inspectors with power to obtain by local analysts analyses of questionable samples of articles of food or drugs sold within their districts, and to provide for the prosecution of offenders against the Act before justices of the peace having jurisdiction in the place where adulterated articles are actually delivered to the purchasers; but it never could have been in the contemplation of the Legislature to give justices jurisdiction to deal with persons offending against the Acts in other parts of the United Kingdom out of their jurisdiction. There are certainly no words expressive of such an intention to be found in section 20 or in any other section of the Acts either of 1875 or 1879. In this case no act tending to establish a violation by Kerr of the statutes I have discussed occurred within the jurisdiction of the Clerkenwell Police Court. The warranty was made at Oakham, the delivery by Kerr to the dairy company at Finchley. There was no sample of the milk taken by any inspector in the course of its delivery to the dairy company, and therefore there could be no such sample to analyze, and, even had there been, no analysis was made by any analyst appointed for the district of Finchley, and the analysis of a sample taken after the milk had been actually delivered to and received by the dairy company in a district where Kerr never had any control over the milk, and of which he had no knowledge, could not affect him, and the certificate given as the result of the analysis of such a sample could not, in our opinion, be any evidence as against Kerr. Moreover, though the certificate may have been evidence as against the dairy company that the sample taken at St. Mary's, Islington, while in the course of delivery by them to the hospital was adulterated, there was nothing on it from which it appeared that the offence of giving a false warranty was committed by the defendant Kerr at Oakham or anywhere else.

Under all the circumstances, we are at a loss to see any ground for the contention that the Clerkenwell magistrate had any jurisdiction over the charge against Kerr. It is only for such offence as appears by the certificate that any prosecution can be instituted under section 20. The rule, therefore, must be discharged.

I wish before concluding to observe, with regard to the form of the certificate, that the analyst's duty is merely to analyze and report the result of the analysis, and he has no right, as I think, to report extraneous facts unconnected with the analysis, and if he does so his certificate would, in my judgment, be inadmissible as evidence of such facts. In so far as it states in due form the result of the analysis the certificate is sufficient for the justices to act upon, unless the defendant requires the analyst to be called as a witness, or unless other evidence is adduced before the justices which induces them to come to the conclusion that it is incorrect. The expression used by me in my judgment in *Fortune* v. *Harson*, *ante*, p. 431, [1896] 1 Q. B. 205, that the certificate is "practically conclusive" was intended only to convey the impres-

sion I entertained that in the vast majority of cases brought before justices no other evidence was offered of the impurity of the article, and to point out the great importance of insisting upon its containing all the material details of the analysis to enable the justices themselves to form a judgment on the question before them. Had I intended to do more I should have qualified my expression by what I have now stated.

Rule discharged.

Solicitors, *Stanley Hoare; P. G. Robinson.*

Q. B. Div.
(Lawrance and Collins, JJ.) March 24, 25.

COOPER *v.* PEARSE. (*a.*)

Landlord and tenant — Compensation — Allotments — Cottage garden—Holding used by seedsman for trade purposes—Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 *Vict. c.* 26), *ss.* 4, 5.

A plot of land occupied by a seedsman and used by him for the business of a seedsman is not an allotment or holding within the meaning of section 4 *of* 50 & 51 *Vict. c.* 26, *and the occupier is not entitled to compensation under section* 5. *The Act only applies to poor persons who cultivate their gardens for food or pleasure.*

Case stated.

This was an appeal on a case stated from a decision of the justices for the borough of Bedford.

At a petty sessions held at Bedford on the 6th of May, 1895, an application was made by the appellant, G. Cooper, against Mary Pearse, the respondent, under the provisions of the Allotments and Cottage Gardens Compensation for Crops Act, 1887, for the appointment of an arbitrator in respect of a claim which he had made for compensation in respect of crops growing upon land which he held of the respondent as tenant, the tenancy of which expired on the 25th of March, 1895, and for labour expended upon and for manure applied to the holding since the taking of the last crop therefrom.

The following are the facts as found in the case stated.

The appellant was a seed merchant, carrying on business in the borongh of Bedford, and up to the 25th of March, 1895, was tenant of some land, being less than an acre in extent, of which the respondent was the owner. The tenancy expired by notice to quit on that date. In the agreement between the parties the land let by the respondent to the appellant was described as "garden land," and the tenancy was stated to be "from half-year to half-year, commencing on the 29th of September, 1893." The land was occupied by the tenant as a garden. At the expiration of the tenancy there was a quantity of flower roots, vegetables, and bulbs upon the ground. Since taking the last crop the appellant had expended certain labour upon and applied certain manure to the land.

The claim was for £159 2s. 9d., and the particulars showed that the crops consisted principally of narcissus bulbs and crocus bulbs, there being also some vegetables. The bulbs were grown by the appellant for sale. They were put in in the autumn of 1893, and would not be fit to take up until July, 1895.

The magistrates refused the application. They were of opinion that the holding was not an allotment within the meaning of the Act, on the ground that the appellant did not cultivate it as a garden, but used it for trade purposes. They further held that the bulbs for which compensation was claimed were not crops grown in the ordinary course of cultivation, on the ground that they were not an ordinary crop grown in the neighbourhood.

The questions for the opinion of the court were: (1) Was the holding in law a holding within the Act of 1887? (2) Could the bulbs claimed for be held in law, under the circumstances, to be crops growing on the holding in the ordinary course of cultivation within the meaning of section 5 of the said Act?

By section 4 it is provided that "'allotment' means any parcel of land of not more than two acres in extent held by a tenant under a landlord and cultivated as a garden or as a farm, or partly as a garden and partly as a farm. 'Cottage garden' means an allotment attached to a cottage. 'Holding' means an allotment or cottage garden."

Section 5 provides as follows: "Upon the determination of the tenancy of a holding after the commencement of this Act the tenant shall be entitled, notwithstanding any agreement to the contrary, to obtain from the landlord compensation in money for the following matters and things, that is to say—(*a*) for crops, including fruit, growing upon the holding in the ordinary course of cultivation. . . . (*b*) for labour expended upon and for manure applied to the holding since the taking of the last crop therefrom in anticipation of a future crop."

W. Mackenzie, for the appellant.—This is an allotment within the meaning of the Act, and the bulbs are crops grown upon the holding in the ordinary course of cultivation within the meaning of section 5. Crops are not confined to fruit and flowers: *Hood* v. *Kendall*, 4 W. R. 123, 17 C. B. 260. "Crops growing in the ordinary course of cultivation" means grown in the usual manner. If grown under glass the tenant would not be entitled to compensation.

Reginald Brown, for the respondent.—This is the first case arising under the Allotments Act of 1887. This plot of land is not a garden within the Act. The Act was intended to apply to small cottagers, and not to a nurseryman or seedsman. A "cottage garden" is a garden used by a cottager for growing vegetables, &c., for his own use, and not for the market. The land in this case is used as a nursery ground or market garden as defined by section 6 of the Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27). A garden is a plot, either attached or not to a cottage, and used for personal use. A garden is defined by Latham as a "piece of ground enclosed and cultivated for herbs or fruits for food, or laid out for pleasure." These bulbs are not "crops." The Act was never intended to apply to bulbs in the ground. A crop is something which can be cut or gathered off a tree or plant.

Mackenzie, in reply.—This land is not the less a garden within the Act because the produce is cultivated for market: *Meux* v. *Cobley*, [1892] 2 Ch. 253, 40 W. R. Dig. 111.

LAWRANCE, J.—In this case there are two questions raised for us to decide. Firstly, whether the holding was in law a holding within the Act of 1887; and, secondly, whether the bulbs claimed for can be held to be crops growing on the holding in the ordinary course of cultivation within the meaning of section 5 of that Act. It seems to me that it is only necessary for us to deal with the first question, and that we need not decide as to whether the bulbs come within section 5. The Act of 1887 provides compensation to the occupiers of allotments and cottage gardens for crops left in the ground at the end of their tenancies. By

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

section 4 "allotment" is defined as a parcel of land of not more than two acres in extent held by a tenant under a landlord and cultivated as a garden or as a farm, or partly as a garden and partly as a farm. "Cottage garden" means an allotment attached to a cottage, and "holding" means an allotment or cottage garden. Section 5 provides that upon the determination of the tenancy of a holding the tenant shall be entitled to compensation "for crops, including fruit, growing upon the holding in the ordinary course of cultivation, and for fruit trees and fruit bushes growing thereon, which have been planted by the tenant." The facts as found in the stated case show that Cooper, the appellant, was a seed merchant, and was tenant of some garden land of less than one acre in extent, but it appears that he did not cultivate this piece of land in the ordinary sense of a garden. A garden is a place where flowers or fruit are grown for food or pleasure. The appellant, however, did not occupy this plot of land for that purpose, but as a place of business. I am therefore of opinion that this is not an allotment within the meaning of the Act, and the appeal must be dismissed.

COLLINS, J.—I am of the same opinion. "Allotment" means land of not more than two acres in extent cultivated as a garden or as a farm, and a cottage garden is an allotment attached to a cottage, and a holding is an allotment or a cottage garden, therefore we see that this Act deals with cottage gardens. It deals with a small class of persons, small cottagers, who may have the benefit of the Act although the plots of land they hold may not be attached to the cottage they occupy. Section 5 of the Act says that the tenant of a "holding" shall be entitled to obtain compensation from his landlord upon the determination of his tenancy for crops, including fruit, growing upon his holding in the ordinary course of cultivation. A "garden" means a place where flowers or fruit are grown for pleasure. The facts found show that Cooper did not occupy this piece of ground in that sense, but that he used it for the purpose of carrying on the business of a seedsman. I think that if the land is used for the cultivation of seeds or similar purposes it does not come within the Act. The Act was intended only to provide compensation to the class of poor persons who cultivate their gardens for food or pleasure. It is therefore not necessary for us to decide the other question as to whether the bulbs are a crop growing upon the holding within the meaning of the Act. This appeal must therefore be dismissed.

Appeal dismissed.

Solicitors: *Crossman & Prichard*, for *Sharman & Trethewy*, Bedford; *Maples, Teesdale, & Co.*, for *Theed Pearse*, Bedford.

IN BANKRUPTCY.

Q. B. Div.
Vaughan Williams, J. } Feb. 3, 11, 17.

In re GRAYDON.
Ex parte THE OFFICIAL RECEIVER. (*a*.)

Bankruptcy—After-acquired property—Personal earnings—Estoppel by record of county court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 53.

A bankrupt is only entitled to retain so much of his personal earnings as are reasonably necessary for the maintenance of himself and his family, the remainder passes to his trustee.

The decision of a county court upon an issue between the bankrupt and the trustee, that certain weekly payments due to the bankrupt under an agreement are in the nature of personal earnings, estops the trustee from subsequently arguing in the High Court, when further weekly payments become due under the same agreement, that they are not in the nature of personal earnings.

Motion by the official receiver, as trustee in the bankruptcy, for a declaration that he was entitled to certain money payable to the bankrupt by the Great Wheel Co. (Limited).

A receiving order was made against Graydon in August, 1892.

In September, 1893, he obtained a patent for the construction of great wheels, and upon the 14th of April, 1894, he entered into a written agreement with the company, by which he granted them a licence to construct a great wheel at the Earl's Court Exhibition in consideration of their paying him a sum of £10 per week for so long as the great wheel should be open to the public.

Upon the 17th of April, 1894, the official receiver gave notice to the company of his claim to any money payable by them to the bankrupt, and in March, 1895, he gave a similar notice to the bankrupt's solicitor.

Upon the 20th of March, 1895, the bankrupt gave a charge upon these payments to his solicitor to secure his costs, including the costs of obtaining the patent.

When the first two instalments became due the official receiver brought an action for that amount (£20) against the company.

The company interpleaded, and the issue was remitted to the Brompton County Court, where the judge decided that the £20 in question was in the nature of personal earnings, and did not pass to the official receiver.

He refused leave to appeal, observing that the sum of £20 was not more than was reasonably necessary for the maintenance of the bankrupt.

The official receiver thereupon waited until £80 became payable to the bankrupt, when he launched the present motion.

Herbert Reed, Q.C. (*Muir Mackenzie* with him), for the official receiver, stated the facts, and was stopped by the court.

J. G. Butcher, for the bankrupt.—These payments are in the nature of personal earnings, and the official receiver is estopped from arguing that they are not personal earnings by the decision of the county court judge: *Flitters* v. *Allfrey*, 23 W. R. 442, L. R. 10 C. P. 29. Further, the bankrupt's solicitor has a valid charge upon them. [VAUGHAN WILLIAMS, J.—It is conceded that if the official receiver takes the benefit of this contract he must pay the charges of making the contract, and also of obtaining and keeping up the patent.]

Herbert Reed, Q.C., and *Muir Mackenzie*, on the point of estoppel.—If there is any estoppel here it must be estoppel by record, and all that appears upon the record of the county court is that the right to a sum of £20 was in issue. The court was only competent to decide the rights of the parties so far as they were before it, that was the right to the £20. Generally, estoppels apply only to the past and not to the future. At the time of the decision in the county court these earnings now in question were future, and no estoppel avails.

J. G. Butcher replied on the point of estoppel, and further argued that these earnings were personal,

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

because they were the product of the brain and skill of the bankrupt.

Reed, Q.C., and *Mackenzie* were not called upon to argue on the point of personal earnings.

Hansell, for the company, took no part in the argument.

Cur. adv. vult.

Feb. 17.—VAUGHAN WILLIAMS, J., delivered the following written judgment.—The question in this case is whether the trustee is entitled to a declaration that he is entitled to certain payments in the nature of royalties for a licence to use a patented article; that is to say, a great wheel, for the carriage of passengers erected at the Earl's Court Exhibition, under letters patent taken out by the bankrupt since the making of the receiving order, and payable to the bankrupt under an agreement also made since the date of the receiving order between him and the Great Wheel Co. (Limited).

The bankrupt says that the trustee is not entitled to this declaration: first, because the sums payable are in the nature of personal earnings, and as such do not pass to the trustee; secondly, the bankrupt says that in prior litigation between him and the trustee—viz., on the trial of an interpleader issue remitted from the High Court to the county court—it was decided that the sums thus payable to the bankrupt were in the nature of personal earnings, and did not pass to the trustee, and that the trustee is estopped by that decision from asserting the contrary.

I will deal first with the point of estoppel. In my judgment, if this question was in issue between the bankrupt and the trustee in the county court, and was decided between the parties, the trustee would be estopped by the decision; but I do not think that it is proved that the point was in issue in the county court. The sum of money as to which the interpleader issue was raised was a sum of £20, two early instalments of the sums payable to the bankrupt.

Now, it seems to me on the authorities that it is not true to say that no personal earnings of the bankrupt after his bankruptcy pass to the trustee. The authorities are not very clear, but I think on the balance of the authorities (see *Wadling* v. *Oliphant*, 24 W. R. 246, 1 Q. B. D. 145, and the cases there cited) that it is only the personal earnings reasonably necessary for the maintenance of the bankrupt and his family which do not pass to the trustee. This is in accordance with the principles which underlie section 53 of the Bankruptcy Act, 1883, with regard to the appropriation of a portion of salary.

Now, this being so, it seems to me that the county court judge did not decide anything more than that the £20 then in question was not more than was necessary for the reasonable maintenance of the bankrupt—that is to say, that, even assuming the county court judge to have decided that the sums payable were in the nature of personal earnings, no estoppel arises as to the *quantum* of future earnings necessary for the maintenance of the bankrupt. That the decision of the county court judge was given in reference only to the amount in issue seems to me the fair inference from his observations when asked for leave to appeal. I also think that the fair inference from his judgment is that he did decide that the sums in question were in the nature of personal earnings, and that the trustee is estopped from denying this to be the nature of the payments when made. I shall not, therefore, go into this question, but merely consider the question of *quantum*.

I think that £5 per week is a fitting sum for the bankrupt to retain as a reasonable maintenance for himself and family.

There must, however, be first deducted from the sums payable the amounts due to Mr. Kimber for costs of creation of the fund. Then will come the bankrupt's £5, and the residue will pass to the trustee. The charge of Mr. Kimber for his general costs seems to me to be a charge given after the trustee had intervened and after Mr. Kimber had knowledge of his intervention; but, as I said in the course of the argument, Mr. Kimber shall have an inquiry in chambers as to this if he chooses.

I think the bankrupt ought to have the costs of this motion out of the fund, as the trustee asked for more than he was entitled to.

Solicitor for the Official Receiver, *R. Davies*.

Solicitor for Mr. Graydon, *E. Kimber*.

Solicitors for the company, *Hasties*.

Q. B. Div.
Vaughan Williams, J. } Feb. 4, 8.

In re SEAMAN.

Ex parte THE FURNESS FINANCE CO. (LIMITED). (*a*.)

Bankruptcy—Protected transaction—Mortgage of chose in action—*Notice of act of bankruptcy—Order and disposition—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *ss.* 44, 49.

The bankrupt had assigned a debt coming due to him to secure an advance of £30 *in October*, 1890. *The mortgagee failed to give notice of this assignment. In June*, 1892, *after an act of bankruptcy, but without notice thereof, the mortgagee advanced a further sum to the bankrupt and took a fresh assignment of the same debt to cover both the loans of* 1890 *and* 1892. *Of this assignment the mortgagee gave due notice.*

Held, that the notice given of the second assignment was equivalent to a taking possession of the subject matter thereof, and, coupled with the deed of June, 1892, *was a dealing for valuable consideration and protected by section* 49 *of the Bankruptcy Act*, 1883, *and that the mortgagee having taken possession by this notice could then set up both the deeds of* 1890 *and* 1892.

Motion by the Furness Finance Co. (Limited) for a declaration that the company was entitled, as against the trustee in the bankruptcy, to the sum of £74 13s. 6d., part of certain money received by the trustee from the War Office for work done by the bankrupt.

On October 29, 1890, the bankrupt borrowed £30 from the company, and by way of security gave them an assignment charging any money he should receive from the War Office in payment for certain work he was then carrying out. The company never gave notice of this assignment to the War Office.

The bankrupt continued to obtain further advances from the company, and on May 31, 1892, he owed them £59 13s. 6d., for which they obtained judgment. The bankrupt did not satisfy the judgment, but, upon June 16, 1892, he obtained a further loan of £15, and executed a fresh assignment charging the money due to him from the War Office with the repayment of the total sum of £74 13s. 6d. due from him to the company. The company gave notice of this assignment to the War Office, and received a letter acknowledging receipt of the notice, but stating that the Department paid no attention to assignments.

Prior to this assignment, on the 20th of May, 1892, a petition had been presented against the bank-

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

rupt, founded upon an act of bankruptcy committed on the 19th of May. The hearing of the petition was adjourned several times, but a receiving order was eventually made upon it on the 11th of August. In the bankrupt's statement of affairs he returned the company as unsecured creditors for £35. The company wrote on the 5th of November, 1892, and informed the trustee that they held the assignment of the 16th of June, and on the 10th of January, 1893, the company's solicitor called upon the trustee, who refused to admit their claim, on the ground that the assignment had been taken with notice of an act of bankruptcy. The trustee proceeded to get in the money from the War Office, and incurred considerable expense in obtaining it. He received it from the War Office on the 27th of December, 1893, and gave notice to the company that he had received it on the 29th of December. This letter miscarried, and it was not until the trustee made out his statement of accounts on applying for his release in 1895 that the company became aware that the money had ever been obtained from the War Office. The whole estate only realized about £183, all of which went in trustee's costs and remuneration.

Upon the hearing of the motion, evidence was taken as to whether, in fact, the company had notice of an act of bankruptcy at the time when they took the assignment of the 16th of June, 1892.

Muir Mackenzie, for the company.—On the evidence the company had no notice of an act of bankruptcy when they took the assignment of the 16th of June, 1892. Further, their notice to the War Office was equivalent to taking possession, and took the debt out of the order and disposition of the bankrupt: *Re Styan*, 2 Mont. D. & D. 219; *Re Wright*, 24 W. R. 977, 3 Ch. D. 70; *Graham* v. *Furber*, 2 W. R. 39, 14 C. B. 134.

Carrington, for the trustee.—Even if the company had no notice of the act of bankruptcy, they are not protected as to the £30 assigned by the deed of the 29th of October, 1890. The company never gave notice of that assignment to the War Office, therefore the chose in action assigned by it was in the order and disposition of the bankrupt with the consent of the true owner upon the 19th of May, 1892, the date of the commencement of the bankruptcy. From that date onwards it was the property of the trustee, and the bankrupt could not assign it to anyone by the deed of the 16th of June, for he had lost all property in it at that date: *Smale* v. *Burr*, 21 W. R. 193, L. R. 8 C. P. 64; *Ramsden* v. *Lupton*, 22 W. R. 129, L. R. 9 Q. B. 17; *Cooper* v. *Zeffert*, 32 W. R. 402.

Muir Mackenzie replied.

VAUGHAN WILLIAMS, J.—This is a difficult case, both on the facts and on the law. On the facts I am of opinion that the company had not notice of any act of bankruptcy when they took the assignment.

As to the law, that, to my mind, is accurately stated by Maule, J., in *Graham* v. *Furber*, where he says: "It was the intention of the Legislature by this statute to relieve such a person, and to place him in as good a position where he got back his goods before notice of an act of bankruptcy as if he got them back before the commission of an act of bankruptcy. When he got his goods back they were taken to have been got back before an act of bankruptcy, if got back without notice of an act of bankruptcy." I think the law as stated is perfectly right. If a person, by a dealing which is a protected transaction under section 49 of the Bankruptcy Act, 1883, takes possession of goods, the doctrine of relation back ceases to have any application, and the creditor must be treated as getting possession before an act of bankruptcy is committed; or, in other words, as if no act of bankruptcy had been committed. That being so, the subject matter of the assignment is immaterial. It makes no difference whether the subject matter is goods or choses in action. Then what is the position of the trustee in bankruptcy here? He says the whole debt was assigned by the deed of October, 1890, and all that was left was an equity of redemption, and that the assignment of the 16th of June, 1892, was only a dealing with the equity of redemption; and that the second deed was not intended to cancel, and did not cancel, the first deed, and that you must treat them as both standing together; and he relies on *Cooper* v. *Zeffert*. Assume that to be so without deciding it absolutely—namely, that the second deed was not intended as a cancellation of the first deed if the second should go to the wall—what does it come to? He says that as the notice here was a notice under the second deed it only operates on the equity of redemption—that is, is only good for the amount actually advanced on the second deed. But if the notice is, as I hold, a taking possession of the fund, then the fact of taking possession, even under a wrong title, does take the fund out of the order and disposition of the bankrupt. It does determine the possession of the bankrupt.

But it is said that if the claim is made under the wrong contract the notice is not a dealing or transaction for valuable consideration within the meaning of section 49 of the Act. I do not agree to that. In my judgment a claim for valuable consideration means a claim under which consideration moved from the bankrupt—that is, a claim not based on a mere gift by the bankrupt. If that is so, here the true owner was relying on a claim based on valuable consideration, and that not the less so because in his notice he mentioned the wrong assignment. Under the circumstances I think this book debt was not in the order and disposition of the bankrupt, and that the company are entitled to be paid out of the moneys received from the War Office the sums actually due to them under both their deeds; but they must recoup the trustee the expenses which he has incurred in recovering the amount, which under the circumstances are not to be limited to mere law costs. He must have a reasonable allowance for his time and work; and if by the delay he has been placed in a worse position than he would have been if the claim had been made earlier, he must not suffer by it, but must be allowed as against the company any payments properly made out of the estate since December, 1893.

Application granted.

Solicitors for the company, *Sims & Vyme*.

Solicitor for the trustee, *F. W. Bailey*.

House of Lords.

From C. A. England. March 19, 20.

UNIVERSAL STOCK EXCHANGE v. STRACHAN. (*a*.)

Gaming—Stock Exchange—Transactions in stocks and shares—Deposit of securities as cover—Right to recover securities—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

On certain written terms, which amounted to specula-

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

tion in differences, S. opened an account and deposited with the appellants, who were outside brokers, certain securities as cover for any balance which might be found due to them. The result was a loss to S. above the value of the securities. In an action by S. to recover his securities the jury found on what was considered sufficient evidence that the transactions between the parties were gaming transactions.

Held, that the deposit was not made "to bide the event" of a wager, but as security against a debt which might arise from a gambling transaction, and therefore not within the 18th section of the Gaming Act, 1845 (8 & 9 Vict. c. 109), and consequently the securities might be recovered.

This was an appeal from an order of the Court of Appeal (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) dated the 23rd of May, 1895 (43 W. R. 611, [1895] 2 Q. B. 329).

The action was brought by the present respondent to recover certain securities, valued at £2,500, which he had deposited with the appellants as security or cover in respect of transactions in stocks and shares.

In September, 1893, the respondent opened an account with the appellants, who were dealers in stocks and shares, not being members of the Stock Exchange, and the total transactions in a few months amounted to £3,500,000. The appellants dealt with their customers, including the respondent, on certain printed "terms of business." These were signed by the respondent, and contained, among others, the following:—

"2. Every purchase or sale contracted by the company is a *bonâ fide* transaction for delivery on a specified settling day, and the company is always prepared, and by means of its capital able, to deliver or take up any stock it may at any time have bought or sold, and the contracts entered into by the company are not contracts of gaming or wagering. All bargains are to be completed on the settling day named in the contract; but any customer willing to postpone completion of a purchase or sale may arrange with the company (upon terms) for postponement of completion until a future date (carry over), but the company, being always prepared to complete on the settling day originally fixed, may decline to postpone completion at its option.

"3. The company charges no commission or fees of any kind, but charges a fixed rate of interest of 5 per cent. per annum on the purchase money of all stocks, computed from the day of purchase until completion. The buyer to receive from the seller all dividends falling due while the account is ensuing, and the buyer paying all expenses of transfer of stocks.

"6. The completion of all purchases and sales shall take place at the company's office at noon on the day specified in the contract or otherwise as may be mutually agreed upon. . . .

"8. The company shall have a lien, until the account is closed and properly settled, upon all the stocks, shares, moneys, or other valuables in its possession belonging to customers for the due performance of any contract or engagement which they may have entered into."

It was found at the trial that no stocks or shares ever were or were ever intended to be, delivered. In April, 1894, the appellants telegraphed to the respondent that unless he deposited further cover the account would be closed, and the appellants, before the usual account day, closed the account, when it appeared that a balance was due to the appellants of larger amount than the securities in their hands, which they now sought to retain.

This action was accordingly brought for their recovery, and at the trial the jury found that the transactions were gaming transactions, and Cave, J., gave judgment for the plaintiff (the present respondent).

The appellants, the defendants in the action, moved to set aside the verdict and judgment, and to enter judgment for the appellants, on the grounds that there was no evidence to go to the jury and that the judge misdirected the jury; or for a new trial.

The Court of Appeal dismissed the application (see 43 W. R. 611, [1895] 2 Q. B. 329).

From this decision the appellants now appealed.

Section 18 of the Gaming Act, 1845, c. 109, is as follows: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. . . ."

Sir E. Clarke, Q.C., and *E. H. Pollard*, for the appellants.—There being no sale and no purchase makes no difference to these transactions. The terms are stated, and are like ordinary bargains between broker and jobber. Either party was entitled to require actual delivery: *Universal Stock Exchange* v. *Stevens*, 40 W. R. 494; *Lowenfeld* v. *Howat*, 19 Court of Sess. Cas., 4th series, 128; *Shaw* v. *Caledonian Railway*, 17 Court of Sess. Cas., 4th series, 467; *Thacker* v. *Hardy*, 27 W. R. 158, 4 Q. B. D. 685; *Forget* v. *Ostigny*, 43 W. R. 590, [1895] A. C. 318. If these were gambling transactions, the plaintiff is precluded by section 18 of the Gaming Act, 1845, from bringing the action, as the securities were deposited to abide the event of a wager. The plaintiff had not revoked the authority given, and this must be done before action brought, the bringing of which is not sufficient revocation: *Grizewood* v. *Blane*, 11 C. B. 538; *Manning* v. *Purcell*, 3 W. R. 273, 7 De G. M. & G. 55; *Hampden* v. *Walsh*, 24 W. R. 607, 1 Q. B. D. 189.

Bigham, Q.C., and *Muir Mackenzie*, for the respondent, were not called upon.

Lord HALSBURY, L.C.—This case comes before your lordships under circumstances which render it unnecessary to deal with it very elaborately or as if it established any very important principle of law. The question of law intended to be argued originally was whether Cave, J., misdirected the jury. I have been looking with care to see what Cave, J., said on the subject, and I find that in summing up to the jury he said this: "Now, I have no doubt that most, if not all, of you are perfectly familiar with transactions on the Stock Exchange; but I may make use of that as an illustration of my meaning. A man goes to a broker and directs him to buy and sell so much stock, as the case may be. That may be, in the eye of the purchaser, a gambling transaction, or it may not; if he means to invest his money in the purchase of the stock which he orders to be bought, that undoubtedly is a perfectly legitimate and real business transaction. If he does not mean to take up his stock, if he means to sell again before the settling day arrives, that may be a gambling transaction so far as he is concerned, but it is not necessarily a gambling transaction so far as the broker is concerned; and in order to be a gambling transaction such as the law points at it must be a gambling transaction in the intention of both the parties to it." I am wholly unable to understand, after that direction to the jury, what possible misdirection could have been suggested. That was a most accurate direction to the jury of what they were to find upon the facts before them; and although there is a direction at the close of his summing-up to the jury which I think it is possible might have been objected to on the other side as being

too favourable to the appellants, yet, so far as the appellants are concerned, it appears to me that it is impossible to say that the learned judge did not put before the jury the true question which they had to determine.

Therefore the case resolves itself into an entirely different question, the only question of law I need refer to—namely, whether or not there was any evidence to go to the jury. I cannot doubt that there was a very considerable amount of evidence to go to the jury, and I agree with the courts below in saying that one does not adequately discuss that question by taking each part of the case by itself and dissecting the case, and disposing of this or that piece of the evidence as if it were to be looked at alone. The whole transaction has to be looked at, and the whole nature of this institution, whatever it is. Speaking upon the evidence before us, it appears to me as if it were a concern expressly designed for the purpose of enabling people to gamble in such a way as to evade the provisions of the law. It may or may not be that—I do not undertake to say whether it is or not, it is not before us at the moment—but I am saying now, as justifying the finding of the jury, that that is what it seems to me to be, looking at the whole nature of the agreement. When I say the agreement, I mean the "terms of business" which they call upon a customer to sign, which is to constitute the contractual relation between the parties. I will not rely too much upon the circumstances of suspicion in it—namely, that they say that it is not to be a gambling transaction, but that it is to be a real *bonâ fide* transaction. When I look at the terms themselves, the whole scheme appears to me to be intended, with great ingenuity, to pretend that there is to be a real transaction, and yet there is to be a payment in respect of the relations between the parties which is only reconcilable, in my mind, with its being an unreal transaction. The appellants are to get 5 per cent. Each of the counsel in turn has been asked what that was for, inasmuch as it was admitted that there was no purchase and no sale. In all these transactions not one single purchase or sale is proved to have existed, and I gather that it was practically admitted that there was not to be any real purchase during the whole period in which this business was carried on. It would have been very important and very relevant evidence if a witness could have said: "On such and such an occasion I was asked to buy Brighton 'A's' to such an extent, and went and entered into a contract to do it"; but by the answers to the interrogatories, as I gather from one of the judgments, though they have not been read here to-day, and by the whole course of the argument, it was practically admitted that there was not to be, and was not in fact, any real purchase in any case. If the real meaning of the parties is this, that there is to be only a payment of differences, what is it but a gaming and wagering transaction between the two as to what shall be the payment on the one side or on the other? If I were on the jury, I should come to that conclusion; but I am not under the necessity of trying this question as if I were upon the jury, because the jury have found that it was a gambling transaction, and upon evidence which seems to me extremely satisfactory.

The only question for your lordships is whether there was evidence to go to the jury, because, under the circumstances of this case, it would be idle to contend that if there was evidence to go to the jury this is a case in which your lordships would say that it should be tried again by another jury. I am satisfied, as far as I am concerned, that the jury were right, and that there was ample evidence to go to them which would justify them in the conclusion at which they arrived. Under those circumstances, as there was no misdirection, and as the case was properly submitted to the jury, and as the jury have so found, it seems to me to be impossible to contend that the appellants should succeed in this case. I am therefore of opinion, and I move your lordships, that the appeal should be dismissed, with costs.

Lord HERSCHELL.—I am of the same opinion. So long as the finding of the jury that it was a gambling transaction stands, it is impossible for the appellants to object to the judgment against them which has been pronounced. They say that that finding ought not to stand; that either there ought to be a new trial because the learned judge misdirected the jury, or the verdict was against the weight of evidence, or that the verdict ought to be entered for them because there was no evidence to go to the jury in support of the respondent's case. As to misdirection I can see none. The learned judge appears to have laid down the law certainly not too favourably for the respondent. With regard to the verdict being against the weight of evidence, the learned judge who tried the question and the Court of Appeal have been satisfied with the verdict of the jury, and under those circumstances it would need a very overwhelming case to induce your lordships to interfere. So far from there being any such case, the verdict is one with which, in my opinion, no complaint can properly be made.

It remains to consider whether there was evidence to go to the jury. The case on behalf of the appellants is this: that when you look at the documents which contain the contract between the parties, you see that these were not upon the face of them gaming contracts, but, on the contrary, were shewn on the face of them not to be gaming contracts—that there was no evidence of anything passing between the parties to the effect that the real transaction should not be such as the documents represented, and, consequently, that there would be no evidence to go to the jury. I cannot accept that view. I think the character of the documents themselves, coupled with the nature of the transactions entered into, the position of the parties who entered into them, and other circumstances which I need not detail, raised a question for the jury whether these were real transactions of commerce, or whether they were a mere gambling for differences. I think it is impossible to say that there was no evidence to go to the jury upon the point.

It has been said that wherever a contract is entered into between two parties containing any obligation under any circumstances to cause property in goods to pass from one to another, whatever else there may be in the contract, and although neither of the parties contemplated that that provision should ever become operative, yet, if it ever may become operative, it cannot be a contract by way of gaming and wagering. I should require much consideration before I could assent to such a proposition as that. It would amount to this: that parties who intended to gamble with one another, but wanted to have the security against one another of being able in a court of justice to recover their bets, could compel a court of justice to adjudicate and secure to them their bets by a judgment, if only they inserted in their contract a provision which might in certain events become operative and compel the goods to be delivered and received, although neither of them anticipated such a contingency; the purpose of the insertion of such a provision, though inserted by way of creating an obligation, being only to cloak the fact that it was a gambling transaction that they were entering into, and that

being done merely to enable the law to be evaded, and to enable them to sue one another for gambling debts. The proposition contended for by the learned counsel for the appellants would really lead to that result, and I need hardly say one would require to consider it for a long time before giving one's assent to a proposition involving such consequences.

I ought to observe upon one other point, though probably it was sufficiently disposed of in the course of the argument. It is said that, although it may not be a gambling contract, yet, nevertheless, the very provisions of the sections against gaming and wagering prevent the respondent recovering the security which he deposited with the appellants, inasmuch as it is an "article of value" deposited with them to "abide the event" of a wager. That seems to me not to be the case. It was deposited as security against a debt which might arise from a gambling transaction. What the appellants are really seeking is to avail themselves of that security by virtue of a void contract; and it is impossible to say that that was an "article of value" deposited with the defendants to abide the event of a wager. That was not really the nature of the transaction at all.

Lord MACNAGHTEN and Lord MORRIS concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Last & Sons.*

Solicitor for the respondent, *Theodore Allingham.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) } May 14.

NOURSE *v.* LIVERPOOL SAILING-SHIP OWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION. (*a.*)

Insurance—Marine—Policy on ship—Life salvage—Liability of underwriter—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 544.

Life salvage is not a loss for which under a Lloyd's policy on ship in the usual form an underwriter is liable.

Appeal from the judgment of Mathew, J., at the trial of the action without a jury.

The action was brought by the owner of the sailing ship *Arno*, to recover from the defendant association a sum of money paid by the plaintiff for life salvage, and the costs of salvage proceedings.

The plaintiff entered the *Arno* in "Class I.—Protection," of the defendant association.

Article 13 of the defendants' articles of association provided (*inter alia*) as follows: "Class I.—Protection (available for all ships). The following risks are covered in this class: Loss of life or personal injury, howsoever and to whomsoever the same may be caused, and life salvage. . . . Costs and charges which a member may become liable to pay in respect of any of the above-mentioned risks."

Article 18 provided as follows: "No contribution or payment shall be made in respect of any loss which is capable of being insured against by the usual form of Lloyd's policy with the running-down clause attached, or in respect of which there exists a right to recover under any policy which may have been entered into; and in estimating and adjusting the claim of any member he shall be deemed to have effected such policy, and to be entitled to recover under the same."

On the 31st of March, 1895, the *Arno* was, in consequence of perils of the sea, in a position of danger in the mid-Atlantic, and on that day the master and crew of the *Arno* were rescued from her by the steamship *Normannia*. The circumstances were such as to justify the master and crew in abandoning the *Arno*. No attempt was made by those on board the *Normannia* to save the ship herself. On the 3rd of April the *Arno* was picked up by the steamship *Merrimac*, and was brought to Liverpool. On the 25th of April proceedings *in rem* were commenced by the life salvors against the *Arno*, and ultimately the Admiralty Court awarded the sum of £1,020 to the owner, master, and crew of the *Normannia* for life salvage. The present plaintiff paid the sum of £438, the proportion due from the ship in respect of the award, and £39 4s. 6d. costs, and also incurred a liability of £88 8s. 4d. in defending the salvage proceedings.

The plaintiff sought in this action to recover the loss so incurred by him from the defendants. The defendants denied their liability, on the ground that the loss was capable of being insured against by the usual form of Lloyd's policy within the meaning of article 18 of their articles of association.

Mathew, J., gave judgment for the plaintiff.

The defendants appealed.

Joseph Walton, Q.C., and *Carver*, for the defendants.—A Lloyd's policy in the usual form covers life salvage, though the instances in which life salvage pure and simple has been recovered from an underwriter may be very rare. Ordinary salvage has always been held to be a loss which falls on the underwriter; and the practice of underwriters to pay it is invariable. The reason why it is payable under a policy on ship is given in *Aitchison* v. *Lohre*, 28 W. R. 1, 4 App. Cas. 755. It is payable not under the suing and labouring clause, but as a loss on the ship brought about by perils of the sea. Life salvage is recoverable for the same reason. Before the year 1846 life salvage pure and simple was never awarded (see 9 & 10 Vict. c. 99, s. 19). The statute law now makes life salvage a loss on ship. Section 544 of the Merchant Shipping Act, 1894, says that "where services are rendered wholly or in part within British waters in saving life from any British or foreign vessel, or elsewhere in saving life from any British vessel, there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved, a reasonable amount of salvage, to be determined in case of dispute in manner hereinafter mentioned." Section 552 provides for the detention of the ship in the case of life salvage. And section 565 confers on the High Court jurisdiction to decide upon all claims whatsoever relating to salvage. Life salvage is now treated in exactly the same manner as other kinds of salvage, and the law makes it a loss on ship, for it is a payment which must be satisfied in order to get possession of the ship. It is therefore a loss which is covered by a Lloyd's policy, for a Lloyd's policy has always covered, and still covers, everything which is a loss in consequence of perils of the sea and which is a loss on ship.

They also cited *Dent* v. *Smith*, 17 W. R. 646, L. R. 4 Q. B. 414.

Sir Walter Phillimore and *Batten*, for the plaintiff.—Life salvage is not a loss for which an underwriter is liable under a policy on ship. It is not like other kinds of salvage, in which the salvor has a lien on the thing saved,

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

They cited *De Vaux* v. *Salvador*, 4 Ad. & E. 420; *Power* v. *Whitmore*, 4 Mau. & Sel. 141; *Robertson* v. *Ewer*, 1 T. R. 127.

Lord ESHER, M.R.—In this case the plaintiff's ship was in danger of being lost through perils of the sea, when a steamer went to her assistance. It appeared impossible that the ship herself could be saved, but the steamer took off the captain and the crew and saved their lives. The ship thus became derelict. Then another steamer came to the rescue and saved the ship herself and her cargo. Those on board the first steamer were salvors of life and nothing more; those on board the second steamer were salvors of ship and cargo. The salvors of life made a claim in the Admiralty Court against the owners of the ship and cargo in respect of the services rendered by them. Such a claim was not maintainable by maritime law or by the common law of England, but it can now be maintained by statute. The Merchant Shipping Act says that where services are rendered to a ship which result in saving life, then, if the ship is saved, the salvors shall be entitled to receive from the owner of the ship for so saving life a reasonable amount of salvage. The statute itself speaks of the sum so payable as salvage, and it makes provision for seizing the ship in order to enable the salvors to enforce their claim. Where this is done the Admiralty Court will award to the salvors a sum to be paid in satisfaction of this statutory liability imposed on the owner. In this case the ship was so seized, and the Admiralty Court awarded a sum of salvage to be paid by the owner. The owner now brings this action against a mutual insurance club to which he belongs, and seeks to recover from them the sum which he has thus paid. The relationship existing between the plaintiff and the defendants is established by the articles of association and rules of the club. By article 13 if he has to pay salvage for saving life, he may recover it from the club. That taken alone is perfectly distinct. But then article 18 says that he cannot recover for any loss which could be insured against by a Lloyd's policy in the usual form. Therefore, so far as article 18 modifies article 13, if the loss which the plaintiff has suffered in this case could be recovered under a Lloyd's policy in the usual form, the plaintiff ought not to succeed.

The sole point is whether the loss could have been recovered under a Lloyd's policy in the ordinary form. This form of policy has been in existence more than a hundred years. How has it during all that time been construed with regard to such a loss as has happened in this case? The loss is this: that the plaintiff has by statute been made liable to pay a sum of money for services rendered in saving life when his ship was in peril. It is not suggested that before 1846, when this statutory liability was first imposed, a sum paid for life salvage only could be recovered under a policy on ship. It is true that if there was salvage of a ship and at the same time, and by the same people, there was salvage of life, it was the practice of the Court of Admiralty to increase the salvage award on that account. But if there was no salvage of a ship, the court never made an award of salvage for saving life only. Therefore the question whether money paid for life salvage could be recovered under a policy on ship never then arose. Now, what is the effect of the statutory enactment? It gives a reward for saving life under particular circumstances, and it applies to the recovery of such reward the procedure which is generally applicable to salvage of ship or cargo. Although the statute calls this reward by the name of salvage, it is not the same as other kinds of salvage, but is an entirely different head. It is a new head of salvage, which when this form of Lloyd's policy was first agreed upon could not have been within the contemplation of the parties. In my opinion the statute does not assume to alter the effect of the policy at all; and therefore the new head of salvage is not covered by a Lloyd's policy in the ordinary form. Consequently article 18 does not do away with the effect of article 13, and there is nothing to prevent the plaintiff from recovering under article 13. I think that the judgment of Mathew, J., is right, and that the appeal must be dismissed.

A. L. SMITH and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendants, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith, and Rigby, L.JJ.) — May 6.

REG. (ON THE PROSECUTION OF THE DARTFORD RURAL DISTRICT COUNCIL) *v.* BEXLEY HEATH RAILWAY CO. (*a.*)

Railway—Footway—Highway—Railway carried across public footpath—Duty to build bridge—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 46.

Where a railway crosses a public footway there is no obligation imposed upon the railway company by section 46 *of the Railways Clauses Consolidation Act*, 1845, *to build a bridge so as to carry the railway over the footway, or the footway over the railway. Such an obligation, if any, can only be imposed by the company's special Act.*

Appeal from an order of the Queen's Bench Division making absolute a rule for a *mandamus* directed to the Bexley Heath Railway Co. commanding them to carry the railway over a public footpath or the public footpath over the railway by means of a bridge.

The Bexley Heath Railway Co. was incorporated by a special Act for the purpose of constructing a railway in the county of Kent, the special Act incorporating the Railways Clauses Consolidation Act, 1845.

The railway crossed a public footpath in the parish of Crayford, the line being constructed at this point upon an embankment, and the footpath being carried up the embankment by means of wooden steps, across the line on the level, and down the other side of the embankment by means of similar steps.

The railway company's special Act did not contain any reference to or clause dealing with this footpath.

The Parish Council for Crayford having represented to the District Council, under section 26 of the Local Government Act, 1894, that the public footpath had been unlawfully obstructed, the District Council applied for and obtained a *mandamus* as above.

The railway company appealed.

8 & 9 Vict. c. 20, s. 46: "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge, of the height and width and with the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

ascent or descent by this or the special Act in that behalf provided . . . provided always, that, with the consent of two or more justices in petty sessions as after mentioned, it shall be lawful for the company to carry the railway across any highway other than a public road on the level."

Farwell, Q.C., and *E. Boyle*, for the appellants.—Section 46 of the Railways Clauses Act, 1845, does not apply to a public footpath. Though the words "public highway" might, if standing by themselves, be wide enough to include a public footpath, yet when the class of bridge referred to is looked at it is clear that they cannot include a footpath. The character and dimensions of the bridge are specified in sections 49 and 50, and show that a bridge over a carriage road alone is contemplated. The word "road" in those sections does not include a footpath. Section 46 and the following sections deal with turnpike roads, public carriage roads, and private carriage roads, and the first time a footway is mentioned is in section 61, which provides for a railway crossing a footway on the level. There is therefore no obligation imposed by that Act upon the railway company to carry the footpath by a bridge over or under the railway.

Macmorran, Q.C., and *G. F. Hohler*, for the respondents.—Section 46 is general in its terms, and applies to all highways. In the case of carriage-ways the dimensions of the bridge are specified in sections 49 and 50, but not in the case of other highways. All highways are included in section 46, but the proviso in that section deals with particular classes of highways—namely, bridle-ways and footways; and in these latter cases the order of two justices is necessary to enable a railway to be carried across such a highway on the level, and if an order of justices is not obtained under sections 59 and 61, there must be a bridge. Therefore, unless the special Act allows it, it is unlawful to carry a railway across the footway on the level.

Farwell, Q.C., replied.

Lord ESHER, M.R.—The railway company against whom this application is made obtained an Act of Parliament authorizing them to make a railway in accordance with the deposited plans. The Act did not refer to this public footpath. The company built the railway on an embankment across the footpath, and the footpath was then carried up the embankment by means of steps, across the line on the level, and down the embankment on the other side by similar steps. A *mandamus* has been obtained directing the company to carry the footpath by a bridge over the railway, or to carry the railway by a bridge over the footpath, by which, I presume, is meant a tunnel under the railway. The question before us is whether that was an order that the court were justified in law in making. It is contended that the court has no power to order such a bridge to be built. The court can only order the company to build a bridge if there is a statutory duty imposed upon the company to build one. Such a duty can only be imposed by the company's special Act or by some public Act. In the company's special Act there is no such duty imposed. The question therefore resolves itself into this: Has any public Act imposed such a duty on the company? The duty, if there is one, can only be imposed by section 46 of the Railways Clauses Consolidation Act, 1845. The words at the beginning of that section, if taken by themselves, would be large enough to include a public footpath. But in order to see whether that is so we must inquire further, and see what kind of bridge is referred to. The duty is to make a particular kind of bridge. It is to be a bridge with an arch of a particular width and height, and with the road having a particular ascent and descent; and, without going into the details, it seems to me perfectly clear that the section can never have meant to include a bridge over or under a public footpath. It would be an utterly useless expense to build such a bridge in connection with a footpath. Therefore it seems to me that section 46, upon its true construction, does not include a bridge over or under a public footpath, and there is no duty imposed by that section to build such a bridge. Then does any other section impose such a duty? Section 61 deals explicitly with a public footpath, which shows that when the Legislature intended to deal with a public footpath they expressly referred to it by name. Section 61 deals with the case of a railway interfering with a public footpath by crossing it on the level. In the present case the railway crosses the footpath on the level. That section, however, does not impose the duty to build a bridge, but merely the duty of taking certain precautions against danger to persons crossing the line. Therefore there is no duty to build a bridge imposed on the railway company by either section 46 or section 61, and the court has no power to order a *mandamus* to issue. This point does not seem to have been taken in the Divisional Court, and therefore we are not overruling any expression of opinion on their part upon this point. For these reasons the appeal must be allowed.

A. L. SMITH, L.J.—I am of the same opinion. The question in the case is whether a duty is imposed upon the railway company by the Railways Clauses Act, 1845, to carry the footpath by a bridge over or under the railway. I cannot spell out of the statute any such obligation. Does section 46 apply to a public footpath? For myself I should have thought that a public footpath would be included in the word "highway." But can the subsequent words "such road" apply to a public footpath? In my opinion they cannot. If that is so, where do we get the obligation to build a bridge over or under the railway? But the case does not stop there, because the necessary dimensions of the bridge are specified, and that carries one on to sections 49 and 50, and it is obvious that the bridge there prescribed cannot be a bridge over a footpath. It is curious that a footpath is not mentioned by name until we come to section 61. That section deals with a railway crossing a bridle-way or footway on the level, but does not impose the duty of making a bridge. I cannot find in any section an obligation upon the company to build a bridge to carry a public footpath over or under a railway.

RIGBY, L.J.—I am also of opinion that this appeal should be allowed. It seems to me that this case depends on the true construction of section 46. The bridge there specified is not a bridge generally, but a bridge of a specified height and width and with a particular ascent and descent, as enacted in a subsequent section of the Act. If we read into the section everything in the subsequent part of the Act the case of a footpath would clearly be omitted. The special Act does not deal with the case of a footpath, and in my opinion there is no obligation to build a bridge over or under a public footpath unless the special Act imposes it. Public footpaths are so numerous and varied in character that the Legislature, when specifying a bridge of particular dimensions for a carriage road, has left the special Act in each case to deal with public footpaths, and if the special Act does not impose the obligation to build a bridge over or under a footpath, the public Act does not impose it. Therefore in the present case there is no juris-

diction to grant a *mandamus* to build a bridge over the railway or to carry the footpath under the railway.

Appeal allowed.

Solicitors for the appellants, *Dollman & Pritchard.*

Solicitors for the respondents, *Pyke & Parrott*, for *J. & J. C. Hayward*, Dartford.

High Court of Justice.

Chan. Div. }
Chitty, J. } April 15.

In re HARDY.
HARDY *v.* FARMER. (*a.*)

Bankruptcy—Composition—Secured creditor—Death of debtor—Administration action—Claim by mortgagees to prove—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-section* 11; *s.* 108—*Bankruptcy Rules*, 1886, *r.* 211.

A receiving order having been made against H. on his own petition, H. made a composition with his creditors under section 18 *of the Bankruptcy Act*, 1883, *which provided for their being paid by instalments extending over a year, and died shortly after the expiration of the year. The instalments were not paid, and an action was commenced in the Chancery Division by a creditor to administer H.'s estate. Certain mortgagees of H., who had neither attended the creditors' meeting nor assented to the composition, took out a summons in the chancery action to be admitted as creditors in that action in respect of the balance of the mortgage debt after deducting the assessed value of their security.*

Held, on the principle of Ex parte Sharp, 34 *W. R.* 550, *that under sections* 108 *and* 18, *sub-section* 11, *of the Bankruptcy Act*, 1883, *the Court of Bankruptcy would have jurisdiction to proceed notwithstanding H.'s death, and would apply its powers and exercise its jurisdiction in favour of the applicants; and the plaintiff in the chancery action having submitted to take the opinion of the Chancery Court as to what would be the result of the applicant's proceeding in bankruptcy, the application of the mortgagees was consequently allowed.*

Summons.

The applicants were mortgagees of the testator Hardy, under indentures of mortgage and transfer, dated respectively in 1886 and 1889, for £2,000 and interest.

In May, 1890, a receiving order was made against the testator on his own petition. Shortly afterwards he made a composition with his creditors under section 18 of the Bankruptcy Act, 1883, which provided for their being paid by instalments extending over a year. The scheme was approved, and the receiving order was thereupon rescinded by the court. The mortgagees neither attended the creditors' meeting when the scheme was approved, nor assented to it. Default was made in payment of the instalments, and the testator died in October, 1891.

This action was instituted for the administration of his estate, when the usual order for accounts and inquiries was made. The estate proved to be insolvent.

The applicants, having valued their security at £1,500, carried in a claim for £500, being the balance of the £2,000, after deducting the £1,500.

The claim was disallowed by the judge in chambers, but without prejudice to any application which might be made in bankruptcy. An application was accordingly made in bankruptcy for a declaration that a proof for £500 ought to be allowed, but was dismissed on its appearing that the proof had been admitted by the trustee under the composition, there being no appeal from his decision before the court.

This was a summons to vary the chief clerk's certificate by allowing the claim. The question turned on the construction of sections 18 and 108 of the Bankruptcy Act, 1883, and rule 211 of the Bankruptcy Rules, 1886. By section 18, sub-section 11, of the Bankruptcy Act, 1883, if default is made in payment of any instalment due under a composition or scheme, the court may adjudge the debtor bankrupt, and annul the composition or scheme; and where a debtor is so adjudged bankrupt, any debt provable in other respects, which has been contracted before the adjudication, shall be provable. *Cf.* Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), which repealed and in substance re-enacted this section: see section 3 (15). By rule 211 of the Bankruptcy Rules, 1886, where a composition or scheme has been approved, and default is made in any payment thereunder, no action to enforce such payment shall lie; but the remedy of any person aggrieved shall be by application to the court. By section 108 of the Bankruptcy Act, 1883, if a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive.

Byrne, Q.C., and *R. J. Parker*, for the summons.—The applicants were entitled to abstain from taking part in the composition proceedings, and their claim is provable against the estate now: *In re Bestwick*, 24 W. R. 938, 2 Ch. D. 485. If the debtor were alive, the applicants would apply to the Court of Bankruptcy under section 18, sub-section 11, of the Act of 1883, to make the debtor bankrupt, and the effect of section 108 is that notwithstanding his death they can still pursue their remedy under section 18, sub-section 11: *Ex parte Sharp*, 34 W. R. 550; *In re Easy*, 35 W. R. 819, 19 Q. B. D. 538. That being the position in bankruptcy, there is no reason why our claim should not be admitted in the action.

Farwell, Q.C., and *Solomon, contra.*—*In re Bestwick* was a decision on the Act of 1869, and does not apply here. The debt is gone, and the applicants' remedy, if any, is in bankruptcy (rule 211 of the Bankruptcy Rules, 1886); but they are too late to avail themselves of that remedy, and are not entitled now to compete with creditors who relied on the old debts being wiped out by the composition. In order to save expense we consent to the question being decided on this application.

Byrne replied.

CHITTY, J.—The ground on which the court is asked to reject the proof is that fourteen months before the testator's death, and after he had presented a petition in bankruptcy, a composition scheme was approved of by the court in bankruptcy, and thereupon the receiving order that had been made against the debtor was discharged. For the general body of the creditors it is urged that the provisions of the 18th section apply and have this effect—namely, first, that by the 8th sub-section, the composition having been accepted and approved as it was, it is binding on all the creditors so far as relates to any debts provable in bankruptcy. This £500 would have been a debt provable in bankruptcy. The 11th sub-section provides, in substance, what is to happen in case default be made in payment of the composition. The composition was for payment by three instalments

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

spread over a year, and there was a surety who guaranteed the payment. The applicants did not prove under the composition, but apparently relied upon their security, which they probably thought at the time was sufficient. Now, if the debtor had been alive, it is quite plain that the applicants could apply to the Court of Bankruptcy under this 11th sub-section. [His lordship stated the effect of sub-section 11, and continued:—] The opponents of the claim rely on the 211th rule in bankruptcy, which has the effect of a statute. [His lordship read the 211th rule, and continued:—] Putting the 211th rule by the side of the 18th section, the result appears to be that a creditor who is bound by the composition, though he has not given any consent, cannot pursue any other remedy except the remedy given by the 11th sub-section; and the result is that if the debtor had been alive, the applicants could not have sued for the balance of the security, supposing that they had realized the security and there was a deficiency of £500, which would have been an ordinary debt. The right, therefore, to sue for the debt or to enforce payment, as the result of what I have gone through, is that it can be enforced only under the provisions of the 11th sub-section.

The applicants, however, refer to the 108th section of the Bankruptcy Act, 1883. [His lordship read the 108th section.] Under that section Cave and Grantham, JJ., sitting as a divisional court, held, in *Ex parte Sharp*, that where the petition is presented by the debtor himself the adjudication could be made, though after his death. Of course the section cannot be read as applying to a bankruptcy petition which has been dismissed. Again, it cannot be applied, as the Court of Appeal held in *In re Easy*, to the case where the petition has been presented by the creditor but there has been no service of the petition during the debtor's lifetime. Now that decision shows that the construction put upon the 108th section is a general construction, and I am not able to find any ground upon which it would be reasonable, in my opinion, to say that the provisions of the 108th section are not applicable to the 11th sub-section of the 18th section. To put a case which was adduced by Mr. Byrne in argument, the Legislature never could have intended that if there had been an order approving a composition, and the debtor had died the next day, the creditors who had not assented to the composition, but who were bound by it, should be told by the executors of the deceased that the effect of the enactment was that composition *plus* death the day after, amounted to a complete discharge, and that there would be no available means whatever open to any creditor to obtain payment of that which had been promised to him under the composition. For this purpose I adopt Mr. Solomon's argument, that this case presents no difference by reason of there being a surety against whom these creditors possibly could even now proceed. I think it is the simple case of the nature I have just described, with this difference, that, instead of dying the day after the composition, the debtor here lived till the end of the period of twelve months, and then died two months afterwards. I think, following the principle on which the Divisional Court acted, that there would be jurisdiction in the Court of Bankruptcy to proceed under the 108th section, and I have asked the counsel who opposed this claim whether they can find any reason for suggesting that, while that decision of the Divisional Court stands—and I see no reason for dissenting from it at all; but, on the contrary, I think it is right—the Bankruptcy Court would not act on the principle of the decision and make the adjudication against the dead man. There are no circumstances in this particular case which would make it unjust for the court, in the language of the 108th section, to order otherwise—that is, to stop the bankruptcy proceedings.

Then it was said by the opponents of the claim that there was no pending petition here; that the receiving order having been rescinded, it would be impossible to apply the 11th sub-section. Again, dealing with the case as if the debtor were alive, it appears to me that that observation is not justified; and that there is a petition on the file at the present moment is not denied.

Then it was suggested that the language of the 11th sub-section—namely, "on application by any creditor"—required a new petition. In my opinion it is quite plain that any creditor who has a ground of complaint by reason of default in the payment of the composition could make the application in the Bankruptcy Court without presenting any fresh petition.

This brings me to the conclusion that the Bankruptcy Court would apply its powers and exercise its jurisdiction in favour of the applicants.

[After referring to the facts and to the proceedings in the Chancery Division and in bankruptcy prior to this summons, his lordship said:] Now it appears to me that thus far the strict course would be to allow the applicants to take further proceedings in bankruptcy, with the view of obtaining an adjudication or some other order; and I put it to the counsel of the plaintiff, who opposed the claim, whether he desired that that course should be adopted, which of course would lead to delay and to expense, and that in the meantime, till there had been a decision in the Bankruptcy Court one way or the other, a sum should be set apart to answer the claim if it should succeed in bankruptcy. But very properly, and with a desire of dividing this estate, which I need hardly mention is insolvent, among the creditors, Mr. Farwell said that he should not ask that that should be done, but that he should be content to take my opinion as to what would be the result of the application to the Court of Bankruptcy. The result is that that which at the present day is always avoided where it can be properly done—that is, circuity of action, involving expense and delay—will not take place. I think upon that I ought to accede to the application.

But, in addition to the arguments I have gone through, many points were elaborately argued against the claim, which I propose to dispose of in a few words, without any want of respect to the counsel who urged them. A great point was made of *Troughton* v. *Gitley*, Ambler, 630, and the subsequent authorities that proceeded on the principle of that decision of Lord Camden; and it was said, as against the applicants, that they had stood by and allowed the deceased to go on incurring debts under such circumstances as would justify the court in saying that the applicants, who did not take the trouble to prove under the composition, were to be postponed to subsequent creditors. It will be sufficient for me to say that I think the counsel who urged the point had no materials on which to found it, and that the circumstances of the case do not give rise to any ground for applying the equitable rule of Lord Camden as against the applicants. I think that they might in strictness have been put to the expense and delay that I have mentioned; and probably that would be the only conclusion I could arrive at had it not been for the very proper submission of the plaintiffs' counsel.

Application allowed.

Solicitors for the applicants, *Geare, Son, & Pease*, for *Martin & Sons*, Nottingham.

Solicitors for the creditors, *Kingdon, Wilson, & Webb*, for *Frankish, Kingdon, & Wilson*, Hull.

Chan. Div.
North, J. April 21, 22.

RICHARDS v. OVERSEERS OF KIDDERMINSTER.
RICHARDS v. MAYOR, &c., OF KIDDERMINSTER. (a.)

Company—Debentures—Receiver—Covering deed—Bills of Sale Acts, 1878 *and* 1882 (41 & 42 *Vict. c.* 31), *ss.* 14, 17—*Poor rate—General district rate—Poor Relief Act*, 1601 (43 *Eliz. c.* 2), *s.* 2—*The Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 16—*The Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 5, 6, 211, *sub-section* (3)—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 24—*Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 1 (a), *sub-section* (4).

A deed by which a company assigns as beneficial owner to a trustee all its property as security to cover debentures does not come within the Bills of Sale Acts.

Held, also, on the facts, that although the powers of the receiver under the deed were wider than those conferred upon receivers by the Conveyancing Act, 1881, *s.* 24, *that Act did not affect their validity, and that on the receiver taking possession of the premises and carrying on the business there was a change of occupation such as was contemplated by section* 16 *of the Poor Rate Assessment and Collection Act*, 1869, *so that the receiver was not liable to pay the proportion of a rate incurred before he took possession.*

The Preferential Payments in Bankruptcy Act, 1888, *s.* 1 (a), *applies only to persons who hold in their hands assets in the winding up, but does not affect persons who are not claiming as creditors in the winding up, but who hold security upon property charged in their favour.*

Semble, *a "covering deed" may be a "debenture" within the meaning of the cases.*

Semble *also, that a general district rate made under the Public Health Act*, 1875, *is not a tax or parochial rate within the meaning of section* 14 *of the Bills of Sale Act*, 1882.

Ross *v.* The Army and Navy Hotel Co., 35 *W. R.* 40, 34 *Ch. D.* 43, *considered.*

Action.

Henry Jecks Dixon & Sons were incorporated as a joint stock company under the Companies Acts on the 13th of December, 1886.

The company had power of borrowing or raising money for all or any of its purposes upon mortgage of any property real or personal of the company or upon debenture bonds, bills, or notes, unpaid capital, or other security of the company, and for other purposes mentioned in the memorandum of association.

By an indenture dated the 13th of February, 1891, and made between Dixon & Sons, of the one part, and the plaintiff, Richards, called the trustee, of the other part, and after reciting that the directors of the company, in exercise of the powers vested in them by the regulations of the company, had determined to borrow for the purposes of the company the sum of £20,000 by the issue of mortgage debentures of £100, or of multiples of £25 each, bearing interest at the rate of six per cent. per annum, payable half-yearly in each year [such debentures to be in the form annexed], and to further secure the principal moneys and interest for the time being payable according to the tenor of the said debentures, and the performance of the stipulations and conditions therein contained in manner thereinafter appearing, the company as beneficial owner granted and assigned to the trustee the property, whatsoever and wheresoever situate, of or to which the company then was, or during the continuation of that security should become, possessed or entitled, except uncalled capital, upon and for the trusts and purposes therein expressed; and it was thereby provided (*inter alia*) that (3) the mortgaged premises (being the premises thereby assigned to the trustee) should be held by him upon trust to permit the company to hold the same and to carry on the business until the security thereby constituted became enforceable as thereinafter, and then upon trust that the trustee in his discretion might enter upon and take possession of the mortgaged premises; (4) provided that the security thereby constituted should become enforceable, amongst other events, if an effective resolution of the company should be passed for the winding up of the company. (5) At any time after the principal moneys thereby secured should have become payable according to the tenor of the debentures or after a notice should have been given of a meeting to consider a proposed extraordinary resolution for winding up the company, the trustee without further notice might appoint one or more persons to be a receiver or receivers of all or any part of the mortgaged premises, in like manner in every respect as if the trustee were a mortgagee within the meaning of the Conveyancing and Law of Property Act, 1881, and had become entitled under that Act to exercise the power of sale conferred, and every receiver so appointed should have and be entitled to exercise all powers conferred by the said Act as if such receiver or receivers had been duly appointed thereunder; and in particular by way of addition to but without thereby limiting any general powers thereinbefore referred to, every such receiver so appointed should have power (*inter alia*) (*a*) to take possession of the property thereby charged or any part thereof, and (*b*) carry on any business of the company; but if the extraordinary resolution referred to in any such notice before mentioned should not be passed by the necessary majority the company and the holders of the debentures should, subject as therein mentioned, be remitted to their original rights. (6) "The trustee shall not, nor shall any receiver or receivers appointed by him as aforesaid, by reason of the receiver or receivers entering into possession of the property hereby charged, or any part thereof, be liable to account as mortgagee in possession or be liable for any loss on realization or for any fault or omission for which a mortgagee in possession might be liable, but every receiver duly appointed by the trustee under the power in that behalf hereinbefore contained shall be deemed to be the agent of the company, and shall as such agent for all purposes be deemed to be in exactly the same position as a receiver duly appointed by the mortgagee under the Conveyancing and Law of Property Act, 1881, and every such receiver and the trustee shall be entitled to all the rights, powers, privileges, and immunities by the said Act conferred on mortgagees and receivers when such receivers have been appointed under that Act." (15) The company would pay the principal moneys and interest secured by the debentures in accordance with the tenor thereof respectively; and (16) the principal moneys and moneys intended to be secured by the debentures should, subject to the provisions of clause 13 (as to the costs, charges, and expenses of the trustee being a first charge), be a first charge on the mortgaged premises, and the said principal moneys and interest should take precedence over all moneys which might thereafter be raised by the company by any means whatsoever; but without prejudice to the right of the company to treat the debentures as a floating security to the extent in the debentures in that behalf expressed, and as between the holders thereof the debentures should rank *pari*

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law.

passu without any preference or priority by reason of date of issue or otherwise.

This indenture was not registered under the Bills of Sale Acts. On the same day there were issued by the company first mortgage debentures for £100 each, and it was provided by each such debenture that the company would, on the 16th of December, 1896, or on such earlier date as the principal money thereby secured should become payable in accordance with the conditions indorsed thereon, pay to the holder, his executors, or administrator, the sum of £100; and the company, as beneficial owner charged, with the payments thereby or by the conditions indorsed thereon provided for, its undertaking and all its property, whatsoever and wheresoever, both present and future (except uncalled capital); and the conditions indorsed upon each of such debentures provided that the debentures of that series should rank *pari passu* as a first charge without any preference or priority one over another, and should be a floating security.

The plaintiff was also a debenture holder as well as trustee under the covering deed. With the consent of the trustee second debentures were issued subsequently. On the 5th of September, 1895, a notice was given of a meeting to consider a proposed extraordinary resolution for winding up the company, and such resolution was on the 16th of September passed by the necessary majority. On the 5th of September the plaintiff, as trustee, appointed Alfred Page to be the receiver of all the mortgaged premises comprised in the said indenture, with all the powers conferred on a receiver by the said indenture or by the Conveyancing and Law of Property Act, 1881. The receiver entered into possession of the premises and carried on the business of the company. The receiver was on the 16th of September also appointed liquidator of the company.

The company was originally assessed to a poor rate made for the parish of Kidderminster on the 19th of April, 1895, to cover the period up to the 30th of September following, in the sum of £73 11s. 2d. in respect of the premises in their occupation, and to a similar amount for a general district rate due to the Corporation of Kidderminster. On the 26th of September the receiver had an interview with the defendants' collector and assistant overseer, when it was agreed that the rate should be apportioned between the receiver and the company in the following proportions—viz., £11 5s. 6d. from the receiver in respect of his occupation of the premises from the 5th of September, and £62 5s. 8d. from the company in respect of their occupation up to that date. The rate-book was altered in pursuance of section 16 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), by the insertion of the name of the receiver and liquidator, and the date of commencement of his occupation was entered as the 5th of September. On the 27th of September the defendants served on the premises a demand note addressed to Dixon & Sons, Limited, Alfred Page, receiver and liquidator. The amount was stated to be £73,11s. 2d., and at the foot was set out "Dixon & Sons, £62 5s. 8d.; Page, £11 5s. 6d."

On the 3rd of October the receiver paid the £11 5s. 6d., and received a receipt for the same made out as follows: "Received of Dixon & Sons, Limited, per A. Page, receiver, £11 5s. 6d."

The company had not paid any part of the £62 5s. 8d., and on the overseers writing and demanding it the receiver answered, recognizing the right of the defendants to be paid the rates preferentially out of the funds coming to his hands as liquidator, but adding that he had no such funds in his hands at present and that the property of the company was vested in him as mortgagee on behalf of the debenture holders. The overseers, seven days having elapsed without payment, issued a summons against the company, which was served at the registered office of the company, and on the 25th of October a distress warrant on the goods of Dixon & Sons, Limited, was issued by the justices of the borough of Kidderminster under 43 Eliz., c. 2, and 12 Vict. c. 14. The company did not appear at the hearing of the summons, and the receiver was not made a party to it.

The plaintiff thereupon commenced this action, suing on behalf of himself and all other the holders of the issue of first mortgage debentures, and as trustee of the covering deed, to restrain the defendants from proceeding with the distress, and for damages for trespass and wrongful distress. At the hearing of the interlocutory application for an injunction it was agreed that the plaintiffs should pay the money claimed by the overseers into court, and that the case should be decided on argument of the points of law involved.

Clayton, for the debenture holders.—The rate is made upon the occupier, and the statute of Elizabeth provides for proceedings to be taken against the offender. The defendants are bound by the apportionment they made and the entry in the rate book. In any case the defendants could not distrain on our goods, even if the company had in fact remained in occupation; but there was a change of occupation.

Rowden, for the defendants.—(1) Rates are entitled to preferential payment under 51 & 52 Vict. c. 62, s. 1. Sub-section 4 creates a statutory first charge on the assets of the company. (2) Supposing the test of liability is change of occupation, there was no change here, because the occupation of the receiver was the occupation of the company, the mortgagor (Conveyancing Act, 1881, ss. 19 and 24). There was, in fact, no successive occupation, but only the occupation of the mortgagors by their own agent. (3) Any title derived by anyone to these goods is derived under clause 5 of the covering deed, which is not a debenture within section 17 of the Bills of Sale Act, 1882, but is a bill of sale, and falls within section 14, and is no answer to the distress, even if it had been registered: *Ross* v. *Army & Navy Hotel Co.*, 35 W. R. 40, 34 Ch. D. 43; *Edmonds* v. *Blaina Furnaces Co.*, 35 W. R. 798, 36 Ch. D. 215; *Re Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627; *Great Northern Railway Co.* v. *Coal Co-operative Society*, *ante*, p. 252, [1896] 1 Ch. 187.

Clayton, in reply, relied on the covering deed being a debenture, and, in the alternative, that the debenture holders could make good their claim under the debentures themselves: *Re Burdett*, 36 W. R. 345, 20 Q. B. D. 310; *Levy* v. *Abercorris Slate and Slab Co.*, 36 W. R. 411, 37 Ch. D. 260; *In re Opera*, 39 W. R. 398, [1891] 2 Ch. 154.

In the second action by the same plaintiff against the Mayor, &c., of Kidderminster, the same question arose in respect of the general district rate of the borough of Kidderminster. The arguments used were the same, except that for the plaintiffs sections 5, 6, 211, sub-section 3, of the Public Health Act, 1875, were referred to; and that the defendants contended that the general district rate was a tax or other parochial rate within the meaning of section 14 of the Bills of Sale Act, 1882. The learned judge, however, intimated that he was of opinion that a general district rate was not such a parochial rate. *Local Board of Wimbledon* v. *Underwood*, 40 W. R. 640, [1892] 1 Q. B. 836, was cited in argument for the plaintiffs.

NORTH, J., stated the facts, and continued:—Now,

the defendants, the overseers, say they are entitled to this sum on several grounds. I think it is convenient to put their case first. The first ground is that by virtue of the Preferential Payments in Bankruptcy Act, 1888 (51 and 52 Vict. c. 62), s. 1, the overseers of the poor are preferred creditors. I do not think that Act has anything to do with it. The Act is entitled "An Act to amend the law with respect to preferential payments in bankruptcy and in the winding up of companies," and then it provides that in the distribution of assets of any company being wound up under the Act there shall be paid in priority to all other debts all parochial or other local rates due from the company at the date of the commencement of the winding up. Now, that seems to deal simply with preferential payments to be made by the person who holds the funds—the official trustee, or whoever it may be—out of the assets in his hands, and it is a direction as to the mode in which the payment is to be made; and out of those sums he is to distribute what are treated in this section as the preferential debts to be paid first. Those creditors are to be paid out of the assets before any other creditors are; but, in my opinion, that does not in any way affect persons who are not claiming as creditors in the winding up at all, but who hold security upon property which the company has in some way charged in their favour. It was said that section 1, sub-section 4, goes further. It provides: "In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt or a company being wound up within three months next before the date of the receiving order or the winding-up order, respectively, the debts to which priority is given by this section shall be a first charge upon the goods so distrained on, or the proceeds of the sale thereof," followed by a proviso, "that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made." No doubt that section does go rather further than to direct what is to be done with the assets in the hands of the trustee in bankruptcy; but it deals only with a particular case which has not happened, and does not, in my opinion, affect the present case in any way.

Then, the next point is with respect to the occupation of the property, and as to that I must refer to the two statutes bearing upon the subject. The first is the old Act for the Relief of the Poor, passed in the forty-third year of Elizabeth, providing for the appointment of overseers of the poor and their raising poor rates from the occupiers of property. Then, in the latter part of what is called the 2nd section of the Act in the revised edition of the statutes, it provides that it shall be lawful for the overseers by warrant from two justices to levy sums of money of everyone who shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods. The other Act which is material is the Poor Rate Act, 1869 (32 and 33 Vict. c. 41), s. 16, which provides that "if the occupier assessed in the rate when made"—that is the poor rate—"shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament being unoccupied at the time of the making of the rate become occupied during the period for which the rate is made, the overseers shall enter in the rate book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences, so far as the same shall be known to them, and such occupier shall henceforth be deemed to have been actually rated from the date so entered by the overseers, and shall be liable to pay so much of the rate as shall be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made, in like manner, and with the like remedy of appeal, as if he had been rated when the rate was made; and an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made."

I omitted to mention that the division of the amount of the rate into two sums of £62 and £11 was made upon the footing of this section applying to the case of there having been a change in the occupation when the receiver entered into possession; and it treats the company as having been occupiers down to that time, and the receiver as being the occupier from that time forward.

In the present case it is said there has not been any change of occupation; but in point of fact, as I mentioned, it is clear there was. The legal effect of what was done has to be considered. Now, as to that, the ground upon which it is put is that the receiver appointed on the 5th of October was the receiver appointed under the Conveyancing Act of 1881. Section 19 there provides: "A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further." One, by sub-section 3, is: "A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof." Then section 24 provides (2): "The receiver shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides."

Now, the deed under which the receiver was appointed was the covering deed, and I must refer shortly to its provisions. [The learned judge read the provisions set out above, and continued:—] Therefore it treats substantially the debentures as the documents dealing with the claim as a debt, and this is by way of security for the debt; and there is a direct power to take possession and to carry on the business, with a proviso for undoing that, if the resolution had not been passed. Now, this power of appointing a receiver goes much further than anything contained in the 24th section of the Conveyancing Act; but the 19th section, which enabled the mortgagee to appoint a receiver, provided also, in sub-section 2: "The provisions of this Act relating to the foregoing powers, comprised either in this section or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences as if such variations or extensions were contained in this Act." Therefore the fact that it goes much further than the Act does not in any way affect its validity; but the result is that the 6th article of the deed which I have last read goes a great deal further than the provision in the Act that the receiver shall be deemed to be the agent of the mortgagor; and, in my opinion, that sub-section in the Act that the receiver shall be deemed to be the agent of the mortgagor does not apply here, because there is the express clause providing for the same thing and much more, in the arrangement actually made between the parties by the deed itself.

The question, then, is what the construction of the deed is; and it is said that under the deed, as under the Act, the receiver was merely the agent of the mortgagor, and therefore the mortgagor continued in

possession, and there was no change in possession. But in my opinion that contention is not sound. It is quite clear that they do contemplate, in a particular event and at a particular time, that there either may or shall be a change of possession, in which a receiver shall enter into possession and shall carry on the business of the company; and, in my opinion, the provision that the receiver is to be the agent for the mortgagor is not so strong as to stultify every other provision in the deed, which says that the possession of the company shall cease, and shall become the possession of the receiver; and it also provides that if, when possession has been properly taken, the contemplated resolution should not be passed, then the parties are to be again in their old position—that is to say, the possession from that time forward is to be the possession of the company in this case; and under article 6 the possession of the mortgagor is to be under the general provisions of the Act.

In my opinion, therefore, it is impossible to say that the change of possession which was clearly contemplated and required by the deed did not take place, and therefore the circumstances referred to in the 16th section of the Poor Rate Act, 1869, did take place. It is not the fact to say that the company were in the occupation throughout; because the receiver on behalf of the trustee—the trustee, if you like to say so, on behalf of the debenture holders—was the person from that time forward in possession.

Then the question is, What right he had, and what his interest in the personal chattels that he seized under the deed was? It is said that the deed was not a debenture, and therefore the Bills of Sale Acts in some way affect its operation. The deed, I should say, never was registered under the Bills of Sale Act, and therefore it is said in some way that the debenture holders have no right as creditors under the deed.

Now, first of all, as regards this covering deed; is it a debenture or not? According to the decisions of Chitty, J., in *Edmonds* v. *The Blaina Co.* and *Levy* v. *Abercorris Co.*, he I will not say defined what a debenture was, but he pointed out some of the qualities or attributes of a debenture, and if the deeds in those cases were debentures, I do not see why the covering deed in the present case should not be a debenture also. Then, on the other hand, Field, J., in a case cited of *Brocklehurst* v. *The Railway Printing and Publishing Co.*, 28 SOLICITORS' JOURNAL, 358, [1884] W. N. 70, held that a covering deed was not a debenture; and in the case of *Ross* v. *The Army and Navy Hotel Co.* the Court of Appeal certainly did proceed on the admission of the parties that the covering deed was not a debenture, and they considered the further question as to whether what I may call the real debentures secured by the covering deed were debentures or not. As regards that question therefore, I do not think it necessary to decide, and I will not, in that conflict of authorities, say whether the covering deed is a debenture or not; but it does not seem to me material whether it is or not, because I think it is quite clear on the authorities the covering deed is not a bill of sale, and therefore that it did not require registration. No doubt in *Ross's case*, to which I have just referred, there was such a covering deed, and the court assumed, as the headnote says (and I think rightly), that the covering deed ought to have been registered, and was void because it was not. Cotton, L.J., says: "Although the covering deed is void under the Act, there is in the debenture itself a contract that the debenture holders shall have a charge upon what for present purposes I will call 'all the property of the company.' Undoubtedly, the covering deed being void, we cannot look at it as a contract to give security." He does not say "undoubtedly it is void," but on the assumption that it is void you cannot look at it as a contract. That is beyond doubt. Then he says: "The debt is altogether out of the way, because if not good as a bill of sale it cannot be good as a contract to give a bill of sale as security." Then Lindley, L.J., says at the beginning of his judgment: "It is admitted that what is called a 'covering deed' was a deed executed by way of security for money lent to the company. Debentures were also given for the money lent. It is said now that the debentures are void, because the deed"—that is, the covering deed—"is admitted on all hands to be void under the Bills of Sale Act." Then he proceeded to consider whether the debentures were void, and held they were not; but no doubt there is an assumption there by the court, as well as the parties, that the covering deed is void.

It seems to me, notwithstanding that case, that the case settling the matter at present, is the later decision of the Court of Appeal in the case of the *Standard Manufacturing Co.*, where the matter was fully considered. It is sufficient, I think, for me to read the headnote in the *Law Reports* as bearing on this point, and it is fully borne out by the judgment, which I have carefully considered: "The mortgages or charges of any incorporated company for the registration of which statutory provision has already been made by the Companies Act, 1845, or the Companies Act, 1862, are not, upon the true construction of the Bills of Sale Act, 1878, bills of sale within the scope of that Act." Now, this covering deed is beyond all question a deed for the registration of which provision is made by the Companies Act, 1862, and I think I was told it had actually been registered. If not, it ought to have been registered. That case seems to me to be exactly in poiut. I must hold that the covering deed, therefore, itself was not a bill of sale, looking at that authority. I should say this, that the headnote says: "Are not, upon the true construction of the Bills of Sale Act, 1878, bills of sale within the scope of that Act." That was not the only point decided, because Bowen, L.J., who gave the judgment of the court, said at the beginning of his judgment: "The question we have to decide is whether both or either of the debentures before us, which are, in fact, debentures of a joint stock company limited, and which create a charge on the floating real and personal property of the company, are void for non-registration under the Bills of Sale Acts, 1878 and 1882, or either of such Acts. So far as the Bills of Sale Act of 1882 is concerned, it seems to us that such debentures are expressly excepted from its operation by section 17." The rest of the judgment deals only with the Act of 1878, simply because the Act of 1882 had been disposed of in those words at the beginning of the judgment; but beyond that it seems to me that the decision as to the Act of 1878 covers the present case, because all bills of sale under the Act of 1882 are bills of sale under the Act of 1878; that is to say, it is not the case that all bills of sale under the Act of 1878 are within the Act of 1882; but, on the other hand, the converse is the case, and therefore, if this is not a bill of sale under the Act of 1878, it is not under the Act of 1882, which is a supplemental Act to the principal Act, and the two are to be read as one. In the 3rd section of the Act of 1882 the Act of 1878 is referred to as the principal Act: "And this Act shall, so far as it is consistent with the tenor thereof, be construed as one with the principal Act." Then it goes on to point out to what the Act of 1882 is not to apply.

There is one other case I want to refer to, and that

is a case where the *Standard case* was followed. In the case of *In re Opera, Limited*, I read from the headnote in the *Law Reports*: "The sheriff, on seizing, on behalf of an execution creditor, goods belonging to a limited liability company, takes—at all events before the sale by him—subject to the rights of debenture holders under debentures charging all the property of the company as security for the debenture debt." There it was held that the charge created by debentures had priority over the rights of the sheriff in execution. It seems to me that the right created by the debentures is equally effective against a distress—not, indeed, by a landlord, because that is not the case we are dealing with—but a distress under a power to distrain which is to be exercised by the Act over the company's goods. It seems to me that, the debenture being a good charge upon the goods, no distress can be made upon them, except, as this case says, subject to the rights of the debenture holders.

Then, in addition to that, there is this point; that, even if the covering deed was a bill of sale which was invalid as not being registered, yet the debentures proper, to cover which the security is created, are beyond all question debentures; and they are here expressed in terms which give a charge. [The learned judge read the debenture form set out above, and continued:—] That being so, the argument that was founded upon section 14 of the Bills of Sale Act, 1882, has no application. That section provides: "A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale which, but for such bill of sale, would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates." That is to say, a bill of sale to which this Act applies shall be no such defence; but as, in my opinion, neither the debentures nor the covering deed are within the Act at all, the benefit conferred by the 14th section has no application. Under those circumstances, the money must be paid out of court to the receiver.

Then, as regards the second case in the paper for judgment, I was told that that was altogether the same as the one in which I have just given judgment, excepting that in one respect it was more favourable to the plaintiff. I need not go into that question, or consider whether it is, or not. The grounds on which I have decided the first case are quite sufficient for deciding the second, and the order in that case will be for payment of the agreed sum to the plaintiff also. Then the costs must follow the event.

Solicitors, *J. W. Miles; L. Weston Wigg*, for *F. E. Burcher*, Kidderminster.

Chan. Div. }
Kekewich, J. } May 8.

YOUNG *v.* THE SOUTH AFRICAN AND AUSTRALIAN EXPLORATION AND DEVELOPMENT SYNDICATE (LIMITED). (*a.*)

Company—General meeting—Voting—Show of hands—Declaration of chairman—Evidence to contradict—Sufficiency of notice of meeting—Table A, clause 42—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 51.

The provision in section 51 *of the Companies Act*, 1862, *that the declaration of the chairman that a resolution has been carried shall be deemed conclusive evidence of the fact does not preclude the court from inquiring whether, in fact, the provisions of the Act have been complied with.*

Motion.

The defendant company was registered as a company, with Table A as its articles of association, on the 7th of September, 1895. Notice of an extraordinary general meeting was given to the shareholders, at which it was stated a resolution would be submitted that the regulations contained in Table A should be rescinded, and that the regulations contained in the printed document submitted to the meeting, and for the purpose of identification subscribed by the chairman thereof, with the modifications approved by the meeting, should be adopted as the regulations of the company in lieu of the regulations thereby rescinded. Notice was also given that the shareholders might inspect the proposed new regulations at the office of the company's solicitors.

The meeting was held on the 9th of April, 1896, and the voting having been taken by show of hands the chairman declared the resolutions duly carried.

This was a motion to restrain a meeting called for confirming the resolutions, or in the alternative from acting upon them. It appeared from the evidence that nine voted for and three against the resolutions, and accordingly that if one vote was subtracted from the majority voting, the majority required by the Companies Act to pass a resolution had not been obtained; and it was admitted that in fact one of the voters counted in the majority was the vote of a person who was not a member of the company.

Warrington, Q.C., and *Lavington*, for the applicants.—Our evidence shows that the majority required by the Companies Act to pass this resolution was not in fact obtained. One person's vote was accepted by the chairman who was not a member. Without that vote the statutory majority did not pass the resolution. The declaration of the chairman is not conclusive where evidence to the contrary can be produced: *Re Horbury Bridge Coal, &c., Co.*, 27 W. R. 433, 11 Ch. D. 109. No sufficient notice of the proposed alterations of the regulations was sent.

Renshaw, Q.C., and *Wilkinson*, for the defendants.—The declaration of the chairman is conclusive evidence that the resolution has been properly passed, without proof of the number or proportion of the votes, under the provisions of the Companies Act, 1862, s. 51.

KEKEWICH, J.—In this case the company was regulated by the provisions of Table A, as it was registered without any articles of association, and in order to determine the question as to what is the result of this general meeting, clause 42 of Table A must be referred to. That clause provides that "at any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried and an entry to that effect in the book of proceedings of the company shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution." The distinction between "sufficient" and "conclusive" evidence is pointed out by Jessel, M.R., in *Re Horbury Bridge Coal, &c., Co.* But the Companies Acts apply, and whether the company is governed by Table A or its own articles, either may be altered by a resolution passed in accordance with the provisions of section 51 of the Companies Act, 1862, which provides that at any meeting mentioned in the section, unless a poll is demanded by at least five members, "a declaration of the chairman that the resolution has been carried shall be deemed to be conclusive evidence of the fact, without proof of the number or

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

proportion of the votes recorded in favour of or against the same." No case decides what is meant by conclusive evidence in this section, but in Buckley on the Companies Acts a case is cited in which a declaration of a chairman that a resolution has been duly passed was held sufficient evidence that the resolution had been passed by a requisite majority, but it was not conclusive evidence where it was challenged by evidence to the contrary. What is meant is that primarily the declaration of the chairman is sufficient, without proof of number or proportion of votes. That is a reasonable construction, and does not mean that it is conclusive if the evidence shows that the number and proportion of votes was in fact not proper. To hold otherwise would enable a chairman to make a fraudulent declaration, if he so wished, without check. That could not be meant, and the wording of the 51st section of the Act helps this view, as it provides that the declaration should be "deemed conclusive," and not "conclusive" alone. The 18th section of the Act contains a similar declaration as to incorporation, upon which there are decisions which show that the court is at liberty to allow parties to dispute the conclusiveness of the evidence, as, for instance, *Re Northumberland and Durham District Banking Co.*, 6 W. R. 527, 2 De. G. & J. 357. To what extent is another question. In my opinion the decision of the chairman does not prevent my inquiring how far the provisions of the Act have been complied with. In this case, the particular meeting was a most important one—namely, for the purpose of altering the regulations of the company. It was therefore highly desirable that all the members should be told what was about to be done at the meeting. The notice convening the meeting was in general terms. I think it would have been better if an explanatory circular had been sent, but the notice said that members were at liberty to inspect the proposed regulations at the office of the solicitors to the company. Practically, shareholders generally leave the management of the company in the hands of the executive, and take no particular interest in the company's meetings. It would probably be a waste of both time and expense to send copies of the proposed regulations to each member. I think, therefore, that the notice sent in this case was sufficient to bind the members. Then as to the question of the sufficiency of the majority to pass the resolution. It appears from the evidence that as a matter of fact unless one vote had been counted, which was the vote of a person who could not properly vote, the requisite majority did not vote for the resolutions, and therefore they were not duly passed. I must therefore grant the injunction asked for.

Solicitors, *T. M. Richards; Venning, Sons, & Co.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills, J.)

May 5.

SPIERS & POND (LIMITED) (*Appellants*) *v.* BENNETT (*Respondent*). (*a.*)

Adulteration—Milk—Abstraction of cream—Disclosure—Notice—Criminal intent—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 9, 25.

The appellants were charged under section 9 *of the Sale of Food and Drugs Act*, 1875, *with having unlawfully sold milk from which the fat had been abstracted to the extent of* 17 *per cent. without disclosing such alteration. They were supplied with milk in a can under a contract which contained a warranty as to the purity of the milk. Part of this milk was poured into a churn, and in so doing a large proportion of the cream remained in the can. The prosecutor was served with a glass of milk from this churn, and on being submitted to analysis it was proved to be deficient in cream to the amount of* 17 *per cent. On the glass in which the milk was served it was stated that it was "not guaranteed as new or pure milk or with all its cream, see notice." The notice was to the effect that the milk was purchased by the appellants under a warranty, but that they were unable to guarantee it as with all its cream, and did not sell it as such.*

Held, that the appellants had done all that was reasonable; that they had made a sufficient disclosure within the meaning of section 9, *and had substantially complied with the statute. It is not necessary to establish a* mens rea *for the purpose of the offence under the section, and if the article is in fact altered and is sold without a disclosure, an offence under the section is committed.*

This was a case stated by A. C. Plowden, Esq., police-court magistrate sitting at Clerkenwell.

On the 1st of November, 1895, a complaint was preferred by A. Bennett, the respondent, sanitary inspector to the Holborn District Board of Works, against Spiers & Pond, Limited, the appellants, under section 9 of the sale of Food and Drugs Act, 1875, charging them with having unlawfully sold milk from which the fat had been abstracted to the extent of 17 per cent. without disclosing to the purchaser such abstraction or alteration, contrary to the provisions of section 9 of the above Act.

The magistrate convicted the appellants. At the hearing of the complaint the following facts were proved.

The appellants were refreshment contractors carrying on business at Farringdon-street Station and other places. On the 25th of September, 1895, the respondent entered the said premises and purchased a glass of milk. The milk was poured out of a churn standing on the counter into a glass and handed to the respondent. The churn was so constructed that no milk would flow from the tap unless and until by pressing a knob at the top of the vessel a "dasher" descended to the bottom, the object of this arrangement being that the milk and cream therein should be kept properly mixed together. On the glass handed to the respondent were distinctly written the following words: "Not guaranteed as new or pure milk or with all its cream, see notice." On the counter was placed a framed notice in the following words: "Milk Notice. Spiers & Pond, Limited, purchase all milk sold by them under a warranty of its purity and genuine quality, and take all possible precautions to ensure its supply to their customers in proper condition, but they are unable to guarantee it as either new, pure, or with all its cream, and (to meet the requirements of the Sale of Food and Drugs Act) do not therefore sell it as such." The respondent saw the writing on the glass whilst in the act of dividing the milk for analysis, and the notice on the counter immediately afterwards. The milk on being submitted to analysis proved to be deficient in cream to the amount of 17 per cent.

It was proved that the only milk supplied to the appellants' said refreshment rooms was supplied to them by the London and Provincial Dairy Co.; that on the morning of the said 25th of September four quarts of milk were delivered in a can; that the appellants' assistant poured into the churn the contents of the can until the churn was full, the milk remaining in the can being sent down into the kitchen. The milk was supplied to the appellants

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

under a contract which contained the following warranty by the said dairy company: "We, the undersigned, hereby warrant that all milk that shall be supplied by us to you shall be new milk, in good condition, pure, and unadulterated, in the same state as when taken from the cow, without the addition of water or any other substance and without the abstraction of cream or any other constituent part of the milk." The magistrate held, as a matter of fact, that the milk supplied to the respondent had been delivered to the appellants under the said contract and that they had no reason to believe it was otherwise than of the nature, substance, and quality demanded; but he was of opinion that the notices were only in the nature of a refusal to guarantee the quality of the milk, and did not therefore constitute a sufficient disclosure of the alteration within the meaning of the section. He was also of opinion that the warranty was too general to bring it within the protection of section 25, and that even if it were sufficiently specific the appellants had nevertheles failed to show that they sold the milk to the respondent in the same state as they had purchased it, as required by section 25, and he accordingly convicted the appellants.

The Sale of Food and Drugs Act, 1875, provides as follows:—

9. "No person shall, with the intent that the same may be sold in its altered state, without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding twenty pounds."

25. "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor unless he shall have given due notice to him that he will rely on the above defence."

Sir E. Clarke, Q.C. (*Grain* and *Foa* with him), for the appellants.—The appellants do not come within section 9. There is no evidence of their having abstracted anything from the milk, and it is not even suggested that they had any knowledge of an alteration. In consequence of the case of *Dyke* v. *Gower*, [1892] 1 Q. B. 220, 40 W. R. Dig. 6, the appellants have now adopted the course they have here taken as regards the notices they display. It is quite clear that the first part of the section requires a criminal intention to be shown. The section cannot be read as two sections; therefore a *mens rea* must be shown in the second half, which must read as if it ran "with the aforementioned intention." Disclosure means stating that which one knows. One cannot therefore disclose that which one does not know. There can, further, be no offence under section 9 unless the article be sold without notice. But a notice was given here, and a reasonable disclosure made within the meaning of the section.

[Counsel was stopped by the court.]

Channell, Q.C. (*Courthorpe-Munroe*, and *J. R. Atkin* with him), for the respondent.—The prosecution being under the latter part of section 9, it is not necessary to show a *mens rea*. Section 9 is rightly interpreted in *Dyke* v. *Gower*. The appellants did not disclose an alteration here; all they said was that they did not guarantee the article. That is not what the Act requires. In order to protect himself the retailer must disclose what the alteration is. It is not necessary to declare the exact percentage of the alteration, but it is necessary to declare that the milk is altered.

Sir E. Clarke, Q.C.—As to what is sufficient notice and what is required, there have been decisions under sections 6 and 8: *Gage* v. *Elsey*, 31 W. R. 500, 10 Q. B D. 518; *Pope* v. *Tearle*, 22 W. R. 950, L. R. 9 C. P. 499.

Lord RUSSELL OF KILLOWEN, C.J.—I should be very reluctant to say anything which will have the effect of in any way interfering with the enforcement in all proper cases of a very salutary Act, but I cannot help thinking that in this case the zeal of the inspector outran his discretion, and that, looking at the whole of the circumstances of this case, as they were perhaps not fully known to him or realized by him when the prosecution was begun, he certainly might well have been advised to abandon it when the circumstances did fully transpire; because I do not think it is possible to doubt that Messrs. Spiers & Pond did all that any reasonable trader dealing with such an article as this, and selling it under the circumstances in which they did sell it, could reasonably be expected to do, to comply with the provisions of this Act. That, however, does not dispose of the question, because we have still to determine whether, although they did all that they could to comply with the provisions of the Act, they have in fact complied with the Act. In other words, whether in this case there was evidence upon which the magistrate was justified in arriving at the conclusion to convict them of the offence. No precise point is reserved for us, but, after stating the facts and contentions on each side, the learned magistrate reserved for the opinion of the court the question whether the appellants were legally or properly convicted of the offence. It therefore becomes necessary in order to make intelligible my view of the case that I should shortly recapitulate the facts.

Messrs. Spiers & Pond have a contract with a dairy company for the supply of pure milk, which contract contains a very precise warranty on the part of the vendor that the milk shall be delivered in its pure and natural condition and without abstraction of any of its valuable properties. Under that contract a small quantity was delivered at one of their establishments in a vessel. One of their employees took the vessel and poured out of it enough to fill a churn, and poured the rest into a jug which was taken down into the kitchen and applied for other purposes. Customers who come to be supplied with milk are served from this churn, which is so constructed that, before milk can be poured into a glass or cup for the customer, automatically by pressing a knob at the top of the vessel the dasher is put into operation, the effect of which is that that dasher moves up and down, and so in that way there is a mechanical contrivance by which the milk can be made to be delivered all of about the same quality.

The magistrate in this case has come to the conclusion that there was an abstraction from this milk of some of its cream. I confess on that point of the case we are left rather to grope about in the dark. But what I can gather from the statement of the learned counsel and on reference to the shorthand notes of the evidence before the magistrate is this—that it is supposed that the person who poured part of the milk in the first instance from the vessel into the churn, and the residue subsequently into a jug, so that the residue might be brought down into the kitchen, so poured it out that the effect was that

a larger proportion of the cream remained in the vessel and so was poured into the jug which went into the kitchen, than went into the churn for the purpose of supplying the customers. I confess that that seems to me to be a point of fact as to which I should, if I had had to decide the case as the magistrate did, have wanted fuller and more detailed evidence; because it is quite clear that if this milk was brought there fresh by the dairyman and was dealt with at once, no kind of manipulation would have affected the fatty proportions of the milk, and it could only be in the event of the milk having stood a long time that that could be accomplished.

I take it, in view of the statement referred to by the learned counsel for the respondents in this case, we must assume that it was admitted that in fact an abstraction had taken place, and that that abstraction amounted to an alteration of the milk within the meaning of the second part of section 9 of the Act. I do not feel called upon at all to express any opinion upon the cases which have been adverted to under the section; but I feel no doubt, that for the purpose of the offence under that section the *mens rea* is not necessary to be established, and I think that if the article which was in fact altered by abstraction was sold without disclosure, it would constitute an offence under the second part of that section. As to what constitutes an abstraction, I confess I feel very considerable difficulty in realizing that it is an abstraction within the meaning of that Act if, dealing with a commodity of this kind in the usual and ordinary way, and not omitting to observe any reasonable or customary method of equalizing the distribution of the fatty particles of the milk, it so happened that a portion of the milk sold in the evening contained a percentage less than that sold earlier, that that was an abstraction under the first or latter part of that section. However, that is not the point with which, as I have said, we have to deal.

I now come to the point which is, as I conceive, the real point in this case. Can it be said, because it is for the defendants on the information or complaint to establish that, and the onus is upon them, that they made adequate disclosure of the alteration within the meaning of the latter part of section 9. Now on the whole, not without some hesitation, because of the precision of the section itself, I have come to the conclusion that Messrs. Spiers & Pond made a disclosure of the alteration. It is conceded that they are not bound to disclose the precise character of the alteration. It is conceded that they are not bound to say: "This milk has had abstracted from it 10 per cent., 20 per cent., or 30 per cent. of the fatty particles," or they are not bound to say that this milk is so much below the normal standard—all that is conceded; but it is contended that they are bound to make a disclosure of the alteration. Now, what have they done, and does that or does not that amount to a disclosure of the alteration? In the first instance, on the vessel in which the customer gets the article which he demands these words are put, "Not guaranteed as new or pure milk, or with all its cream; see notice." I agree that that does not amount to much more than saying: Take notice, I am not guaranteeing this as new milk; I am not guaranteeing it as pure milk; and I am not guaranteeing it with all its cream. It is, however, saying: There may be an alteration in it; to what extent there is an alteration, or how caused, or if in fact there is an alteration, I cannot be quite certain; but if there is an alteration I am giving you notice to look out for it. The other notice seems to me to go further, although it is quite true, as the learned counsel for the respondent has said, that a part at least of this notice was probably framed with reference to another section of the Act. The notice says: "Messrs. Spiers & Pond (Limited) purchase all milk sold by them under a warranty of its purity and genuine quality, and take all possible precautions to ensure its supply to their customers in proper condition." There is no reason on the facts of this case to doubt that that is true and that they have done that. Then the notice says: "But they are unable to guarantee it as either new or pure, or with all its cream"—that seems to me to be significant—"and, to meet the requirements of the Food and Drugs Act, do not therefore sell it as such." Does not that in common sense mean: "We are dealing with an article as to the exact condition of which at the moment of the sale it is impossible to predicate what its exact condition is; but we give you notice that we deliver it to you as we get it, taking all precautions to ensure its supply to you in proper condition, and we do not sell it to you as milk which has not had subtracted from it some of its important properties." That may not be in express terms, or what the literal terms of the statute may seem to require, but I do think it would be a very slavish adherence to the letter and an utter disregard to the provisions of this statute if we were to say that under such circumstances a man who had acted in this way and who had given this notice was to be held to be liable to a penalty for doing the act complained of, as if he had made no disclosure and had given no notice. My hesitation which I have expressed proceeds solely from the words of the statute, and I do not think we are doing any violence to the operative object and spirit of the statute in holding in this case that it has been substantially complied with, and that therefore the magistrate was wrong in convicting.

My learned brother refers me to the section and to the expression which I have used as to the onus of proof resting upon the party complained of. That is by no means clear.

WILLS, J.—I am of the same opinion in every respect.

Conviction quashed.

Solicitors for the appellants, *H. J. & T. Child.*

Solicitors for the respondent, *M. H. Hale.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.)

April 28.

BURNETT *v.* BERRY. (*a*.)

Corporation—Bye-law—Validity of—Betting—Bye-law prohibiting betting in a street or public place—Municipal Corporations Act, 1882 (45 & 46 *Vict.* c. 50), *s.* 23.

A bye-law made by a borough council under section 23 *of the Municipal Corporations Act*, 1882, *was in the following terms: "Any person who shall frequent and use any street or other public place within the borough of Wolverhampton, either on behalf of himself or of any other person, for the purposes of bookmaking and betting or wagering, or agreeing to bet or wager, with any person shall be liable to a penalty not exceeding £5."*

Held, that the bye-law was not unreasonable; and that a person who frequented and used a street in said borough for the purpose of carrying on the business of betting was liable to be convicted under such bye-law, even though he did not in fact thereby create any obstruction or nuisance.

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Case stated by the stipendiary magistrate for the borough of Wolverhampton, under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33.

Under the powers conferred on them by the Municipal Corporations Act, 1882, s. 23, the Borough Council of Wolverhampton made the following bye-law: "Any person who shall frequent and use any street or other public place within the borough of Wolverhampton, either on behalf of himself or of any other person, for the purpose of bookmaking and betting or wagering, or agreeing to bet or wager, with any person shall be liable to a penalty not exceeding £5."

Two informations were filed against the respondent for unlawfully frequenting and using a certain street and a certain public place for the purpose of bookmaking and betting, contrary to the bye-law.

The magistrate dismissed both informations, upon the ground that the bye-law imposed a restriction, which was not consistent with the statute or common law, upon a legal calling, and upon the ground that the Corporation had no power to impose such a restriction, and that the bye-law was *ultra vires* and void. The magistrates found as a fact that the respondent did not cause any obstruction or nuisance.

Bosanquet, Q.C. (*C. W. Mathews* with him), for the appellant, was stopped by the Lord Chief Justice, who said that the court had recently decided in favour of a similar bye-law.

H. E. Richards (*Jelf, Q.C.*, with him), for the respondent.—If the bye-law adjudicated upon were identical with the one in question, it would be useless to proceed with the argument. [Lord RUSSELL OF KILLOWEN, C.J.—The words were: "If any person or persons shall assemble with any other person or persons," &c.] That case could be distinguished, because an assembly of persons was likely to cause an obstruction; but mere walking in the streets would not cause an obstruction. Betting is not illegal—not even the business of betting. In *Thwaites* v. *Coulthwaite*, *ante*, p. 295, [1896] 1 Ch. 496, Chitty, J., made an order for an account in a bookmaking partnership on the ground that it was a business that might be conducted in a legal manner. In *Partridge* v. *Mallandaine*, 35 W. R. 276, 18 Q. B. D. 276, a betting business was assessed for income tax. In *Strickland* v. *Hayes*, *ante*, p. 398, [1896] 1 Q. B. 290, Lindley, L.J., held that under the Municipal Corporations Act the local authority had no power to create new offences by means of bye-laws. The bye-law was not necessary for the good rule and government of the borough, and was therefore not valid: *Macdonald* v. *Lochrane*, 51 J. P. 629.

Lord RUSSELL OF KILLOWEN, C.J.—In my judgment the magistrate was wrong. Authorities dealing with other bye-laws have very little weight or use in assisting the court to adjudicate upon a particular bye-law. I will make this observation upon *Strickland* v. *Hayes:* when Lindley, L.J., is reported to have said in that case that a bye-law could not create a new offence, he cannot have meant that the scope of bye-laws should be restricted to acts which were already offences against the criminal law, because that would be to restrict bye-laws to merely providing some form of summary machinery for the punishment of offences which already existed.

This bye-law purports to be made under section 23 of the Municipal Corporations Act, 1882, which provides that the local authority shall have power to make bye-laws "for the good rule and government of the borough, and for the suppression of nuisances." The learned counsel says that there must be some limitation to that power. It must be limited to bye-laws useful for the good rule and government of the borough. What, then, was the object of this bye-law? And was it necessary or useful for the good rule and government of the borough? One cannot for a moment doubt that it was not intended to apply to casual betting in the streets, but it was intended to prevent men who made betting their business, from using the streets for that purpose to the likely annoyance of passers-by. It would be impossible under this bye-law, as it was suggested by counsel, to convict a person who, while walking in a street for other purposes, happened to make a bet with another person.

WRIGHT, J., concurred.

Solicitors for the appellant, *Sharpe, Parker, & Co.*, for *Horatio Brevitt*, Wolverhampton.

Solicitors for the respondent, *Willcock & Taylor*, Wolverhampton.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith, L.J.) — May 19.

PEEBLES v. OSWALDTWISTLE URBAN DISTRICT COUNCIL. (*a*.)

Practice—Parties—Death of plaintiff—Survival of cause of action—Action of mandamus—*Statutory duty—Right of executors to continue action—R. S. C.*, 1883, *ord.* 17, *rr.* 1, 4.

An action was brought by the owner of a mill against a local authority for a mandamus *commanding the defendants to make proper sewers in accordance with section* 15 *of the Public Health Act*, 1875, *and to give facilities for carrying the plaintiff's liquid refuse into the sewers under their control in accordance with section* 7 *of the Rivers Pollution Prevention Act*, 1876. *The plaintiff having died while the action was pending,*

Held, that the cause of action survived, and that the executors of the plaintiff were entitled to an order allowing them to continue the action.

Appeal from an order of Kennedy, J., allowing the executors of the deceased plaintiff to continue the action.

The plaintiff, who was the owner of certain mills within the district of the defendants, brought the action for a *mandamus* commanding the defendants to cause to be made such sewers as might be necessary for effectually draining their district for the purposes of the Public Health Act, 1875, and to give facilities for enabling the plaintiff to carry the liquids proceeding from his factories or manufacturing processes into the sewers under their control.

By section 15 of the Public Health Act, 1875, "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

By section 7 of the Rivers Pollution Prevention Act, 1876, "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers."

The plaintiff having died after the commencement

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

of the action, his executors applied under ord. 17, r. 4, for an order that they should be substituted for the original plaintiff, and that the proceedings should be carried on between them and the defendants. The plaintiff had by his will devised his mills to his executors, and directed them to carry on his business.

Kennedy, J., granted the application.

The defendants appealed.

C. C. Scott (*Danckwerts* with him), for the defendants.—There was no jurisdiction to make this order. Ord. 17, r. 1, says that a cause or matter shall not become abated by reason of the death of any of the parties, if the cause of action survive or continue, But this is not a case of a surviving cause of action, and the rule *actio personalis moritur cum persona* applies. That of which the plaintiff complained is not a breach of contract, but is an alleged wrongful act, and there is nothing to bring the case within the exception to the general rule which was laid down in *Phillips* v. *Homfray*, 32 W. R. 6, 24 Ch. D. 439.

C. A. Russell (*Bigham, Q.C.*, with him), for the executors of the deceased plaintiff.—In a note to the case of *Wheatley* v. *Lane*, 1 Wms. Saunders, 216a, it is said that the rule *actio personalis moritur cum persona* "was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed; for there the action survived." Here the action has been brought not to recover damages, but to enforce the performance of a duty. The learned judge rightly thought that this action ought not to be treated as a mere action of tort. In *Jones* v. *Simes*, 43 Ch. D. 607, 38 W. R. Dig. 158, an action for a mandatory injunction and damages for obstruction of light was held to survive on the death of the plaintiff.

Lord ESHER, M.R.—The plaintiff brought this action to enforce a statutory duty which he alleged to be on the defendants. We need not now decide whether such duty existed. The plaintiff then died. The question is whether the duty died with him. If the duty existed, it was a duty which they owed to him in respect of property belonging to him. It seems to me that it is right for us to say that, if they owed him this duty, his property is just as much in want of the performance of the duty as it was before his death, and that therefore his executors are entitled to enforce the performance of it against the defendants just as the plaintiff himself could have done. I think that the order of the learned judge cannot be interfered with.

A. L. SMITH, L.J.—I am of the same opinion. The plaintiff alleged a duty on the part of the defendants under the Public Health Act and Rivers Pollution Prevention Act, and he brought an action of *mandamus*. While the action was pending he died. Can his executors be made parties to the action under order 17? The question is: Does this cause of action survive? In the note in Wms. Saunders, to which we have been referred, it is said that it was a principle of the common law that if an injury were done either to the person or property of another for which damages only could be recovered, the rule *actio personalis moritur cum persona* applied. But in the same note it is said that this rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed. It is argued that this cause of action does not survive, because the duty to be performed here is a statutory duty, not a duty arising from contract. I think, however, that Kennedy, J., was right. The decision in *Jones* v. *Simes* seems to me to be applicable to this case.

Appeal dismissed.

Solicitors for the executors, *Soames, Edwards, & Jones*, for *Boote & Edgar*, Manchester.

Solicitors for the defendants, *Pritchard, Englefield, & Co.*, for *Charles Costeker*, Darwen.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) May 4.

Re THE LANDS SECURITIES CO. (LIMITED). (*a*.)

Company—Winding up—Scheme of arrangement—Construction of scheme—Discount, Meaning of.

Expressions in a document addressed to commercial men should be construed in the sense in which ordinary men of business would understand them. Accordingly the words "discount at the rate of 4 per cent." in a scheme of arrangement and compromise with creditors were held to mean discount in the popular sense—viz., a rebate of interest on the amounts.

Appeal from Vaughan Williams, J.

The facts will be found fully set out in the judgment of Lindley, L.J., and it is only necessary to state here that under a scheme of arrangement or compromise with creditors sanctioned by the court, it was provided that, in addition to the calls already made by the liquidator in the winding up, the remainder of the uncalled capital should be called up by instalments spreading over four years, and an option was given to every shareholder to pay up calls in advance at a discount of 4 per cent.

A question was raised by a shareholder (Mr. Farquhar) as to whether the word "discount" meant discount at the rate of 4 per cent. per annum on the total amount of each instalment as it became due, or true discount—viz., such sum as would at 4 per cent. produce the amount of the instalments of the call when they became due.

Vaughan Williams, J., held that it meant true discount, and not discount in the popular sense.

The shareholder appealed from this decision.

Younger, for the appellant. — The word "discount" must be understood to have the meaning it would have under ordinary circumstances. The rate of 4 per cent. is so high that the present value cannot be meant.

He referred to the Century Dictionary; the Succession Duty Act, 1853, s. 4; the Bankruptcy Act, 1883, rule 21, schedule 2; and 7 Geo. 1, c. 1, s. 31.

Kirby, contra.—The definitions of true discount, as opposed to bankers' discount or rebate of interest, can be found in ordinary text-books like Colenso's Arithmetic. If discount be not taken in the sense of true discount, persons paying in advance will be unduly benefited.

He also referred to the definition of discount in Wharton's Law Dictionary, 3rd ed. [*Younger* pointed out that the words relied on were omitted in the latest edition.]

Younger was not called on to reply.

LINDLEY, L.J.—The point before us is a very simple one, but, like many other simple points, it is not so easy of solution as it is easy of statement. We have to consider a clause in a scheme of arrange-

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

ment between the debenture-holders and the creditors of the Land Securities Co. It appears that the Land Securities Co. was in such a state of indebtedness that very heavy calls had to be made, and a scheme of arrangement was come to, the important portions of which I will read. Clause 1 is that in addition to the call of £1 per share already made, a call be made on the remainder of the uncalled capital of £25 per share. That, of course, is a heavy call. Clause 2 says that the call of £25 per share may be paid by instalments of £2 per share payable at intervals of three months. That runs over a very considerable period—from the 2nd of August, 1894, to the 30th of September, 1898. It would take four years to pay that call of £25 per share by quarterly instalments of £2 per share. Then comes clause 3, on which everything turns—that an option be given to every shareholder to pay up the total calls or any portion thereof in the order of due date, under discount at the rate of 4 per cent. per annum, the instalments being taken as payable at the above dates."

Now, a controversy has arisen as to what is meant by the expression "under discount at the rate of 4 per cent. per annum." The liquidator says that it means this: "If any shareholder desires to prepay his call, he must pay me such a sum as, at interest at 4 per cent., will amount to the total amount of the call which he will have to pay of £25 per share." In other words, he says: "I must calculate the present values of these instalments." He has done so; and the result is that a very considerable sum has become payable from Mr. Farquhar, the appellant, who had the misfortune to hold 3,500 shares; £25 per share comes to £87,500, and the present value of that, calculated as I have suggested, amounts to £80,790, and that sum the appellant has paid. Now the appellant says, "I have overpaid you £650; this clause 3 does not mean that I am to pay you such a sum as, if invested at 4 per cent., would produce the total amount of £87,500, but I am to be allowed a rebate of 4 per cent. upon the payments I should have made; and that sum, if you add it up, is £652 12s. less than the sum I have paid to the liquidator."

Now, it appears that this expression "under discount at the rate of 4 per cent." is open to some little ambiguity. It may mean either one thing or the other; and the question is, What would any ordinary business man understand by this scheme? I apprehend that whatever would be the meaning put upon this expression by ordinary business people is the meaning to be put upon it. Now, it strikes me, I confess, that any ordinary business man—any person accustomed to deal with companies or anything of that kind — would understand the expression "under discount at 4 per cent." in the ordinary commercial sense; that is to say, "I shall pay you the amount less 4 per cent. interest," and his mind would not run on the present value. On the other hand, I agree that an actuary of an insurance company would adopt the calculation which the liquidator has adopted here; but when you look at the form of this clause 3, and the rate of 4 per cent., and when you bear in mind that 4 per cent. cannot easily be made, at all events by investment, it strikes me that a person reading this would be led off the consideration of the present value, and would be led on to the ordinary business meaning of the phrase. Vaughan Williams, J., seems to admit that; but then he says he thinks that mode of calculation would produce an unfair inequality between those who can pay and avail themselves of this option, and those who cannot. But it is obvious that this option was held out to the shareholders as an inducement to them to pay earlier. The liquidator's position is this. He had debentures bearing interest, on an average, at 4 per cent., and I do not doubt that it would be better for the debenture-holders that this discount should be calculated on the present value theory rather than on the rebate theory. But we must come back to the question, What would an ordinary person understand by these words? I cannot think that the supposed inequality is a sufficient justification for departing from the meaning which anybody would put upon them. I must say I think that the rebate principle is the correct one. I think anybody reading this document, and coming to this arrangement upon these terms, would so understand it; and I think that is the true construction of the document and the one which we ought to abide by. I think, therefore, that Vaughan Williams, J., was wrong in this matter, and that his first impression was the right one.

LOPES, L.J.—I am of the same opinion. The question is, What is the meaning in clause 3 of the words "under discount at the rate of 4 per cent. per annum"? The liquidator says it is to be calculated on the present value. On the other hand, it is said by Mr. Farquhar, who is, no doubt, very much interested in the matter, that it must be taken on the commercial value.

Now, what would really be the understanding of ordinary persons in business who came into contact with this clause 3? In my judgment there is not one in a hundred who would come to any other conclusion than that it really meant a rebate of 4 per cent. for early payment. Of course, the early payment was the inducement held out, and the shareholders would understand by this that if they made this early payment they would have a rebate of 4 per cent. per annum. As was observed during the argument, if it was intended to be calculated on the present value, 4 per cent. could not be the rate of the present value, and there would be an inconsistency in the very terms of the clause. I am strongly of opinion that the proper mode of construing these words is to attribute to them the meaning of a rebate at the rate of 4 per cent., and I am unable therefore to agree with the conclusion at which Vaughan Williams, J., has arrived.

KAY, L.J.—This document embodying the scheme, which it seems the court approved, is essentially a commercial document, and the question is, What, in a commercial document of this kind, is the meaning of "under discount at the rate of 4 per cent. per annum"? The scheme provides for the payment of £25 per share by instalments which are to be paid every three months, and to extend over four years altogether. Then it provides that any shareholder may, if he likes, pay the amount due on his shares in advance, "under discount at the rate of 4 per cent. per annum."

Now, what is the ordinary commercial meaning of these words? I entirely agree that in a document of this kind the meaning of these words is that, and that only, which an ordinary commercial man, reading this document, would be likely to attribute to them. I confess I come to the conclusion, without a doubt, that the ordinary commercial meaning of these words is this: "If you pay me that which is due from you in advance, you shall have a rebate at the rate of 4 per cent. per annum for the payment in advance." The learned judge says at the commencement of his judgment: "I am bound to come to the conclusion that discount is an equivocal word." [His lordship read an extract from the judgment, and continued:—] I really cannot follow that. I cannot understand on what possible ground there

should be any bias in favour of the creditors and against the shareholders. The question is, What is the meaning of the document? Why are we, if there be a case of ambiguity, to lean in favour of one side more than the other? I adopt entirely that which the learned judge says, that the *primâ facie* meaning of these words is a rebate such as I have described. This is a document addressed to commercial men, and that is the commercial meaning; and that which the persons to whom it is addressed would *primâ facie* understand to be the meaning of those words is, unless there is something to alter it in the context, the meaning the court ought to attribute to them.

So far, therefore, I venture to agree with the judgment of the learned judge; but then he goes on and gives his reason. If I understand the language which he used, both during the argument and in the judgment, the reason which is the convincing reason with the learned judge is that what was intended obviously was that each shareholder should pay the present value of his call, and that if you make him pay anything else you create an inequality between the shareholders who can pay in advance and those who cannot pay in advance. I understand that, and I should see the force of it if this document did provide for the present value on either construction. But it does not. It provides for the payment in advance "under discount at the rate of 4 per cent. per annum." This was in the year 1894, and 4 per cent. was not the value of money at that time. Therefore it did not contemplate paying the present value at that time of the calls which the shareholders had to pay; and there goes at once, the main reason upon which this judgment of the learned judge seems to be founded. I therefore, with great deference, dissent entirely. I do not think this is a case in which the construction ought to have any bias either in favour of the creditors or in favour of the shareholders. The question is, What is the real meaning of these words addressed to commercial men? I think the real meaning is that which I have indicated, a rebate of interest; and I think the other reason which the learned judge gives, when it is examined, does not exist at all, and an attempt to support the judgment on that ground would be, in my humble judgment, an utter fallacy. I think therefore, with great deference, that this decision must be reversed, and the appeal be allowed.

Appeal allowed.

Solicitors, *Rose & Johnson; Ashurst, Morris, Crisp, & Co.*

From Q. B. Div. (Lindley, Kay, and A. L. Smith, L.JJ.) March 23.

THE COMMITTEE OF LONDON CLEARING BANKERS *v.* THE COMMISSIONERS OF INLAND REVENUE. (*a*.)

Inland revenue—Commissioners of Customs—Transfer order to by merchant—Whether or not a bill of exchange—Sole purpose of remitting money—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 32, *and schedule* "*Bill of Exchange*," *exemption* (10).

The goods of A., a merchant, being subject to the payment of customs duty, A. gave to the revenue officer a document addressed to the cashier of the Bank of England, drawn and signed by B. & Co., his bankers, which was in the following terms: "Transfer from our account to the account of the Commissioners of Customs £225 16s. 7d." (the amount payable in respect of the duty payable in respect of A.'s goods). On the receipt of such document the revenue officer cleared the goods.

Held, that such document was a bill of exchange payable on demand within the meaning of the Stamp Act, 1891, s. 32, and that it did not fall within the exemption (10) *as being drawn for the sole purpose of remitting money to be placed to an account of public revenue.*

This was an appeal by the Committee of London Clearing Bankers against the decision of a divisional court, and raised the question whether certain transfer orders were bills of exchange within the meaning of the Stamp Act, 1891, s. 32, and, if so, whether they were liable to the payment of stamp duty either at the fixed rate of one penny or *ad valorem*. On the 25th of October, 1894, two instruments were presented on behalf of the Committee of London Clearing Bankers to the Commissioners for their opinion as to the duty with which they were chargeable. The following is a copy of one of such instruments:—

"046,713. "Public Revenue.

"London, Aug. 31, 1894.

"To the Cashiers of the Bank of England.

"Transfer from our account to the account of the Commissioners of Customs,

"Two hundred and twenty-five pounds sixteen shillings and sevenpence. (£225 16s. 7d.)

"On account of Barclay, Bevan, Tritton, Ransom, Bouverie, & Co. W. B. PEARMAN."

This instrument bore upon it two impressions of the words "duty paid" from a rubber stamp, being the official mark of an officer of Customs.

The other instrument was in the same form, but it was for a different amount, was not stamped "duty paid," and was crossed "Bank of England."

When the instruments were presented for adjudication the commissioners were informed by Messrs. Murray, Hutchins, Stirling, & Co., with respect to the first instrument, that it was a transfer order of Messrs. Barclay, Bevan, Tritton, Ransom, Bouverie, & Co. from their account with the Bank of England, to the account of the Commissioners of Customs with the Bank of England, and that this order was handed by Messrs. Barclay & Co. to a customer in exchange for his cheque on them for the amount of customs duty on goods requiring to be cleared at the Custom House, and was handed by the customer to the Commissioners of Customs, by whom it was delivered to the Bank of England; and, with respect to the second instrument, that it was a similar transfer order, which was delivered by Messrs. Barclay & Co. to an officer of Customs in exchange for their customer's cheque on them for the amount of customs duty on other goods requiring to be cleared, and that this order was delivered by the Commissioners of Customs to the Bank of England. On the 9th of August, 1894, the commissioners of Inland Revenue issued a circular to bankers, of which the following is a copy:—

"The attention of the Board of Inland Revenue has been drawn to the fact that certain bankers, when passing money to the account of that revenue by draft of transfer from an account at the Bank of England or by ordinary draft, omit to stamp the draft. The Board conceive that the omission arises from a misapprehension of the terms and effect of exemption 10, under the head 'Bill of Exchange,' in the schedule to the Stamp Act, 1891, and desire to point out that that exemption is confined to the remittance of money which is money standing to a revenue account prior to remittance, and that they will not accept any such draft as above referred to when unstamped."

(*a*.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

The commissioners expressed their opinion that each of the instruments was a bill of exchange payable on demand within the meaning of the Stamp Act, 1891, and was liable to be stamped with the duty of one penny.

The Committee of London Clearing Bankers declared themselves dissatisfied with the determination of the commissioners, on the grounds, first, that the instruments are not bills of exchange within the meaning of the Stamp Act, 1891; and, secondly, that, if they are, they fall within exemption No. 10, under the head "Bill of Exchange," in the first schedule to that Act, in favour of "bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue," and they required the commissioners to state a case for the opinion of the court, which was accordingly done.

By section 32 of the Stamp Act, 1891: "For the purposes of this Act the expression 'bill of exchange' includes draft, order, cheque, and letter of credit, and any document or writing (except a banknote) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression 'bill of exchange payable on demand' includes (*a*) an order for the payment of any sum of money by a bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or not be performed or happen; and (*b*) an order for the payment of any sums of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf."

By the schedule to the said Act, under the heading "Bill of Exchange payable on demand or at sight or on presentation" a fixed duty of one penny is imposed; and under the heading "Bill of Exchange of any other kind whatsoever (except a banknote) and promissory note of any kind whatsoever (except a banknote), drawn or expressed to be payable, or actually paid, or endorsed, or in any manner actually negotiated in the United Kingdom" certain *ad valorem* duties are imposed. There then follow certain exemptions, of which the tenth is in the following terms:—

"(10) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue."

The Divisional Court held that the documents in question were bills of exchange payable on demand, and that they did not fall within exemption 10.

The committee appealed.

Cohen, Q.C., and *Tindal Atkinson*, for the committee.—It must be shown by clear and unambiguous language that these transfer orders are subject to duty: *Oriental Bank Corporation* v. *Wright*, 5 App. Cas., at p. 856, 29 W. R. Dig. 35; *Partington* v. *Attorney-General*, L. R. 4 E. & I. App., at p. 122 17 W. R. H. L. Dig. 1. These orders are not bills of exchange within the meaning of the Stamp Act, 1891. A transfer from one account to another is not a payment of money: *Buck* v. *Robson*, 26 W. R. 804, 3 Q. B. D. 686. The words "entitling or purporting to entitle" any person to payment in section 32 solely refer to documents which will be honoured—that is to say, as to which there is an undertaking to honour them. Here there is no warranty that these orders will be honoured at all. If it should be held that these documents are bills of exchange payable on demand, then we say that they fall within exemption (10) contained in the schedule to the Act. The money in question is clearly intended to be and is in fact remitted to the account of public revenue.

Sir R. E. Webster, A.G., and *Danckwerts*, for the Commissioners of Inland Revenue.—On the question whether these documents are bills of exchange within the meaning of the Stamp Act, 1891, we submit that section 32 is merely an interpretation clause. Section 1 is the charging section; section 32 merely describes two classes of documents. The words are wider than they are in section 3 of the Bills of Exchange Act, 1882, defining what, for the purposes of that Act, are bills of exchange. Sub-section (*a*) of section 32 was intended to meet cases like *Buck* v. *Robson*. Looking to the object of this statute, it is idle to contend that these documents are not cheques: *Thorne* v. *Smith*, 10 C. B. 659; *British Linen Co.* v. *Caledonian Insurance Co.*, 9 W. R. 581, 4 Macq. H. of L. 107, at p. 113. On the second point, as the real purpose for which the document is drawn is to clear the goods, how can it be said that it is drawn for the sole purpose of remitting money. The exemption refers to the remittance of money by a revenue officer to headquarters, it does not apply at all until the money is in the control of an officer on behalf of the Crown.

Cohen, Q.C., replied.

LINDLEY, L.J.—I do not think we should gain anything by taking further time to look into the case. We have had it drawn to our attention, and are prepared, I think, to deal with it. I must say that after some little fluctuation of opinion I have come to the conclusion that the decision of the court below is right. One approaches it in this way. We are dealing with a stamp Act which says that bills of exchange are to be stamped. It divides bills of exchange into two classes, bills of exchange which are to be stamped with a penny stamp, and bills of exchange which are to be stamped with *ad valorem* stamps. The first are in the Act called bills of exchange payable on demand, and the second are called other bills of exchange.

Now, in order to apply that to practice, one must know what is meant, within the meaning of this Act, by the expression "bills of exchange"; one must know further what particular classes of documents which fall within that expression are to be stamped with a penny—*i.e.*, are to be deemed payable on demand. That is the problem to be solved.

Now, in order to solve it you must look to section 32, which is the interpretation section, and it is divided into three sub-clauses. The first is a general one applicable as I understand it to the first question, What is a bill of exchange for the purposes of the Act? Then the second and third of the sub-clauses answer the other question, What is included in the term a bill of exchange payable on demand?

Now the first part of section 32 says: [His lordship read it down to the words "any sum of money."] Now stop there. It is obvious when you come to look at these words with a little attention that the words include documents which would not be called bills of exchange either at common law or under the Bills of Exchange Act, 1882. That answers the first question. All the documents mentioned are to be stamped. Now, the schedule to the Act shows a little more information is wanted. It is necessary to know what is to have the penny stamp and what is not. Therefore section 32 says "the expression 'bill of ex-

change payable on demand' (which I will convert into this—documents to bear a penny stamp—for that is what it means) includes" certain other things. Then there are directions for the penny stamp as distinguished from the *ad valorem* duties. I need not read clauses (*a*) and (*b*).

Now we have got to apply that construction, which I do not doubt is the true construction of this Act of Parliament, to the documents which are before us in this case. I will read the documents from the statement of the case. There are two documents, and the necessity for their use and the mode of using them has been explained. I will state it shortly as I understand it. A merchant has got some goods on which customs duties are payable. Well, it is against the rules for the Custom House officials to take cheques, and of course merchants do not carry cash in their pockets; so what they do is this (there are two ways of doing it). The merchant gives to the Custom House officer a cheque, and asks him to take it to the banker and get for it the transfer order No. 2, which I will read presently. The Custom House officer having got that document is in a position to release the goods. He treats that—and he is authorized to treat that document, although he is not authorized to so treat the cheque—as payment, and in that way no cash actually passes up to that point. The other way of doing it is this. The merchant takes his own cheque to his bankers, and asks them not to give him cash for the cheque but to give him transfer order No. 1. Having got that, the merchant goes to the Custom House officer and gets it stamped "duty paid." Then he gets his goods.

Now let us look at the documents, I do not think it is necessary to dwell upon the two different forms. The form is this: [His lordship read the transfer orders.] Now, what does that mean? It means this: Barclay, Bevan, & Co., say, "You, the Bank of England, have got in your books an account to the credit of us, Barclay, Bevan, that is to say you are our debtors; you have other customers (the Custom House Commissioners), and we ask you to transfer from our account to the account of the Commissioners £225."

Then they send that document, which within the terms of section 32 entitles a person (the Custom House Commissioners) to payment, or purports to entitle them to payment, or to draw upon the Bank of England for that sum of money. Whichever way you look at it, it strikes me that it is a document which falls within the description "Bill of exchange" within the Stamp Act; therefore, if I am right so far, it is taxable under the Act. I have not got so far yet as to say whether it is to be a penny or an *ad valorem* stamp. Now comes the next question—With what stamp is it to be stamped? If it is a bill of exchange at all, there can be no doubt that it is a bill payable on demand and is to be stamped with a penny, and not with an *ad valorem* stamp. So far I think it is tolerably plain, notwithstanding the very ingenious arguments which have been addressed to us, and the case of *Buck* v. *Robson*, which related to an equitable assignment.

Now we come to the next point, in which at first sight I confess that I thought—before I understood it—that there was more in it than I do now, namely, as to the exemptions. The exemptions in the schedule to the Act contain this: [His lordship read exemption 10.] Well, now, the word "sole," I confess, puts a difficulty in Mr. Cohen's way which I do not see an answer to now that I understand it, and I ask myself this—not as a lawyer, but as a business man, a person simply using business language—What is this thing drawn for? What is the real purpose with which it is drawn? Never mind the purposes to which it may be directed. The real purpose is to get the release of the goods upon which duty is payable. I cannot shut my eyes to that. The method of doing it is by obtaining a remission of money from one account to another; but when we are asked to say that this is a bill drawn "for the sole purpose of remitting" (even if it is remitting at all within the meaning of the Act) I cannot say that it is. It is not in point of fact (so far as I can understand it) "for the sole purpose" either in the first case or in the second. In the first case it is quite obviously not so, because it is the merchant who takes his own cheque and gets this document. What for? To enable him to get the goods. In the second case (which is more like the sole purpose) what does the Custom House officer take it for? He takes it as an authority to him to release the goods. He might take a cheque, no doubt, but he would get into a scrape if he did. He might take a cheque and get it cashed, but he does not want to do that. He wants to get an authority to release the goods, and that is what it is for. The bill in both cases is drawn for the purpose of obtaining the release of the goods; therefore I do not think that I can say that this is drawn for the sole purpose of remitting the money. Well, that settles that question.

There is another ground which the Attorney-General has pointed out for arriving at the same conclusion—that is, that if you look into the history of this exemption clause the real object of it is to allow an exemption from stamp duty when money has been collected by somebody whose duty it is to remit it to headquarters. I do not doubt that is the real truth of it, but, whichever way you look at it—whether you lay stress on the word "sole" (which to my mind makes it plain) or whether you lay stress on the word "remitting"—the conclusion is the same, and the appeal must be dismissed with costs.

KAY, L.J.—I am of the same opinion, and I will add my reasons very shortly. Mr. Cohen's very ingenious argument, first of all, was that section 32 has two branches—one which applies to a bill of exchange not payable on demand, and the other to bills of exchange payable on demand—and that the first part does not apply to a bill of exchange payable on demand at all. I confess I am not at all able to agree with that argument. The first part seems to me to be a definition for the purposes of the Act of bills of exchange quite generally, including both bills of exchange payable on demand and bills of exchange which are not payable on demand. Any one of the things in the first branch of that section includes bills of exchange payable on demand and bills of exchange not payable on demand. Then the second branch explains the words "on demand" to include certain cases as to which it might have been doubted, but for these words, whether they would come within the definition of "payable on demand." That, I think, is the function of the second part of the section; and unless that were so we should have this very odd result, that there is no definition in the Act at all of "bills of exchange payable on demand."

Well, then, in this case I quite agree that Mr. Cohen was right to lay principal stress upon the second of the two documents which are in contest before us now. The first of the two documents was obtained in this way. A merchant owes customs duty on goods which are in the hands of the Customs. He cannot get them freed without payment of duty. He goes to his bankers, draws a cheque for the amount, and gets from the bankers an order to transfer. He knows he cannot by merely handing a cheque to the Custom House people obtain a release of the goods, they are not entitled to take a cheque;

but if he gets this order to transfer the amount of the duty from his account to the account of the Commissioners of Customs, then, when he puts that into the hands of the Custom House officer, he can get the release of his goods. That is the first step. The merchant goes himself to the bank, gets the transfer order, hands it to the Custom House officer, and thereupon obtains the release of the goods. The Custom House officer for his own purpose then hands that to the bank, and gets a transfer of the money from the account of the merchant to the account of the Commissioners.

The second case at first sight looks a little more favourable to Mr. Cohen's argument. The second case is where the merchant draws a cheque and takes the cheque to the Custom House officer; then the Custom House officer cannot release the goods on getting the cheque, but the Custom House officer takes the cheque to the bank and obtains a transfer order himself; and when he gets the transfer order, and not before, he treats himself as having been paid the duty, and then he gives the release of the goods. Those are the two transactions, and when they are examined, really, it seems to me, one of them is not the least more favourable to Mr. Cohen's contention than the other.

Now, looking at section 32, does this document, the transfer order, come within the words of it or not? The words include, amongst other things, "any document or writing, except a banknote, entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money." Now, why does not this entitle the Custom House officer who gets the transfer order to payment of the money therein mentioned? I think it does. If it does not, it certainly comes within the other branch, because the moment the transfer is effected the commissioners would have the right to draw upon their account increased by the amount of that transfer, and therefore it would entitle them to draw. Now, observe the words are only a document "entitling or purporting to entitle any person to draw." It may be (one can imagine such a case) that they never could draw by reason of their account being overdrawn for a larger amount before they got the transfer order; but that makes no difference whatever—the document would still be a document entitling them to draw if, according to the arrangement with their own particular bankers on their own account, they were able to draw. Therefore I have no doubt whatever that it comes within one or other branch of that part of section 32, and I, speaking for myself, should be rather inclined to say that it was a document entitling the Commissioners of Customs to payment rather than entitling them to draw, because drawing is an incidental thing which follows not immediately upon this document, but upon the transfer obtained under the document. Supposing this document were given and the goods released, and then the transfer were to take place, would not that be payment? The document entitles the commissioners to that process, and if the transfer took place it would support a plea of payment if an action were brought. Therefore it seems to me clearly to be a document entitling the commissioners to payment. Well, then, certainly it entitles them to payment on demand, and the Crown does not claim more than a penny stamp upon it as a bill of exchange payable on demand.

Then, the only remaining question is, Does this or does it not come within the exemption? I will not repeat what has been said. I quite agree that the word "remitted," if it stood alone, might be ambiguous, because in ordinary business transactions it is used in a very vague way and in a very large sense. A man sends his bill in with a note saying he will be obliged by a remittance. That is common enough, and there the word is used undoubtedly as an equivalent "for payment." But does it mean here payment to anybody of a debt? Well, I think it does not. The words are evidently limited. It is not "for the purpose of remitting money," but it is "for the sole purpose of remitting money." Now, in either of the two cases which I have thus mentioned very briefly could the transfer order which amounts to payment, and is received as payment, be said to be "for the sole purpose of remitting money" to an account of the public revenue? It seems to me impossible. I think the second case is the stronger of the two where the officer of Customs receives the cheque himself, takes the cheque to the bank, and instead of cashing it gets from the bank the transfer order, and by means of that transfer order obtains the transfer from the account of the merchant to the account of the Commissioners of Inland Revenue. Is that for the sole purpose of remitting? Until he gets the transfer order, as I have pointed out (and it is clearly admitted), he cannot release the goods. He cannot treat the cheque as payment. He might possibly obtain cash on the cheque, and then release the goods; but he does not do that. He gets the transfer order, and upon obtaining the transfer order he releases the goods; therefore the primary function and object and purpose of the transfer order, even in that second case, is to pay the customs duties and obtain release of the goods. It is a secondary purpuse that it also enables the officer to pay the money in, or to obtain payment of the money into, the account of the Commissioners of Inland Revenue. The truth is that it is one transaction by which two objects are carried out. If the money had been actually paid in cash into the hands of the officer, and he had thereupon released the goods, his duty would have been then, using the word "remit" in its strictest meaning, to have remitted the money to the bank account of the Commissioners of Customs. Instead of going through the two operations, they are combined in one, and by virtue of the order for transfer the payment is effected, and also subsequently, or at the same time, the cash is passed to the account of the Commissioners of Customs. Therefore it seems to me that that is a bill of exchange within the meaning of the Act, but it is quite impossible to say that it is a bill drawn "for the sole purpose of remitting money to be placed to any account of public revenue."

For these reasons I think the learned judges in the court below were quite right in the decision they arrived at, and that this appeal must be dismissed.

SMITH, L.J.—I agree. Lindley, L.J., has so entirely expressed my views on this case that I shall, if he will allow me, adopt them as my own. I have nothing to add, except that the appeal must be dismissed, and with costs.

Solicitors, *Murray, Hutchings, Sterling, & Murray; The Solicitor for the Inland Revenue.*

High Court of Justice.

Chan. Div. }
North, J. } Feb. 4.

Ex parte THE VICAR OF CHRIST CHURCH, EAST GREENWICH.
Ex parte THE LONDON COUNTY COUNCIL. (*a.*)

*Church Building Acts—Mortgage by vicar—Land taken compulsorily—Money in court—Payment out—*3 & 4 *Vict. c.* 60, *s.* 19.

Section 19 *of* 3 & 4 *Vict. c.* 60 *does not limit the application of surplus land originally given for a church site and not required, or of the money representing such land, to purposes from which the incumbents in succession shall have the benefit or derive income, but the Ecclesiastical Commissioners may apply such land or money to purposes from which the successive incumbents would not derive benefit or income.*

Held, therefore, that the court would order payment out of a fund, representing such surplus land, to be applied in paying off a mortgage made by the vicar in order to provide a vicarage and in executing repairs to the church, the proposed application of the fund having been approved by the Ecclesiastical Commissioners.

Summons.

In 1846, by deed poll, the trustees of Sir John Morden's Charity, under the authority of the Church Building Acts, granted to the Ecclesiastical Commissioners a piece of land at East Greenwich for the purpose of building a church under the provisions of the said Acts. On this site a church had been accordingly built and duly consecrated, but the enclosure surrounding the church had not been consecrated.

In 1882 the vicar borrowed £600 from Queen Anne's Bounty for the purpose of providing a vicarage, and he had executed to the governors of the Bounty a mortgage of the glebe, tithes, rents, &c., to secure the repayment of the said sum.

In 1891 the London County Council, under powers contained in the Thames Tunnel Act, purchased from the vicar part of the unconsecrated ground surrounding the church. The price was fixed by arbitration, and the same was paid into court. Part of this sum had been awarded to meet necessary expenditure on the church caused by the taking of the land by the Council, and had been already paid out to the vicar.

In 1895 the Ecclesiastical Commissioners, acting under section 19 of 3 & 4 Vict. c. 60, an Act to further amend the Church Building Acts, directed that, subject to such costs, as the court might direct to come out of the fund in court, £230 should be paid to Queen Anne's Bounty, being the balance due on the mortgage, which was repayable by yearly instalments extending over thirty years, and that the residue should be paid to the vicar for the repair of the church. The trustees of Morden College, as representing the successors of the donors of the site, consented to the proposed application of the money. The question on the summons was whether the money could be applied as proposed.

The material parts of section 19 of 3 & 4 Vict. c. 60 are as follows: "And be it enacted that in every case in which any grant shall have been or shall be made of any land or ground to the said Commissioners for any of the purposes of the said recited Acts or any of them . . . and in which the said Commissioners shall determine to apply a part only of such land or ground to any of the purposes of the said recited Acts or any of them, it shall be lawful for the said Commissioners, and they are hereby authorized and empowered, . . . to apply any part of such land or ground which shall not have been or shall not be applied by the said Commissioners for the purposes of the said recited Acts or of any of them to any other ecclesiastical purpose, either as glebe or otherwise, for the use of the incumbent or minister of the parish, place, or district in which such land or ground is situate, or for the purpose of any parochial or charitable school or any other charitable or public purpose relating to any such parish or place. . . ."

Dibdin, for the vicar.—Under this section the Commissioners could have, with the consent of the donors, as the land is not required for the site of a church, directed it to be applied for any other ecclesiastical purpose, and this money represents the land and can be dealt with in the same way.

Kenyon Parker, for the County Council.

NORTH, J., read section 19 of 3 & 4 Vict. c. 60, and continued:—I thought at first that there might be a difficulty in directing under this section, just as there is a difficulty under the Lands Clauses Act, that money arising from the sale of land should be applied in payment of instalments due on the mortgage to Queen Anne's Bounty. I am of opinion, however, that this section is wider than section 69 of the Lands Clauses Act. The court is not dealing with part of the estate of the Church, not part of the estate belonging to the Establishment, whether it is used for a church, churchyard, or vicarage, or any other such purpose; but it is dealing with money representing land which has never been applied to any such purpose, though the application to such purpose was contemplated. But when the ecclesiastical authorities changed their minds about it the land became a sort of windfall so to speak—not part of the estate, but an accretion to the estate which can be dealt with under section 19. No doubt the Commissioners might under this section say that the land should be used as part of the glebe, when, of course, it would continue for ever to be used for the benefit of the successive incumbents. It first appeared to me that what was contemplated by section 19 must be of such a character that the vicars in succession would have the benefit, which could not be if the money now in question were applied in partly paying off a charge which the incumbent would have to pay out of his own pocket if he lived long enough, or which the succeeding incumbent would have to do if the first died before the charge was exhausted. But I think the words of section 19 are not so limited. The section says "to any ecclesiastical purposes, either as glebe or otherwise, for the use of the incumbent or minister of the parish, place, or district in which such land or ground is situate." The Commissioners consider that they have power to apply it for the present purposes, and I have no doubt from their approval, that is the best purpose to which they can apply it. I think that the purpose comes within the meaning of the words that I have just read. This view is strengthened by remaining words of the section, which say "for the purpose of any parochial or charitable school or any other charitable or public purpose relating to any such parish or place." That would cover something out of which the incumbent would get no income whatever. I think, therefore, that this is an ecclesiastical purpose, and as the Commissioners have directed it to be so applied it must be so applied.

Solicitors, *Saw & Son; Solicitor to London County Council.*

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

Chan. Div.
North, J.

Dec. 10, 21.

SYMES v. SYMES. (a.)

Appointment — Validity — Remoteness — Contingent remainder.

An appointment of real estate under a power in a marriage settlement, of which the appointors were tenants for life, was made to the use of A., B., and C. (children then living of a son of the appointors), and to all other the children of the said son who should happen to be living at the death of the survivor of the appointors, and to the heirs and assigns of such of them as should attain twenty-five; with a proviso that if the appointment to the after-born children of the son should fail, the deed should operate as an appointment in fee to A., B., and C., or such of them as should attain twenty-five. Subsequently to the appointment four other children were born to the son. They had not attained twenty-five at the death of the surviving tenant for life, but A., B., and C. had.

Held, to create legal contingent remainders to take effect upon the death of the survivor of the appointors; and that the seven children of the son took estates for life, with remainders in fee to A., B., and C. as tenants in common.

In re Lechmere and Lloyd, 18 *Ch. D.* 528, 30 *W. R. Dig.* 225, *distinguished.*

Special case stated under the provisions of ord. 34, r. 1, to have determined the validity and effect of an appointment purporting to have been made in pursuance of a power in a marriage settlement.

By an indenture, dated the 3rd of February, 1819, being the marriage settlement made in contemplation of the marriage of David Symes and Ann Symes, his wife, one undivided fourth part or share of the lands and hereditaments therein mentioned, was limited to the use of the husband and his assigns during his life, and from and after his decease to the use of trustees their heirs and assigns during the lives of David Symes and Ann Symes and the life of the survivor of them upon trust as therein mentioned; and after the determination of the life estate of the said David Symes, and after the decease of the said Ann Symes, to the use of trustees for the term of 1,000 years upon certain trusts therein mentioned, which never arose; and subject to the said terms and the trusts thereof, to the use of such child or children of the said David Symes, by the said Ann Symes, or the issue of any such child or children, which issue should be living during the joint lives of David Symes and Ann Symes for such estate or estates, and on or at such age or respective ages in such manner, and if more than one in such shares and proportions as the said David Symes and Ann Symes should jointly during their joint lives by any deed appoint; and in default of or subject to any such appointment to the use of the first and every other the son or sons of the said David Symes by the said Ann Symes begotten or to be begotten successively in tail male with remainder over.

There was only one child of the marriage—viz., John David Symes (the elder), who married in 1843, and three children only of his marriage had been born and were in existence at the date of the deed poll hereinafter mentioned—viz., John David Symes (the younger), William Henry Symes, and Mary Elizabeth Symes. Four other children were born subsequently.

By a deed poll of the 2nd of September 1848, David Symes and Ann Symes, in exercise of the powers given to them by the said hereinbefore stated indenture, jointly appointed that the said share should from and immediately after the decease of the survivor of them be to the use of John David Symes (the younger) William Henry Symes, and Mary Elizabeth Symes, and all other the child and children of John David Symes (the elder) who should happen to be living at the decease of the survivor of the said David Symes and Ann Symes, and to the heirs and assigns of such of them as should attain the age of twenty-five years equally, as tenants in common, and not as joint tenants; but in case either of them the said John David Symes (the younger), William Henry Symes, and Mary Elizabeth Symes, and any such other child or children as aforesaid should depart this life under the age of twenty-five years, then immediately after such his or her decease to the use of the survivors or other of them then his or her heirs and assigns; and such deed poll further provided that in case the appointment intended to be thereby made to or in favour of the after-born children of the said John David Symes (the elder) should from any cause fail of effect, then David Symes and Ann Symes, in further exercise of their said power, further declared and appointed that the deed should operate as an appointment of the said hereditaments to the said John David Symes (the younger), William Henry Symes, and Mary Elizabeth Symes, or such of them as should attain twenty-five years as aforesaid, their several and respective heirs and assigns.

David Symes died on the 24th of May, 1867; John David Symes (the elder) died on the 3rd of May, 1863; Ann Symes died on the 5th of November, 1873, and at her death there were then living seven children (including the three mentioned in the deed poll of 1848) of J. D. Symes (the elder), but the above-mentioned three only, had then attained twenty-five years.

John David Symes (the younger) died on the 19th of June, 1893, having devised all his real estate to his wife. He had no male issue.

William Henry Symes died on the 25th of June, 1892, having devised his real estate to trustees; the plaintiff, born on the 11th of January, 1879, was his eldest son, and was the heir in tail male of John David Symes (the elder).

Frederick George Symes, another of the sons of J. D. Symes (the elder), died on the 21st of July, 1894, having devised his real estate to a trustee.

From the death of Ann Symes each of the seven children of J. D. Symes (the elder) or their heirs and devisees had been in uninterrupted and undisputed enjoyment and receipt of an equal seventh part of the rents and profits of the share.

Vernon Smith, Q.C., and *Waggett*, for plaintiff, contended that the appointment was in favour of the children during their lives in equal shares, and then that there was a contingent remainder to such of them as attained twenty-five, their heirs and assigns, which limitation would be bad because too remote: *In re Atkinson*, 40 W. R. 666, [1892] 3 Ch. 52; *Blight* v. *Hartnoll*, 30 W. R. 513, 19 Ch. D. 294.

Swinfen Eady, Q.C., and *Curtis Price*, for defendants, the representatives of deceased sons and the four daughters.—The alternatives are an estate for life which merges in fee at twenty-five, or an estate for life, remainder in fee not coalescing. We contend the estates do coalesce.

Vernon Smith, Q.C., in reply, cited *Re Frost*, 38 W. R. 264, 43 Ch. D. 246.

NORTH, J.—The question in this case is, What is the true construction of the deed of appointment of the 2nd of September, 1848?

(a.) Reported by R. SILLEM, Esq., Barrister-at-Law.

Mrs. Symes survived her husband, and the appointment took effect in possession at the date of her death on the 5th of November, 1873. There were seven children of the only son of the marriage, all of whom were living at her death. The three elder children were born before the appointment, and had attained twenty-five before Mrs. Symes' death, the other four were not born till after the appointment, and at her death had not attained twenty-five.

The first limitation in the appointment with which we have to deal is clearly a legal contingent remainder. It is to the use of the children of the son who should be living at the death of the survivor of the husband and wife, and that is perfectly good because it must vest, if it vests at all, upon the death of Mrs. Symes, the tenant for life, and she was living at the date of the settlement. The grandchildren who were living at her death are to take immediate vested interests, and that is a perfectly good legal limitation. It was clearly intended that they should take immediate interests, and their interests are obviously life estates, for there are no words of inheritance, and by virtue of the subsequent clause the interest of any of the grandchildren who may die under twenty-five comes to an end. Then there is a limitation in remainder to the heirs and assigns of such grandchildren as shall attain twenty-five. This is not a limitation to the same class as that to which the life estates have been limited. It is a limitation in fee to such members of the previously named class as shall attain twenty-five. It might include all the members of the previous class, but it is a different class. This limitation is clearly a contingent remainder, and it must vest or fail at the time when the prior life estate comes to an end, that is upon the death of Mrs. Symes, and it would vest in those grandchildren who had attained twenty-five at the time at which it must either vest or fail. It is clear, therefore, that the remainder vested upon the death of Mrs. Symes in those three grandchildren who had then attained twenty-five, to the exclusion of the other four.

There are, no doubt, cases in which words similar to those of the present appointment have been construed as an executory devise, and not as a contingent remainder; but that was because in the instruments there in question there were words which showed that the limitations were clearly intended to operate as executory devises. In the present case there are no words which justify me in construing the limitations as executory uses. [The learned judge referred to the judgment of Jessel, M.R., in *Re Lechmere and Lloyd*, 18 Ch. D. 528, 30 W. R. Dig. 225, and said that the very case which had now arisen had been put there, and then continued:—] The principle of this decision was followed in *Miles* v. *Jarvis*, 24 Ch. D. 638, 32 W. R. Dig. 231, and in *Dean* v. *Dean*, 39 W. R. 568, [1891] 3 Ch. 150. And, as the condition of attaining the prescribed age must be fulfilled at the determination of the prior life estate, it is immaterial whether the prescribed age is twenty-one or twenty-five. The appointment in this case is therefore complete, and nothing fails to take effect. Each of the seven grandchildren takes one-seventh of the estate for life, with remainder in fee to the three elder grandchildren, in equal shares as tenants in common. The proviso shows an obvious intention that if all the seven grandchildren could not take, at any rate the three who were living at the date of the appointment should do so. The result is therefore that the grandchildren who had not attained twenty-five at the date of the death of the tenant for life take estates for life only as tenants in common, and not as joint tenants; each taking one-seventh share of the property. In the case of the three who take remainders in fee their respective life estates will merge in such remainders.

Solicitors, *Guscotte, Wadham, & Bradbury; Yarde & Loader.*

Chan. Div. / Stirling, J. — March 26, 27; May 19.

In re LLOYD AND THE NORTH LONDON RAILWAY. (*a.*)

Railway company—Compulsory purchase of leaseholds—Payment of purchase money into and out of court—Charges and expenses incident to—Letters of administration—Lands Clauses Act, 1845 (8 *Vict. c.* 18), *s.* 80.

A railway company purchased under their compulsory powers leaseholds which were bequeathed by the will of A. in trust for B. for life, remainder to C. absolutely, and the purchase money was paid into court. C. having died intestate, and an order having been made for payment out of the money,

Held, that the costs of taking out administration to C. must be borne by the company.

Ex parte Kelly, 31 *L. R. Ir.* 137, 41 *W. R. Dig.* 113, *followed.*

Held, also, that the company were not liable to pay the costs of taking out administration de bonis non *to the estate of A.*

This was a summons by the railway company to vary the certificate of the taxing master, and raised the question by whom were the costs of taking out certain letters of administration to be borne.

In 1867 the North London Railway Co. took certain leasehold property forming part of the estate of a testator who died in 1858, and by whose will the property in question stood limited to the testator's daughter, M. A. Lloyd, for life, and subject thereto to all his children and the children of a deceased daughter absolutely.

The purchase money for the property was paid into court by the company, and on the 23rd of November, 1868, an order was made for the investment of the fund and payment of the dividends to the tenant for life on a petition to which M. A. Lloyd and the executors of the testator were parties.

On the death of the tenant for life in 1892 the fund became divisible into eleven shares.

The executors and all the original legatees had died after the payment into court.

In March, 1895, an order was made for the distribution of the fund amongst the legal personal representatives of the deceased legatees, and for the payment of the costs by the company in accordance with the provisions of the Lands Clauses Consolidation Act, 1845.

In taxing the costs the taxing master had allowed (1) the costs of obtaining letters of administration *de bonis non* to the estate of the testator, and (2) the costs of obtaining letters of administration to the estates of the deceased legatees.

The company objected to these allowances and took out this summons to have the certificate of the taxing master varied.

Hastings, Q.C., and *R. F. Norton*, for the company, argued that in neither case were the costs "charges, and expenses incident to" the obtaining payment out of court. It would have been necessary to take out administration to these deceased persons even if the land had not been taken by the company.

They referred to *In re Liverpool Improvement Act*,

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

16 W. R. 667, L. R. 5 Eq. 232; *Ex parte Kelly*, 31 L. R. Ir. 137, 41 W. R. Dig. 113.

Sheldon, for the respondents, argued that the company ought to bear all the costs in question, for if the company had not taken the land, the parties interested might very well have dispensed with the necessity of taking out these administrations: *Re Gregson's Trusts*, 13 W. R. 193; 2 De G. J. & S. 428; *In re Barcham*, 29 W. R. 525, 17 Ch. D. 329; *In re Brooshooft's Settlement*, 37 W. R. 744, 42 Ch. D. 250; *In re Olive's Estate*, 38 W. R. 459, 44 Ch. D. 316; *Ex parte Kelly* is not distinguishable from this case; *Ex parte Rorke*, [1894] 1 Ir. R. 146.

Hastings, Q.C., replied.

STIRLING, J.—This is a summons to vary the taxing master's certificate made upon a taxation of costs under the Lands Clauses Act, 1845. [His lordship stated the facts.] As to the cost of obtaining administration to the testator, I cannot see how this can be chargeable against the company, and I think that those costs must be disallowed.

There is much more difficulty as to the costs of obtaining letters of administration to the estates of the deceased beneficiaries. They are not claimed under the 82nd section, which relates to the costs of making out the title, but under section 80, the question being whether these are charges and expenses incident to the payment of this money out of court. It was urged, however, that letters of administration would have been equally necessary if these leaseholds had never been taken by the company; and in reply to that it was said that the beneficiaries might in that event have simply gone into possession, and obtained payment of the rents to themselves without ever perfecting their legal title. There does not appear to be any English case exactly in point; but two Irish decisions were referred to—namely, *Ex parte Kelly* and *Ex parte Rorke*. It seems to me that the former of those cases does decide the point. There money was paid into court by a railway company under the Lands Clauses Act, 1845, in respect of leasehold premises. Persons claiming under the marriage settlement of their father, then deceased, applied for payment; but the court decided that other children, then dead, and of whom there were no personal representatives, had taken vested interests, and declined to pay out, until administration had been taken to their estates. One of the applicants thereupon took out administration to the deceased children and obtained payment of the fund, and it was held that the company should pay the costs of obtaining these administrations. The second case is less directly in point because the Master of the Rolls in Ireland appears to have decided it upon the special circumstances. He begins by saying that he did not intend to lay down any general rule; but he does make some general observations, for at page 152 he says: "I do not see any hardship in construing section 80 of the Lands Clauses Acts, 1845, as it has been construed in the cases in this country and in England, which have been referred to by counsel. It must be remembered that an owner of property may be quite content to remain with his title as it is, and may not care to make it better. But if his land is taken from him compulsorily he has to go further, and must show at least something more than a holding title."

I confess that I am not sure that apart from these two cases I should have arrived at the same conclusion; but in a matter of this sort it is very important that the practice should be uniform, and I accordingly follow them. As to these costs, therefore, the decision of the taxing master must be affirmed.

Solicitors, *Burchell & Co.; Sanderson, Holland, & Co.*

Chan. Div.
Kekewich, J. } March 3.

BOVILL *v.* ENDLE. (*a.*)

Mortgage—Mortgagee in possession—Repayment—Six months' notice or interest.

A mortgagee who takes possession is not entitled to notice or interest in lieu of notice, when the principal interest and costs have been tendered, even though the tender is before the day fixed for payment in the deed, as entry into possession is equivalent to a demand for payment.

Action.

This was a redemption action in which the plaintiff held second and fourth mortgages of certain premises held by one Jones, under a building agreement in respect of which the defendants Messrs. Elliott held the first and third mortgages.

The first mortgage was dated in September, 1894.

Messrs. Elliott entered into possession of the premises, and expended moneys in completing two unfinished houses, and they received the rents of the houses that were finished and occupied.

On the 22nd of February, 1895, the plaintiff tendered to the Messrs. Elliott the amount of their principal, interest, and costs to date; but they refused the tender on the ground that the plaintiff was not entitled to tender payment before the date fixed in the deed—viz., six months from the date of the mortgage.

The plaintiff thereupon commenced redemption proceedings.

Elgood, for plaintiff.—Messrs. Elliott having taken possession are bound to accept payment of their principal, interest, and costs, notwithstanding the date for redemption has not arrived. Where the mortgagee proceeds to enforce his security the mortgagor may pay at once without notice or interest in lieu of notice: *Re Alcock, Prescott* v. *Phipps*, 23 Ch. D. 372, 32 W. R. Dig. 137; *Letts* v. *Hutchins*, L. R. 13 Eq. 176, 20 W. R. Ch. Dig. 7; *Banner* v. *Berridge*, 29 W. R. 844, 18 Ch. D. 254; *Smith* v. *Smith*, 40 W. R. 32, [1891] 3 Ch. 550. *Brown* v. *Cole*, 14 Sim. 427, does not apply as the mortgagee there had taken no proceedings.

E. Ford, for the defendants Messrs. Elliott.—*Brown* v. *Cole* is in point.

Elgood replied.

KEKEWICH, J.—It appears from the authorities that if a mortgagee takes proceedings in court to recover his money, the mortgagee cannot refuse a tender of his principal, interest, and costs, on the ground that he is entitled to six months' notice. The mortgagee has taken steps to compel payment of the debt, and is therefore not entitled to the interest in lieu of notice. Now, is entering into possession taking proceedings to compel payment of the debt? It appears to me that although the case is not actually covered by authority yet it is in principle, and that a mortgagee cannot enter into possession for his own benefit and then say he is entitled to remain in the position of a mortgagee out of possession and ask for the interest or notice. The positions are inconsistent, and, in my opinion, the mortgagee by taking possession says he requires payment. Nor do I think *Brown* v. *Cole* makes any difference, for that case decides that a mortgagor cannot, before the time limited for payment to the mortgagee expires, either insist on acceptance of a tender of the money or take

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

proceedings to redeem. But that is because during that time the mortgage must remain as a security for the money advanced, and it is not competent for the mortgagee or the mortgagor to disturb that relation. If the mortgagee himself disturb that relation, he cannot insist on notice and no interest is payable in lieu thereof.

Solicitors, *Elgood & Moyle; Bramall, White, & Saunders.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills, J.)

May 19.

Le Neve Foster (*Appellant*) *v.* Fyfe and Proctor (*Respondents*). (*a.*)

Mines—Justices—Offences against the Mines Act, 1872 *—Proceedings instituted by the Inspector of Mines—Information laid by his "agent"—Jervis's Act,* 1848 (11 *&* 12 *Vict. c.* 43), *ss.* 10, 16—*Metalliferous Mines Regulation Act,* 1872 (35 *&* 36 *Vict. c.* 77), *ss.* 33, 35.

Notwithstanding section 35 *of the Metalliferous Mines Regulation Act,* 1872, *an information for an offence against that Act can, having regard to section* 10 *of* 11 *&* 12 *Vict. c.* 43 (*Jervis's Act*), *be laid by an inspector of mines through an agent lawfully authorized in that behalf by him.*

Special case stated by the justices of Carnarvon.

The short point was whether an inspector of metalliferous mines could lay an information under the Metalliferous Mines Regulation Act, 1872, by an agent, or whether the provisions of section 35 of that Act excluded the ordinary rules of the Summary Jurisdiction Acts applying to prosecutions instituted under the Mines Act.

The special case stated that on the 9th of December, 1895, one Morgan, an inspector of police (who admittedly was not an authorized inspector of mines) purporting to act as the duly authorized agent of the appellant, the inspector appointed for the metalliferous mines in that district, laid and signed an information on the appellant's behalf against the respondents for unlawfully failing to cause the top of a shaft of a certain mine to be and to be kept securely fenced for the prevention of accidents, contrary to section 13 of the Metalliferous Mines Regulation Act, 1872.

The appellant and his solicitor appeared before the justices to give evidence in support of the summons, as did also the inspector of police by whom the information was given.

Before the case was opened the respondents took a preliminary objection that the information was improperly laid, on the ground that, in the absence of a written authority from a Secretary of State, all proceedings under the Act must be instituted by the inspector of mines, who had no authority to delegate his powers to an agent.

The justices decided in favour of this objection, and refused to hear the charge, but at the request of the appellant stated a case.

Sutton, for the appellant.—The justices were wrong, and ought to have heard the summons. Section 33 of the Metalliferous Mines Regulation Act, 1872, directs that all offences and penalties under the Act, and all money and costs directed to be recovered as penalties, may be prosecuted and recovered in the manner directed by the Summary Jurisdiction Acts before a court of summary jurisdiction. Section 35 of the same Act is as follows: "No prosecution shall be instituted against the owner or agent of any mine to which this Act applies for any offence under this Act which can be prosecuted before a court of summary jurisdiction, except by an inspector of mines or with the consent in writing of a Secretary of State." Section 35 does not, however, in any way prevent section 10 of Jervis's Act from applying to prosecutions under this Act, so that an information can be preferred either by an inspector of mines personally or by his agent on his behalf, provided that in the latter case the proceedings have been "instituted" by the inspector, and not by "any other person." If they are "instituted" by any other person, then the inspector's subsequent consent or ratification is not sufficient; and if they are to be proceeded with, the authority of a Secretary of State must be obtained in writing sanctioning the same. There is no evidence that Morgan "instituted" these proceedings on his own initiative or acted at any time in the matter other than as the agent of the appellant.

[He was stopped.]

Macaskie, for the respondents.—The justices were right in refusing to hear the summons, for the inspector of police was not entitled to institute proceedings. By section 35 of the Act of 1872 the information must be laid by the inspector of mines personally, or if by any other person, then only with the consent of the Secretary of State, and that consent must be in writing. There is no evidence that Morgan, the police inspector, was ever instructed to commence these proceedings by the appellant, and mere ratification will not do. [Lord Russell of Killowen, C.J.—He was in the court, and his evidence could have been taken.] The informant relied upon some authority given him by the appellant to act as his agent; but mere verbal authority is insufficient, for by inference it must be "in writing," since the authority of a Secretary of State must be in writing. [Lord Russell of Killowen, C.J.—That is because the Secretary of State may authorize any person to take proceedings who has no authority or interest in the matter.] Suppose the justices refused to convict, then, under section 16 of Jervis's Act, the defendants may ask for costs. How is such an order to be made if the inspector of mines repudiates having given his "agent" authority to lay the information? [Wills, J.—That question must have arisen often under Jervis's Act, and I have never heard of a single instance where the difficulty has not been met.] Probably because the matter has never been pressed, since the costs of the application would be more than the costs to be recovered.

He cited *Anderson* v. *Hamlin*, 25 Q. B. D. 221, 38 W. R. Dig. 81; *Kyle* v. *Barber*, 52 J. P. 725, 36 W. R. Dig. 108.

Lord Russell of Killowen, C.J.—I think this case must be remitted to the justices with an intimation that in the judgment of this court the view they took of section 35 of the Metalliferous Mines Regulation Act, 1872, was wrong. The information was laid in the name of the appellant by D. T. Morgan, who in the information is described as the duly authorized agent of the inspector of mines for that purpose. It was contended before the justices that the information must have been laid by the inspector himself, and that he could authorize no one as his agent to do so on his behalf. It is therefore unnecessary for this court to go into the question of whether there was sufficient evidence before the justices for them to have held that Morgan was, in fact, duly authorized to act as agent for this purpose by the appellant; although I think, had it been necessary to inquire into that, there would have been evidence on which

(*a.*) Reported by Erskine Reid, Esq., Barrister-at-Law

they could have so found. I agree with Mr. Macaskie that the scheme of the Act of 1872 was that *a priori* the inspector of mines should alone be the person to lay a complaint or information; but I see nothing in section 35—or, indeed, in any other part of the Act—which takes the case out of the ordinary provisions of Jervis's Act. I think that the proceedings were instituted by the appellant, who authorized Morgan to make the complaint as his agent and on his behalf. We are informed that since the proceedings were instituted the mine owners have had the shaft secured. That fact ought to be taken into consideration by the justices, and if they find that it was merely an accidental omission they must take that fact into consideration also.

WILLS, J.—The crucial question, to my mind, is whether there is evidence to show that the inspector of mines was the person who, in the first instance, instituted these proceedings. If that is rightly answered, as we think, in the affirmative, then I see no reason why he may not authorize someone to lay the information in his name as any other informant may do under Jervis's Act.

Case accordingly remitted to the justices.

Solicitor for the appellant, *The Treasury Solicitor.*

Solicitor for the respondents, *James Neale.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills, J.) May 8.

WATSON *v.* WHITE. (*a.*)

County court—Jurisdiction—High bailiff—Neglect to levy—Action for negligence—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 49.

Section 49 of the County Courts Act, 1888, provides a remedy in the case of the neglect of the high bailiff to levy execution, but the section does not prevent the high bailiff being liable in such a case to an action for damages for failure to perform his statutory duty in the same manner as the sheriff of a county is liable.

Summons for a writ of prohibition referred to the court by the judge in chambers. A question being raised as to the jurisdiction of the court to hear the application, it was agreed to treat it as an original motion.

The plaintiff recovered judgment in the City of London Court for £6 2s. 6d. against a defendant who carried on business in the district of the Whitechapel County Court. The warrant of execution was sent to the registrar of that court under section 158 of the County Courts Act, 1888, and the registrar directed his high bailiff to issue execution.

The plaintiff alleged that the high bailiff had been guilty of negligence in neglecting to levy, and he commenced this action against the high bailiff in the City of London Court, claiming damages. At the trial counsel for the high bailiff objected that the action would not lie, on the ground that the only remedy open to the plaintiff was under section 49 of the County Courts Act, 1888. The judge of the City of London Court thereupon stayed the action until a writ of prohibition had been applied for.

The County Courts Act, 1888, s. 49: "In case any bailiff of any court who shall be employed to levy any execution against goods and chattels shall, by neglect or connivance or omission, lose the opportunity of levying any such execution, then upon complaint of the party aggrieved by reason of such neglect, connivance, or omission (and the fact alleged being proved to the satisfaction of the court on the oath of any credible witness), the judge shall order such bailiff to pay such damages as it shall appear that the plaintiff has sustained thereby, not exceeding in any case the sum of money for which the said execution issued, and the bailiff shall be liable thereto; and upon demand made thereof and on his refusal so to pay and satisfy the same, payment thereof shall be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the court."

Section 35 provides that the high bailiff "shall be responsible for all the acts and defaults of himself and the bailiffs appointed to assist him, in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers."

Poley, for the defendant.—The high bailiff is the creation of statute, and the remedy provided by section 49 is the only remedy open to persons complaining of the high bailiff's misconduct.

He referred to *Reg.* v. *Judge of Newport* (*Salop*) *County Court*, 36 W. R. 476, 20 Q. B. D. 242; *Reg.* v. *Judge of Chelmsford County Court*, 35 W. R. 511, 18 Q. B. D. 704.

Lochnis, for the plaintiff, was not called upon to argue.

Lord RUSSELL OF KILLOWEN, C.J.—I confess that I have no doubt whatever as to what our decision should be in this case. The learned counsel apparently cannot produce any authority in support of his contention. The case of *Reg.* v. *Judge of County Court of Shropshire* is quite clear, but it has nothing to do with this point, nor does the other case referred to apply here. The high bailiff is undoubtedly the creation of statute, which casts upon him certain obligations, but the statute also annexes to him the common law liability for the failure to discharge his duties. Section 49 is in part of a disciplinary character—that is to say, it authorizes a county court judge to correct the officer of his court for misconduct, and the section also provides a summary method of dealing with cases like the present one. But the section does not say that the remedy provided thereby shall be the only remedy open to persons complaining of negligence on the part of the high bailiff. On the contrary, section 35 in express terms places the high bailiff in the same position and makes him liable in exactly the same manner as the sheriff of the county. Section 49 affords a more summary method of redress, but it does not deprive the plaintiff of his common law remedy against the bailiff for his alleged breach of duty.

WILLS, J.—I agree.

Motion dismissed.

Solicitors for the plaintiff, *Aldous & Welfare.*

Solicitors for the defendant, *M. Webb & Sons.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.) April 30.

WALKER *v.* STRETTON. (*a.*)

Local government—County council—Bye-law—Validity—Construction—Lights on vehicles—Municipal Cor-

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

porations Act, 1882 (45 & 46 *Vict.* c. 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 *Vict.* c. 41), *ss.* 75, 85.

A bye-law for the good rule and government of a locality made by the local authority ought to be construed so as to give reasonable effect to the object aimed at.

A county council made a bye-law that "a person driving any vehicle shall, from the end of the first hour after sunset to two o'clock a.m., except during such part of that period as shall be between the rising and setting of the moon, carry attached to such vehicle a lighted lamp placed so as to exhibit a light in the direction he is proceeding in order to signal the approach or position of the vehicle; and in case of a vehicle carrying timber, such person shall also carry attached at the end thereof a lighted lamp so as to exhibit a light to persons overtaking the vehicle."

Held, that this bye-law was not bad, either (1) *by reason of its throwing on an alleged offender the* onus *of proving that the alleged offence occurred at a period between the rising and setting of the moon, for that could be proved by means of an almanac; or* (2) *by reason of the omission in the bye-law of the words "in any street or public place," for those words were to be implied; or* (3) *by reason of the words "attached at the end thereof" being capable of being construed as applicable either to the vehicle itself or to the timber carried thereon, for those words reasonably construed must be taken as applicable only to the vehicle itself.*

Special case stated by the justices of Warwickshire.

An information was laid by the superintendent of police against the respondent that he, on the 26th of August, 1895, being in charge of a timber carriage at eleven o'clock at night, had no lighted lamps attached to such carriage as required by a bye-law made by the Warwickshire County Council for the good rule and government of the county under powers given by section 23 of the Municipal Corporations Act, 1882, which section was made applicable to county councils by section 75 of the Local Government Act, 1888. The bye-law was in the following terms: "A person driving or having charge of any vehicle . . . shall from the end of the first hour after sunset to two o'clock a.m., except during such part, if any, of that period as shall be between the rising and setting of the moon, carry attached to such vehicle a lighted lamp or lighted lamps which shall be so constructed and placed as to exhibit a light in the direction in which he is proceeding, and so as to afford adequate means of signalling the approach or position of the vehicle. Provided that where one lamp only is carried it shall be attached to the off or right side of the vehicle. . . . And in the case of vehicles carrying timber, such person shall also carry attached at the end thereof a lamp or lamps so constructed as to exhibit a light or lights visible to persons overtaking such vehicle."

It was proved or admitted at the trial that the respondent was in charge of a timber carriage on the night in question, that it was a very dark night, and that he had no lighted lamps. Two constables were called to prove that the moon rose between one and two o'clock in the morning, but neither of them could speak of this fact of his own knowledge, and referred to an almanac for information, and their evidence was on this ground objected to on behalf of the defendant.

The magistrates considered that the local authority had no power to make such a bye-law, and held that it was unreasonable and bad, because it was not restricted to vehicles on public highways; and also on the ground that a person in charge of a carriage ought not, in order to bring himself within the exception, to have to prove that at the time of the commission of the alleged offence the moon had risen and had not set, and that it was equally unreasonable to require such proof from the informant; further, that although the moon might have risen, the night might be so dark as to render lights necessary for the safety of the public. They were of opinion also that lights on vehicles were as necessary in the neighbourhood of towns in the early morning as late at night.

For these reasons the magistrates dismissed the summons.

The superintendent of police appealed.

Alexander Glen, for the appellant.—The magistrates ought to have convicted. The bye-law was framed for securing the safety of the public. It is not unreasonable in itself; and the bye-law is made under powers given to the local authority by section 75 of the Local Government Act, 1888, which renders section 23 of the Municipal Corporations Act, 1882, applicable. This bye-law as to the carrying of lighted lamps by carts after dark is in the same terms as section 85 of the Local Government Act, 1888, which imposes regulations as to carrying of lights on bicycles. If both a reasonable and an unreasonable construction can be read into a bye-law, the court, in cases of doubt, will construe it in such a way as to carry out the intention of the local authority, who are in a position to judge of the necessity for such a bye-law: *Reg.* v. *Saddlers' Co.*, 32 L. J. Q. B. 337. Almanacs are admissible in evidence to decide the time at which the moon rose and set on a particular day, just as much as they are evidence of the state of the tide. It is not for the informant to prove that the respondent comes within the benefit of an exception: see Summary Jurisdiction Act, 1879, s. 39 (2). It is admitted that if the moon did not rise till later than eleven o'clock the charge is proved. It is admitted also that the night was very dark, and the fact that a bye-law was passed shows that lighted lamps on carts were necessary in that locality for the safety of the public. The magistrates ought therefore to have convicted, whether the moon had in fact risen or not.

Parfitt, for the respondent.—The magistrates were right in refusing to convict, for the bye-law is bad on two grounds. First, it is unreasonable, for (*a*) it is unworkable, since to come within the exception the respondent has to show that at the time in question the moon had risen and had not set. The *onus* of proving that astronomical fact rests in law on the informant, and not on the respondent. At any rate it used to be so held in cases of burglary, where the question was whether the sun had risen or set at a particular time. Almanacs are not admissible evidence of time against the respondent. [WRIGHT, J.—Because local time varies from Greenwich time?] Yes; and the witnesses called by the informant were unable to prove of their own knowledge the state of the moon at that time: *Tutton* v. *Darke* and *Nixon* v. *Freeman*, 5 H. & N. 647, 8 W. R. C. L. Dig. 26. The bye-law is also unreasonable (*b*) for it is too wide, as the words "street or public place" are omitted. Secondly, it is bad, for it is too vague—it does not state whether one of the lights is to be placed at the end of the timber or on the back of the cart.

Alexander Glen replied.

Lord RUSSELL OF KILLOWEN, C.J.—We think that this appeal must be allowed. The magistrates refused to convict on the ground that the bye-law was unreasonable, and the question we have to decide is whether they were right or wrong in the conclusion they have come to. These questions as to bye-laws

are so frequently before the court, and so often involve matters of importance, that I wish to say a general word or two with regard to the construction that should in my opinion be placed upon them. In my judgment these courts are bound to support, as far as possible, bye-laws that are made by local authorities, unless it can be clearly shown that such bye-laws have been made without jurisdiction, or that the bye-laws themselves are obviously unreasonable or improper. The court ought not to be, so to speak, astute in "pickling holes" in rules which deal with local matters and local requirements, of which the authorities who frame the laws are often in a better position to judge than the courts. It is therefore safe to lay down this as a general proposition: that the courts should strive to construe a bye-law so as to give reasonable effect to the object aimed at. No doubt it is most desirable that bye-laws should be so clearly expressed that "he who runs may read," yet, as we know from experience, this clearness is not always attained in the case even of laws framed by the higher legislative bodies.

In the present case the magistrates held the bye-law to be bad because in some points it went too far and in others not far enough to ensure public safety; and to some extent I am bound to say I agree with them. It has also been contended by counsel for the respondent that the bye-law was unreasonable because it was unworkable, since the proviso that it should not apply between the rising and setting of the moon placed the defendant under an unnecessary burden of difficult proof; but I do not think there is any real practical difficulty. Then as to another objection raised—namely, that the words "street or public place" have been omitted—I think it is possible and right to read the bye-law as applying only to persons driving in public places, and therefore it ought not to be ruled by us as bad on the ground that it is too wide. The third objection seems to me to fail also, for it is clear that the proviso as to the second light to be carried on timber wagons, is intended to mean that such light is to be attached to the back of the cart and not to the end of the timber. On the whole, I think, the magistrates were wrong in their conclusion, and the case must be sent back for them to convict and impose such fine as they consider under the circumstances is applicable.

WRIGHT, J., concurred.

Case remitted with instructions to convict.

Solicitors for the appellant, *Field, Roscoe, & Co.*, for *A. S. Field*, Leamington.

Solicitor for the respondent, *Timbrell & Deighton.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.) April 27.

GARDNER *v.* HART. (*a.*)

Dog—Innkeeper—Liability of innkeeper for injuries caused by a dog—28 & 29 Vict. c. 60.

An innkeeper is, by reason of section 2 of 28 & 29 Vict. c. 60, deemed to be the owner of a dog living in his hotel, and is liable for injuries to cattle caused by it, notwithstanding the dog was at the time of the injuries complained of under the control of a person staying at the hotel, to whose care it had been committed by the real owner.

Appeal from the decision of the judge of the Leicester County Court.

The statute 28 & 29 Vict. c. 60 amended the law with regard to injuries to cattle and sheep caused by dogs. Section 2 of that Act provides as follows: "The occupier of any house or premises where any dog was kept, or permitted to live or remain, at the time of such injury, shall be deemed to be the owner of such dog, and shall be liable as such, unless the said occupier can prove that he was not the owner of such dog at the time the injury complained of was committed, and that such dog was kept, or permitted to live or remain, in the said house or premises withou his sanction or knowledge; provided always that, where there are more occupiers than one in any house or premises, let in separate apartments or lodgings or otherwise, the occupier of that particular part of the premises in which such dog shall have been kept, or permitted to live or remain, at the time of such injury, shall be deemed to be the owner of such dog."

A dog caused injuries to the plaintiff's horse. The dog belonged to Nutt, who was, until a few days before the time when the injuries were committed, staying at the defendant's hotel. On removing from the hotel, he left the dog in the charge of his friend Newton, who was also living in the hotel. The dog used to spend the night in Newton's room.

Newton and the defendant went out for a drive together in the plaintiff's cab, and took the dog with them.

When the dog was released from the cab it flew at the plaintiff's horse, and bit it.

The plaintiff thereupon brought an action against the defendant under 28 & 29 Vict. c. 60, and recovered damages.

The defendant appealed.

Lyon, for the defendant.—No liability would attach to the occupier in respect of injuries occasioned by a dog while under the control of its owner. The case is not altered by the fact that the dog was here under the control of what may be called its vicarious owner.

Toller, for the plaintiff, was not called upon.

Lord RUSSELL OF KILLOWEN, C.J.—The section of the Act justified the county court judge in holding the defendant liable.

WRIGHT, J., concurred.

Solicitor for the defendant, *R. H. Buckby.*

Solicitors for the plaintiff, *Morse & Simpson.*

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Q. B. Div.
(Lawrance and Collins, JJ.) March 23.

REG. *v.* WEBB AND OTHERS (JUSTICES). (*a.*)

Bastardy—Service of summons—"Last place of abode" — Validity of service — Jurisdiction of justices — Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.

A summons under section 4 of the Bastardy Laws Amendment Act, 1872, may be served at the "last place of abode" of the person summoned, although that person is out of the jurisdiction at the date of such service.

At the hearing of an application for an affiliation order it was proved that the summons had been served by being left at the house where the person summoned had resided up to a day seven days before the date of the service; and that on that day he left the house with

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

the intention of proceeding to America. It was not proved that he had obtained a place of abode in America at the date of the service. He did not appear, and the justices, after hearing evidence, made an affiliation order against him.

Held, that the service was valid, and that the justices had jurisdiction to make the order.

Dicta *of the* Earl of Selborne, L.C., *in* Berkley *v.* Thompson, 33 *W. R.* 525, 10 *App. Cas.* 45, *and of* Kay, L.J., *in* Reg. *v.* Farmer, 40 *W. R.* 228, [1892] 1 *Q. B.* 637, *considered.*

Argument of a rule *nisi* obtained by J. Hotchkiss for a *certiorari* to bring up an affiliation order made against him by justices for the purpose of quashing it.

The facts disclosed by the affidavits were as follows.

E. Grove was delivered of a bastard child on the 31st of March, 1895. On the 9th of April a summons was at her instance issued against the applicant, and on the 10th of April it was left at the house of the applicant's father.

The applicant had lived at his father's house continuously up to the 3rd of April, on which date he left that house with the intention of proceeding at once to America to reside there. It was not proved that he had on the 10th of April any fixed place of abode in America or had arrived there; and a letter purporting to be written by him in America on the 10th of May mentioned that he had after his arrival in that country wandered from place to place and slept in the fields.

Willes Chitty, for the justices, showed cause.—There is no evidence that the applicant had a place of abode in America on the 10th of April; his father's house was therefore his last place of abode, and the summons was properly served there under section 4 of the Bastardy Laws Amendment Act, 1872: *R.* v. *Damerell*, L. R. 3 Q. B. 50, 16 W. R. C. L. Dig. 14; *R.* v. *Farmer*, 40 W. R. 228, [1892] 1 Q. B. 637.

[He was stopped.]

Colam, for the complainant, did not argue.

E. M. Pollock, for the applicant, in support of the rule.—The evidence shows that the applicant had no intention of returning to England, therefore his abode was in America on the 10th of April, and the summons was not served at his "last place of abode." Moreover, as the applicant must be presumed to have been out of the jurisdiction on the 10th of April, the summons could not be served at all under section 4 of the Act. Lord Selborne, in *Berkley* v. *Thompson*, 33 W. R. 525, 10 App. Cas. at p. 49, and Kay, L.J., in *R.* v. *Farmer*, express opinions to that effect; and the provisions of section 3, as to the issuing of process in cases where the putative father has left England and has afterwards returned, show that it was not intended that proceedings should be taken when he is absent out of the jurisdiction.

Chitty, in reply.—There is no evidence that the applicant was in fact out of the jurisdiction at the date of the service. In *Berkley* v. *Thompson* the question was as to personal service, and the *dictum* of Lord Selborne is directed to that question. *R.* v. *Farmer* is inconsistent with the view that service at the last place of abode cannot be made where the alleged father is out of the jurisdiction.

LAWRANCE, J.—I am of opinion that this rule must be discharged. The question arises under section 4 of the Bastardy Laws Amendment Act, 1872, which provides that "after the birth of such bastard child, on the appearance of the person so summoned or on proof that the summons was duly served on such person or left at his last place of abode, &c.," the justices may hear the evidence and adjudge the man to be the putative father.

It is clear that the applicant was living at his father's house until a few days before the summons was issued; according to his mother's evidence he left on the 3rd of April; on the 10th of April the summons was served at his father's house as being his last place of abode. It is said that he was then living in America, but there is no evidence that he had any fixed place of abode there; in fact, the letter of the 10th of May negatives that suggestion. Under these circumstances *Reg.* v. *Farmer* seems to me conclusive that his father's house was his last place of abode. In that case Lord Esher, M.R., and Lopes, L.J., considered whether the man had a place of abode in America, and came to the conclusion that he had. Lord Esher then says: "I take it that if a man goes to a new place of abode in England his last place of abode is that to which he goes, and in which he is abiding. Does it make any difference that the place of abode is abroad, where the man is not merely wandering about but has got a fixed place of abode? I think not." But in the present case I am unable to come to the conclusion that the applicant had a fixed place of abode in America. As to the *dictum* of Lord Selborne in *Berkley* v. *Thompson* it is sufficient to say that it was not necessary for the decision of the point with which the court was dealing. If we were to yield to the argument founded on that *dictum*, it would make nine-tenths of the judgments in *Reg.* v. *Farmer* completely inappropriate.

COLLINS, J.—I am of the same opinion. The question is whether this summons was served at the last place of abode of the applicant. It seems clear to me that the place at which it was served was his last place of abode, unless he can show that he had before the service acquired another place of abode. It is said that he had then acquired a place of abode in America, but I am satisfied that he had not; in fact, it is not clear that he had then reached America at all.

Another point was taken, which if it were good would render the consideration of the question of the applicant's place of abode irrelevant. The *dictum* of Lord Selborne in *Berkley* v. *Thompson* is relied on as showing that the presence of the person served within the jurisdiction is necessary in order to make a service at his last place of abode valid; and it is said that Kay, L.J., in *Reg.* v. *Farmer* expresses his agreement with that view. But it seems to me that section 4 is an absolute provision enabling service to be effected by leaving the summons at the man's last place of abode, irrespective of where the man may happen to be. There certainly is another provision in section 3 relating to the absence abroad of the putative father, but I do not think that that provision is inconsistent with the specific enactment contained in section 4. And I think, further, that the *ratio decidendi* in *Reg.* v. *Farmer* is really conclusive upon this case. There Lord Esher, M.R., says: "We have to consider whether he had at the time the summons was served a place of abode in America. If he went there with the intention of returning, or for the mere purpose of avoiding service, I should say he had no place of abode in America. In such a case it would be true to say that his last place of abode was his father's house." It is clearly to be inferred from that passage that if in that case no new place of abode had been acquired, the Master of the Rolls would have held that the summons was properly served by being left at the father's house, although the person served had gone to America. Then in the

same case Lopes, L.J., says: "I agree that the case would have been different had it been made out that he went away merely to avoid service . . . but of that I see no evidence, or that he went away merely for a temporary purpose." That assumes and decides that proceedings might be taken under section 4, although the defendant was out of the jurisdiction. The *dictum* of Lord Selborne in *Berkley* v. *Thompson* occurs in a case in which the question was whether personal service in Scotland was good. It does not in my opinion apply to the present case, and it is not an authority for deciding in favour of the applicant.

Order discharged.

Solicitors for the complainant, *Wainwright & Baillie.*

Solicitors for the applicant, *Charles Robinson & Co.*, for *W. Waldron*, Brierley Hill.

Solicitors for the justices, *Rowcliffes, Rawle, & Co.*, for *Bernard King & Sons*, Stourbridge.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) June 2.

KIRBY *v.* NORTH BRITISH AND MERCANTILE INSURANCE CO. (*a.*)

Mayor's Court—Appeal—Notice of appeal—Condition precedent—Extension of time—Mayor's Court of London Procedure Act, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 8—*R. S. C.*, 1883, *ord.* 59, *r.* 16.

It is a condition precedent to the right of appeal under section 8 *of the Mayor's Court of London Procedure Act*, 1857, *that the appellant should give notice of appeal within two days. This provision is not affected by the general power conferred on the High Court by ord.* 59, *r.* 16, *to extend the time for bringing an appeal from an inferior court.*

Appeal from an order of a Divisional Court refusing to grant an extension of time for appealing from the Mayor's Court.

The action was brought under the Employers' Liability Act, and was tried in November, 1894, when the jury by the direction of the Common Serjeant found a verdict for the defendants, and judgment was entered accordingly. The plaintiff's claim was for a sum exceeding £20.

The plaintiff did not give notice of appeal within two days of the judgment, in accordance with the terms of section 8 of the Mayor's Court of London Procedure Act, 1857, nor did he comply with any of the provisions of that section; but more than a year after the judgment, he applied at chambers, under ord. 59, r. 16, for an extension of time for appealing.

Lawrance, J., granted an extension of time, but the Divisional Court (Lord Russell of Killowen, C.J., and Wright, J.) reversed his order, on the ground that there was no jurisdiction to extend the time.

By section 8 of the Mayor's Court of London Procedure Act, 1857, either party to a cause in which the sum sought to be recovered shall exceed the sum of twenty pounds may appeal on a point of law to the High Court, "provided that such party shall within two days after such determination or direction give notice of appeal to the other party or his attorney, and also give security within such time or times as the court shall direct, to be approved of by the registrar of the court (if the judge shall so direct) for the costs of the appeal."

By section 23 of the Judicature Act, 1884, "the power to make rules conferred by section 17 of the Supreme Court of Judicature Act, 1875, and enactments amending the same, shall be deemed to include the power to make rules for regulating the procedure on appeal from inferior courts to the High Court."

Ord. 59, rule 16, dealing with appeals from inferior courts, is as follows: "The High Court shall have power to extend the time for appealing, or to amend the grounds of appeal, or to make any other order, on such terms as the court shall think just, to ensure the determination on the merits of the real questions in controversy between the parties."

The plaintiff appealed.

Moyses, for the plaintiff.

Roskill, for the defendants.

Lord ESHER, M.R.—The first thing we have to do is to construe section 8 of the Mayor's Court Act, and see whether on the true construction of it there are not conditions precedent to the right of appeal. We must also see what is the first condition precedent. The section says that in any cause in which the sum sought to be recovered exceeds £20 an appeal will lie, provided that the party desiring to appeal shall within two days give notice of appeal to the other party. What is the true construction of an enactment so worded? In my opinion it is a condition precedent to his right to appeal at all. Therefore the first condition precedent is to give notice to the other side. Then he has to do something more, he has to give security within such time as the court directs. If he gives notice, he ought next to go and ask what security he should give and within what time. If he gives notice, but does not proceed to give security, I think the other party may go and apply for security. The appellant ought to go, but the respondent may go. Therefore all depends on the first condition. If that is not fulfilled, there is no right of appeal.

Now, unless this section is repealed, can any court give leave to appeal without that condition being fulfilled? In *Morgan* v. *Bowles*, 42 W. R. 269, [1894] 1 Q. B. 236, the decision was that the provision as to giving security was not affected by the rules of order 59. It was held that the general words of the rules did not repeal the special enactment of the statute. The reasons given in the judgments apply to the provision as to giving notice. There is nothing in the Judicature Act, 1884, which repeals this provision; neither in my opinion is it repealed by the rules and orders made under the Judicature Act; they only use general words and they do not assume to alter it, and I think that if any rule had assumed to alter it it would have been *ultra vires*. In my opinion the case of *Morgan* v. *Bowles*, which followed the judgment of the Court of Appeal in the case of *In re West Devon Great Consols Mine*, 36 W. R. 342, 38 Ch. D. 51, was rightly decided. There is no power to do that which the plaintiff asks for. To make the order would be to go directly in the teeth of section 8 of the Mayor's Court Act. The appeal must therefore be dismissed.

KAY, L.J.—It is admitted that from 1857 to 1884 there could have been no appeal in a case like the present, unless notice was given within two days in accordance with the terms of section 8 of the Mayor's Court Act. The contention is that this was altered by the Judicature Act of 1884. But that Act does not mention the Mayor's Court Act at all. Section

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

23 simply gives a power to make rules for regulating the procedure on appeals from inferior courts. A rule was made under that power—viz., ord. 59, r. 16, which enables the court to extend the time for bringing such an appeal if it thinks just. We are asked to decide that that rule does away with the absolute condition imposed by section 8 of the Mayor's Court Act. I cannot come to that conclusion without more express words than are used in the rule. I doubt whether any rule could alter it; but this rule does not assume to alter it. It is argued that extending time for appealing within the meaning of the rule involves everything which is necessary to enable a party to appeal. I think that the maxim *generalia specialibus non derogant* applies to this case, as Bowen, L.J., held it to apply in the case of *In re West Devon Great Consols Mine*. I cannot suppose that it was intended to do away with the provision as to notice. The appeal therefore fails.

A. L. SMITH, L.J.—The Mayor's Court Act says that in certain cases a party to a cause in that court may appeal. But this right is not given absolutely. The Act goes on to say "provided that"—which seems to me to be the same thing as saying "if"—such party gives notice within two days, and also gives security. In my opinion it cannot be said that if he does neither the one nor the other he can still get leave to appeal. This enactment has never been repealed, and in my judgment the Rule Committee have no authority to repeal Acts of Parliament.

Appeal dismissed.

Solicitor for the plaintiff, *A. H. Dabbs.*

Solicitors for the defendants, *Bircham & Co.*

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith, L.J.) May 19.

WHITELEY *v.* EDWARDS. (*a.*)

Married woman — Separate estate — Restraint upon anticipation — Judgment — Execution — Arrears of income accruing due after judgment—Receiver.

Where judgment has been obtained against a married woman who is entitled under a settlement to income for her separate use with a restraint upon anticipation, there is no power to appoint a receiver of her income which has accrued due after the date of the judgment.

The decision of the Court of Appeal *to the above effect in* Hood Barrs *v.* Cathcart (Nos. 1 and 2), 42 *W. R.* 628, [1894] 2 *Q. B.* 559, *is not affected by the decision of the* House of Lords *in* Hood Barrs *v.* Heriot (No. 1), ante, *p.* 481, [1896] *A. C.* 174.

Appeal from an order of Kennedy, J.

On the 4th of July, 1895, the plaintiff recovered judgment against the defendant, a married woman, for £878 16s. 6d. and costs.

By the defendant's marriage settlement certain property was transferred to trustees upon trust to pay the income thereof to her for her separate use with a restraint against anticipation.

On the 1st of April, 1896, the judgment being unsatisfied, the plaintiff applied for an order appointing a receiver of the defendant's income which accrued due on the 25th of March, 1896, but which had not been paid over to her.

Kennedy, J., refused to make an order.

The plaintiff appealed.

Swinfen Eady, Q.C., and *T. W. Chitty*, for the plaintiff.—In *Hood Barrs* v. *Cathcart* (Nos. 1 and 2), 42 W. R. 628, [1894] 2 Q. B. 559, it was sought, as in this case, to appoint a receiver of the income of a married woman which accrued due after the date of the judgment against her. This court held that a receiver could not be appointed, and in the judgment delivered by Kay, L.J., it was laid down that the restraint against anticipation is not removed till the income is in the hands of the married woman. But the decision in that case has now been overruled by the judgment of the House of Lords in *Hood Barrs* v. *Heriot* (No. 1), *ante*, p. 481, [1896] A. C. 174. In the latter case the income which it was sought to attach had accrued due before the date of the judgment; and this court, before whom the case was heard under the name of *Loftus* v. *Heriot*, [1895] 2 Q. B. 212, 43 W. R. Dig. 112, following the decision previously delivered by Kay, L.J., held that the judgment could not be enforced by any kind of process against such arrears of income. The House of Lords reversed this decision, and the reasons given by Lord Herschell and Lord Macnaghten show that they intended to overrule the previous decision of *Hood Barrs* v. *Cathcart*. It must now be taken to be the law that as soon as income which was subject to a restraint against anticipation becomes due the restraint is removed, and the income can be taken in execution.

Oswald, Q.C., and *Eyre Thompson*, for the defendant.—The decision of this court in *Hood Barrs* v. *Cathcart*, which exactly covers the present case, has not been affected by the judgments of the House of Lords in *Hood Barrs* v. *Heriot*. The only part of the earlier case which was criticised by the learned lords was a *dictum* in the judgment of Kay, L.J., which was not necessary to the decision.

They cited *Cox* v. *Bennett*, 39 W. R. 401, [1891] 1 Ch. 617, and *Pillers* v. *Edwards*, 71 L. T. N. S. 788, 43 W. R. Dig. 111.

Lord ESHER, M.R.—On the 16th of June, 1894, two judgments were given in this court on two separate appeals. In one case the judgment of the court was delivered by Davey, L.J., in the other case the judgment was delivered by Kay, L.J. The two appeals raised a point which was common to both, and all the judges who took part in the judgments were agreed as to that point. But in the second judgment another point was taken, and our opinion on that point was no doubt part of our judgment. Afterwards, in the case of *Loftus* v. *Heriot*, that second point again came before this court and had to be determined. We then determined it in accordance with the opinion which we had previously expressed upon it. *Loftus* v. *Heriot* was taken to the House of Lords, where our decision was reversed. Now, what did the House of Lords overrule? Did they overrule both the points which I have mentioned, or only the second point? If they have not overruled the first point, which was common to both the judgments in *Hood Barrs* v. *Cathcart*, there is no reason for departing from our judgment on that point. And that is the point which is raised in this case. I think that the House of Lords confined themselves to the second judgment, viz., that which was delivered by Kay, L.J.; they confined themselves to the case where the arrears of income were in existence before the date of the judgment against the married woman, and they did not touch the case where the arrears of income were income which came into existence after the date of the judgment. I therefore think that we must adhere to our judgment—viz., that delivered by Davey, L.J., and I think that in so doing we are not refusing to follow the House of Lords. The appeal must therefore be dismissed.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

A. L. SMITH, L.J.—In the case of *Hood Barrs* v. *Cathcart* two appeals came before this court. In both cases we held that where a judgment had been obtained against a married woman possessed of income to her separate use with a restraint against anticipation a receiver of her income could not be appointed where the income had not accrued due at the date of the judgment. I adhere to the judgment delivered by Davey, L.J. In the second judgment—viz., that delivered by Kay, L.J.—we went further and said that the restraint upon anticipation did not come to an end till the money had practically come into the hands of the married woman. Then came the case of *Loftus* v. *Heriot*, in which the facts were different; there the income which it was sought to attach had become due before the date of the judgment against the married woman, but it had not yet been paid to her. We held, as we had held in the judgment delivered by Kay, L.J., that the income was not free property till it came into her own hands, and that the fetter against anticipation had not come off. That case went to the House of Lords, and our judgment was reversed. The House of Lords dealt simply with the case where the income was already due at the date of the judgment, and they differed from our opinion that the fetter had not come off. Now the point is taken that the House of Lords overruled *Hood Barrs* v. *Cathcart*. In my opinion they only overruled the point in the judgment of Kay, L.J., to which I have referred. I think that the decision of Kennedy, J., is right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Roche & Son.*

Solicitor for the defendant, *H. H. Hood Barrs.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) Feb. 27.

CLUTTERBUCK *v.* TAYLOR. (*a.*)

Election law—Parliament - Service franchise—Part of a house—Cubicle—Separate occupation—Occupation as a dwelling—Parliamentary and Municipal Registration Act, 1878 (41 *&* 42 *Vict. c.* 26), *s.* 5—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 3.

A police constable had the exclusive occupation of a cubicle in a police station. The cubicle was one of a number contained in one room. It was separated off from the rest of the room by a partition seven feet high not reaching to the ceiling, and was entered by a door opening into a passage which passed down the room. The cubicles had air, light, and warmth in common. The whole building was under the control of the chief constable, who could order any constable to change his cubicle at any time. The constable slept in the cubicle, but could not without leave take his meals there or smoke there, or go into it during the day time. He had the key of the door, but he was bound to let the inspector in at any time, and he could be ordered to give up the key.

Held, by the Court of Appeal (Rigby, L.J., *dissenting*), *that the cubicle was not separately occupied by the constable as a dwelling within section 5 of the Parliamentary and Municipal Registration Act*, 1878.

Barnett *v.* Hickmott, 43 *W. R.* 284, [1895] 1 *Q. B.* 691, *approved.*

Appeal from the judgment of a Divisional Court (Lord Russell of Killowen, C.J., and Grantham and Vaughan Williams, JJ.) on a special case stated by a revising barrister.

An objection was taken before the revising barrister for the city of Gloucester to the retention of the appellant's name on the list of Parliamentary voters, Division 2, on the ground that he had not been the inhabitant occupier of a dwelling-house for twelve months prior to the 15th of July, 1895.

The appellant was a police constable, and during the whole of the qualifying period had the exclusive occupation of a cubicle in the police station at Gloucester. This cubicle, with others, was contained in a room in the police station. It measured about 8ft. by 7ft., and was partitioned off on three sides by a wooden partition about 7ft. high, the wall of the room forming the fourth side. There was a space of two or three feet intervening between the top of the partition and the ceiling of the room. The cubicle was entered by a door opening into a passage which passed down the room. The appellant had the key of the door, and was entitled to lock it at pleasure. The cubicles had air, light, and warmth in common. The appellant slept in his cubicle on a bed supplied by the county, but he generally took his meals in a common mess-room and also used the common washing-room of the station.

The revising barrister held, on the authority of *Barnett* v. *Hickmott*, 43 W. R. 284, [1895] 1 Q. B. 691, that the appellant was not entitled to vote in respect of the occupation of his cubicle, and erased his name from the list, but stated a case for the opinion of the court.

The Divisional Court upheld the decision of the revising barrister.

The appellant appealed to the Court of Appeal, and when the appeal first came on for hearing the court thought fit, in order to obtain further information, to direct that certain questions of fact should be addressed to the revising barrister to be answered by him.

The answers returned by the revising barrister were to the following effect: The chief constable had control of the whole building; the chief constable could order any constable at any time to change his cubicle; he could order any constable not to receive visitors in his cubicle; he could order any constable not to take his meals in his cubicle; he could order any constable not to have washing apparatus in his cubicle; he could order any constable not to go into his cubicle during the day time (though the revising barrister said it would be unreasonable to make such order in the case of a man who had been on night duty); the inspector could order any constable to open the door so as to let the inspector go in; he could order him to give up the key of his cubicle; he could order him not to smoke in his cubicle. As a matter of fact the constables were sometimes allowed to take their meals in their cubicles, and were also allowed sometimes to smoke in them.

Graham and *Garrett*, for the appellant.—The appellant is entitled to the service franchise under section 3 of the Representation of the People Act, 1884. He was during the qualifying period an inhabitant occupier of a "dwelling-house," as that word is defined in section 5 of the Parliamentary and Municipal Registration Act, 1878. The restrictions under which he occupied the cubicle did not make him any the less an occupier. Every person who possesses the service franchise is liable to have his enjoyment of the premises restricted by any regulations which his master chooses to make.

They cited *Bradley* v. *Baylis*, 30 W. R. 823, 8 Q. B. D. 195; *Stribling* v. *Halse*, 16 Q. B. D. 246, 34 W. R. Dig. 68; *Atkinson* v. *Collard*, 34 W. R. 75, 16 Q. B. D. 254.

Lewis Thomas and *J. H. Percival*, for the respondent.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

LORD ESHER, M.R.—The claimant in this case is a policeman who does not occupy a separate house or a separate room, but the things relied on as giving him the franchise are things done by him in a compartment of one room in the police station—viz., in what is called a cubicle. The cubicle is partitioned off from the rest of the room and from other cubicles by boards which do not reach up to the ceiling. Inside the cubicle there is a bed, and in the bed the claimant sleeps, but he only does so by virtue of his employment as a policeman. He cannot choose which cubicle he will sleep in, and when it is chosen for him he cannot refuse to sleep there. When he is in it the air which he breathes and the light which is given to him are not air and light confined to his cubicle, but the common light and air of the whole room in which he and the other policemen are. That fact alone appears to show conclusively that the cubicle is not separately occupied as a dwelling. It seems to me inconsistent with the idea of a dwelling that light and air should be shared with other people. But we thought it better to have further facts found by the revising barrister as to the conditions under which the cubicles are occupied. It appears that this building and the mode of using it are under the control of the chief constable. That seems to me to be inconsistent with the idea of each cubicle being a dwelling separately occupied. The chief constable can at any time order a constable to change his cubicle, that is to say, a constable can from day to day be ordered to change that place which is said to be his dwelling. Then a constable cannot receive a visitor in his cubicle without the permission of the chief constable. Neither can he without leave take his meals in his cubicle, nor have washing apparatus there. He can be ordered not to go into his cubicle during the day time, and though, as the revising barrister says, it would be unreasonable to make such an order in the case of a man who had been on night duty, the chief constable has the power. Further, a constable is bound to let his superior officer enter his cubicle at any time. He can be ordered at any time to give up the key, and he can be ordered not to smoke in his cubicle. We must take all these things together, and ask whether they are consistent with the idea of a person occupying a dwelling. These restrictions are the terms of the constable's occupation, for if he were turned out of the force he would not be entitled to come into the room at all. And they seem to me to be absolutely inconsistent with and antagonistic to the ordinary idea of the occupation of a dwelling. Therefore, in my opinion, he is not such an occupier as is entitled to the franchise.

It is said that soldiers in barracks are entitled to the franchise. But I do not think that would be so, if the facts were like these. I therefore think the appeal must be dismissed.

LOPES, L.J.—In this case the judges of the Divisional Court followed the decision in *Barnett* v. *Hickmott*; and for my part I should have been disposed to affirm their judgment, even without the additional facts which are now before us. A dwelling-house is defined by section 5 of the Parliamentary and Municipal Registration Act, 1878, to include every part of a house separately occupied as a dwelling. The cubicle in question is a compartment of a room which is divided into a number of compartments, which are not completely separated from one another, but have air, light, and warmth in common. The use of the cubicle by the constable is subject to the many restrictions of which we have been told. It seems to me that he only has the use of the cubicle for the specific purpose of sleeping in it during a part of every twenty-four hours. Under these circumstances I think it cannot be said that he occupies a part of a house separately occupied as a dwelling. My idea of occupation within the meaning of the Act of Parliament is an occupation which is not subject to limitations and disabilities such as are inconsistent with the substantial rights which a man ordinarily enjoys with regard to his own house.

RIGBY, L.J.—I have the misfortune to differ from my learned brethren. The question is whether the claimant was during the qualifying period an inhabitant occupier of a dwelling-house. He did, in fact, occupy the cubicle without interference during the qualifying period. He had the key of the cubicle; and when he was on night duty he used the cubicle during the day, and when he was on day duty he used it during the night. It seems also that he took his meals in the cubicle when the common mess-room was not available. Section 3 of the Representation of the People Act, 1884, says that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant." Here the cubicle was not occupied by any superior under whom the claimant served. Therefore, assuming that the cubicle was a dwelling-house, he was an inhabitant occupier of a dwelling-house during the qualifying period. Can the power of the chief constable to make regulations and so restrict the use of the cubicle by the claimant have anything to do with the franchise? He occupied in fact, and the Act says nothing about restrictions on the mode in which occupation may be enjoyed, or what the effect of them is to be. We know of establishments where large numbers of people are employed and live under certain restrictions. But I do not see how such restrictions can affect the question of the franchise. The service franchise is something totally different from the other kinds of franchise. The owner of this franchise does not acquire it by reason of any right of property. He is not in the position of a tenant at will; he is not a tenant at all. He has no landlord, but he merely occupies premises by virtue of his service under such regulations as his master may choose to make.

Then is this cubicle a dwelling-house? By section 5 of the Act of 1878 "dwelling-house" includes any part of a dwelling-house, provided that it be separately occupied as a dwelling. It need not be a large or important part, but any part, even the smallest and the least significant part, is sufficient to confer the franchise. This cubicle, it is true, is part of a room in a building, but it is none the less a part of the whole building. In my opinion it is a dwelling-house. Then did he occupy separately? As to the light and air of the cubicle being enjoyed in common with the whole of the room, the Legislature seems to me to have dealt with that point in the third paragraph of section 5, which says that "for the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part." The claimant had possession of the key of his cubicle during the whole of the qualifying period, and though his superior officer had the power to go into the cubicle at any time, it does not appear that he ever did so. The claimant there-

fore occupied separately. And further, in my opinion, he occupied his cubicle as a dwelling. It does not seem to me to be necessary that he should occupy it for all the purposes of a dwelling. The question is whether his occupation of it, so far as it went, was occupation as a dwelling. I concede that there appears to have been an unlimited power of interference with the user of the cubicle by the claimant, but I do not think that the franchise has anything to do with that. A man who claims as an inhabitant occupier of premises is not bound to show a good title to occupy them. He may have been a trespasser, but when the franchise comes to be dealt with the only question is, Was he there? The claimant in fact used his cubicle as a place for sleeping during the qualifying period, and in my opinion his user of it, restricted though it was, was as far as it went user of it as a dwelling.

Appeal dismissed.

Solicitor for the appellant, *R. White*, for *Frank Treasure*, Gloucester.

Solicitor for the respondent, *C. T. Courtney Lewis*, for *Langley-Smith*, Gloucester.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) April 22.

In re BAYLIS. (*a*.)

Solicitor—Costs—Taxation—Settled account—Previous payment—Agreement for costs—The Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 41—*The Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 8.

Where there is an agreement as to costs between a solicitor and his client the court can refer that to the taxing master to ascertain whether it is fair and reasonable, and if not, it is not to be treated as binding upon the client.

A settled account, though coupled with the retainer of agreed costs, is not payment as between solicitor and client unless a proper bill is delivered.

Decision of Chitty, J., ante, p. 404, *affirmed.*

Hitchcock *v.* Stretton, 40 *W. R.* 555, [1892] 2 *Ch.* 343, *explained;* Re Frape, 41 *W. R.* 417, [1893] 2 *Ch.* 284, *distinguished.*

Appeal from Chitty, J. (reported *ante*, p. 404).

Mr. Buckley, a client of Mr. Baylis, a solicitor, attained twenty-one in 1882, and in 1883 sought the services of Mr. Baylis. Baylis acted for him as solicitor whilst Buckley was still an undergraduate at the university in a great variety of matters of business, and in assisting him in obtaining loans from insurance companies and other societies of a reputable character.

When Baylis obtained a loan he placed before Buckley an account, not a regular bill of costs, showing how the money was to be applied, that he was deducting his costs up to that time, and was giving a cheque for the balance to Buckley.

It was agreed between them, verbally, that the solicitor's remuneration should be not according to the usual scale charges, but a percentage on the sums advanced, on the ground of the special opportunities he possessed for obtaining loans. The cash accounts contained items of lump sums expressed to be for "costs" or "agreed costs" or "on account of costs." The loans were made at a reasonable rate of interest, and the client made no charge of fraud against the solicitor, nor imputed to him any improper conduct in the matter of the loans.

Baylis ceased to act as Buckley's solicitor in 1894, and shortly afterwards Buckley took out a summons against Baylis for the delivery of a bill of costs, and to have the same referred for taxation.

On the hearing of the summons Chitty, J., made the usual order for delivery of bills of fees, charges, and disbursements, and for taxation thereof, with a direction to the taxing master to certify whether any and what agreements within the Solicitors' Remuneration Act of 1881 had been entered into between the solicitor and his client, and, if so, whether any and which of such agreements were or were not fair and reasonable. The costs were reserved, and the solicitor was to have two months for delivery of his bills.

The solicitor appealed.

T. E. Scrutton, for the appellant, used the same arguments as in the court below.

Farwell, Q.C., and *Sington*, for the respondent, were not called upon.

LINDLEY, L.J.—In my opinion the order made by Chitty, J., was perfectly correct. What the learned judge has done is this. He has ordered Mr. Baylis to deliver a bill of costs, and that that should be referred to the taxing master for taxation; and he has added this, that "the taxing master is to inquire whether any and what special agreement has been entered into between the applicant and the respondent within the Solicitors' Remuneration Act, 1881, and, if so, whether any and which of such agreements are or are not fair and reasonable."

It was said, and the statement is perfectly true, that the summons would not have been taken but for the unpleasant feeling which existed between Mr. Baylis and Mr. Buckley's father. The correspondence shows that these proceedings were the father's doing. But it is not a case of the father using the name of the son in any proceedings, but he urged his son to take proceedings. The true inference is that, although the father has promoted the proceedings, they are really the proceedings of the son. Whether they were instigated by the father or not is immaterial, for they are *bonâ fide* the litigation of the son.

The present appeal is made on behalf of Mr. Baylis to show why no bill should be delivered, or, at all events, that no order to tax should be made, even guarded as this order was by Chitty, J. Several points are made on his behalf. The first point made is that these are settled accounts, and have been paid. We may treat them as one, because though separate in one sense, the answer to one is the answer to the other. We cannot hold that these were settled accounts or paid accounts, inasmuch as there never has been any delivery of any bill of costs of any sort or kind. Counsel for the appellant has urged that they will be paid accounts when the bill is delivered under the order of the court, because the payments will then be held to refer to the bill, and that therefore it is premature to order taxation. I cannot follow that argument. There is no bill now before the court, there is no bill to which these payments can be referred. This is not like the case of *Hitchcock* v. *Stretton*, 40 W. R. 555, [1892] 2 Ch. 343, in which I think that perhaps Stirling, J., went a little too far in holding that on delivery of a bill of costs after the issue of the writ in the action payments made before the proceedings could be referred to it. I cannot help thinking that the real reason why Stirling, J., decided in this way was that when he came to see the bill of costs he could

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

not find that there was anything at all which required taxation. I am quite satisfied that if he had thought there were improper payments he would have ordered taxation. As a matter of law, I repeat, I think that he went a little too far, though I do not say the decision was wrong, but I feel convinced that this explanation of his reason is the true one. It is said that because in *Ex parte Heming*, 28 L. T. O. S. 144, 5 W. R. Dig. 141, it was held that payments made before proceedings instituted could be referred to a bill subsequently delivered, we ought therefore to stay our hands in this case; but that is an impossible contention, and the same observation applies to *Re Thompson*, 42 W. R. 462, [1894] 1 Q. B. 462, where the court came to the conclusion that the payment could be referred to the bill of costs because the client had actually had the bill and had been satisfied with it. Here we can exercise no judgment of that kind because we have no materials to enable us to do so. The authorities only show that a solicitor who pays himself by retaining and does not deliver a bill of costs cannot treat that retention as payment. No authority to the contrary has been cited, and I cannot see that there has been here payment or settled account.

The other point is different. It is said that it was wrong to order taxation because these accounts were written agreements within section 8 of the Solicitors' Remuneration Act, 1881. If there had been any agreement in writing within the Act, we should have to pay attention to it. If the circumstances are looked at, it is clear what the agreement was—viz., that the real agreement was a verbal agreement with this young man that Mr. Baylis should pay himself his costs in this way. Having our attention called to that, I am not prepared to construe the words as we construed those in *Re Frape*, 41 W. R. 417, [1893] 2 Ch. 284. In that case we held that if there were grounds for suspicion of unfairness, the court would order the taxing master to consider whether the agreement was fair and reasonable; but in this case we are told that the agreement was only for "costs as agreed." That expression does not look as if this document was the written agreement, but rather as if it referred to some other agreement. The account refers to some antecedent agreement not embodied in that account, so that the decision in *Re Frape* does not cover this case at all. I think that decision was quite right, and I will not throw any doubt upon it; but to extend that decision to a case where there is no agreement in writing would be a very different matter.

The delay which has taken place is a further and a serious point. If by ordering taxation we should be doing an injustice to Mr. Baylis, or if, owing to lapse of time, he had lost the materials for preparing his bill, and could not comply with the order, it would be different; but on his own evidence he has in his possession ample materials for making it out, and there is nothing to show that we should be doing any injustice in ordering him to do so.

I have only one other word to say. When you look at these charges they are very large sums; I do not say they are overcharges, but the difference between them and the scale fees is shown by the evidence, and they are much larger than the usual charges made by solicitors. That requires investigation, and was quite enough to justify Chitty, J., and this court in making the order which has been made. That order is guarded in the manner which I have pointed out, and was quite right, and the appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion, and I think that the order made by Chitty, J., is perfectly right in the circumstances of this case. It is said that one reason why it is not right is that there has been delay. It is perfectly true that there has been delay. Mr. Buckley attained his majority in 1882, and twelve years elapsed during which Mr. Baylis acted for him without any question being raised. No doubt that is a long delay; and if it had not appeared from the evidence that Mr. Baylis was in a position to prepare a bill of costs, that would have great weight. But he has the materials from which to prepare his bill, and I have even some doubt whether he has not the bill itself ready. That is the answer to the plea of delay. But there is another answer. I cannot help thinking that there is ground for saying that the agreement relied upon is somewhat unreasonable, because it does appear that there is a very large excess in the amounts charged compared with what would be chargeable under the scale; and that is a strong argument in favour of the order made by Chitty, J., and one which tells against the suggestion that the order is wrong because of delay.

Then it is said that there has been payment and a settlement of account, but in my opinion there has been neither payment nor settlement. No bill of costs has ever been delivered. It is said that the solicitor has retained the money himself, and that that amounts to payment. It is not said that if no bill had been delivered that would be payment; but it is said that when under the order the bill is delivered, if it contains anything to which the previous retention can refer, that will convert the retention into payment. That seems to be a preposterous contention. There is no doubt a case of *Hitchcock* v. *Stretton*, in which it was held that retention could be referred to a bill delivered after the issue of the writ, but that was a different case. The reason why Stirling, J., in that case acted as he did was because he felt that under the circumstances there was nothing wrong, but that all was fair and right, and that to send the bill for taxation would have been a useless proceeding.

The further point taken is under the Act of 1881, s. 8. I need not read that, but sub-section 2 says: "The agreement shall be in writing, signed by the person to be bound thereby or by his agent in that behalf." The question is whether in this case there was any such agreement in writing as is contemplated by that enactment. The expressions used in the accounts are "agreed costs" and "agreed as costs." In my opinion that is not a compliance with the statute, and I cannot help thinking (speaking for myself) that the terms of the agreement ought to be found in the writing, and that that is what the statute intended. It is not necessary to go that length for the purpose of this case. Upon "agreed costs" and "agreed as costs," taken by themselves, it is impossible to come to any conclusion what the agreement may be; but we are relieved from the difficulty which might have arisen because we were told by the appellant's counsel what the real agreement was—viz., that there was to be an allowance of 5 per cent. on loans secured by Mr. Baylis. That was an oral agreement; and how can it be said that these words, "agreed costs" and "agreed as costs," in any way indicate what the real agreement was? That point also fails, and in my opinion the order made by Chitty, J., was in every respect right.

KAY, L.J.—I am of the same opinion, but I will add a few words, because this is a case which involves principles of great importance. In every case of an agreement between solicitor and client the court has always recognised that a solicitor can exercise great influence over his client, and it looks upon an agreement prepared by the solicitor with great jealousy

and care, and throws upon the solicitor the burden of showing that it was fair and proper. The Act of 1881 did not alter that, but recognized it in the plainest possible terms. Where there is an agreement the court can refer that to the taxing master to ascertain whether it is fair and reasonable, and if not it is not to be treated as binding upon the client. Is there here, in the first place, an agreement binding under the Act of 1881? The only thing in writing and signed, which is what the Act requires, is a statement which in the first account is in these words, "costs of mortgage as agreed, £35." In some of the later ones it is "agreed costs," and so on. The appellant's counsel argued that there you have on the face of the document an agreement that that is to be the amount of the costs. But he began by saying that there was a verbal agreement with this young man just after he attained twenty-one, to the effect that when any money was borrowed the solicitor should be paid 5 per cent. on the gross amount to cover his costs and commission. That was the agreement on their part. Although it may have been difficult for the other side to set up that case, it is different when the solicitor tells us so himself, and it is quite plain that these documents refer to that agreement. They are not in themselves the agreement, but they refer to an antecedent agreement to pay 5 per cent. for commission and costs, and the words "costs of mortgage as agreed" are completely explained. This was not a written agreement at all; it was a verbal agreement, and not in writing, and ought not to be binding on the client. It was said that that was not consistent with the decision in *Re Frape*, but I think it is consistent with it. It was a strong decision. I was a party to it. But it does not go so far as we are asked to go in this case. The question there was this. In an account which was signed by the client there was an item for "agreed costs £80." That document enabled the court to say that it was a sufficient description of all the costs incurred down to the date of that document (and there was no suggestion of any agreement outside that document), and that the agreement was that £80 should be the amount payable for all these costs. That is quite different from the point now before us. This is not on the face of the document an agreement, but a reference to an antecedent verbal agreement which is not binding on the client. That completely distinguishes this case from *Re Frape*. This verbal agreement was entered into with Mr. Buckley when he was such just of age. The court will look very carefully at an agreement, even if it has been signed; but the true result of this is that there was no written agreement. There is not enough to satisfy the Act of 1881, and we must treat it as if there was no signed agreement. If we had to look into it further, I should say that the agreement, whether written or not, requires most careful investigation, because the first account does not refer to any agreement. It says "costs as to loan £30." That was a loan of £600 made by one of the leading insurance societies in London. The account is made out by the society thus: "Costs of investigation of title." Therefore the investigation was not made by Mr. Baylis, but by the solicitors of the society. On looking at the scale it appears that the only charge Mr. Baylis could have made was 1 per cent., which would have amounted to £6, instead of which he has charged £30. That seems to me to be an exorbitant charge which would quite justify the court in inquiring whether it was a fair and reasonable agreement. Then it was said that there had been payments of these accounts. I asked whether there had ever been a case in which retention had been held to be payment where no bill of costs had been delivered, and here no bill has been delivered up to this moment. The answer was "No, but there are cases where a bill has been delivered after the retention and has been kept for some time without rejection, and the retention has been held to refer to that bill and treated as payment." Other cases are said to have gone further than that, as, for instance, *Hitchcock* v. *Stretton*, before Stirling, J., where, after the action had begun, the bill was for the first time delivered, and the learned judge thought himself bound to treat that as referable to the retention which had been made before any proceedings had been commenced or any bill delivered. With great deference to Stirling, J., I should not have so decided. I do not think that anything warrants us in going a step further than we did in *Re Frape;* and we are asked to go even further than the decision in *Hitchcock* v. *Stretton* and to hold that a bill delivered under the order of the court will relate back and make all these retentions payments. Even if *Hitchcock* v. *Stretton* was right, this would be to carry it a great deal further. I entirely dissent from the argument that delivery of a bill under this order would make that payment, which is not payment now. I cannot follow that argument.

Then it is said that this is a settled account, but the same answer as is given to the suggestion of an agreement is conclusive. There is one item which the client has had no opportunity of investigating. He has not agreed in any way binding on him to make a payment of that item, and no bill has been delivered, and it cannot be treated as a settled account.

It is urged that the respondent is coming a long time after the event. There is no Statute of Limitations which applies, and the Act of 1881 says not a word as to the time within which a bill must be delivered, so there is no statutory bar. But still there has been a long delay. The first account was in 1885, and we are now in 1896. If it could be added to that, that the solicitor is in a great difficulty, that he has lost his vouchers and cannot make out a bill, there would be great force in the argument; but we have it, that he has the materials and that his clerk has actually made out a draft bill, so there is no difficulty of that kind. This is a matter between solicitor and client, and of a client very much in the hands of the solicitor, and I do not feel disposed to say that the question of delay is enough to make the order of Chitty, J., improper. I also think that the father's action was quite right, although the son is, perhaps, doing what he would not have done without it. [His lordship referred to the order of Chitty, J., and continued:—] If the taxing master finds that there has been an agreement which is binding under the Act of 1881, he will tax the bill in relation to that agreement; but he cannot tell until he sees the bill whether the agreement is reasonable or not. Seeing that the solicitor has all the materials, it is rather extraordinary that he should venture to interfere with an order which is reasonable, right, and proper. The appeal fails, and must be dismissed, with costs.

Appeal dismissed.

Solicitors, *Peard & Son*; *Rowcliffes, Rawle, & Co.*, for *A. & G. W. Fox*, Manchester.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) April 14, 15.

BIGGERSTAFFE *v.* ROWATT'S WHARF (LIMITED).
HOWARD *v.* ROWATT'S WHARF (LIMITED). (*a.*)

Company—Debentures—Set off—Assignment of debt—Appointment of receiver—Time of assignment—Liquidated demand—Money had and received—Goods paid for but not delivered — Managing director — Acts within apparent authority.

Debentures issued by a limited company, being a floating charge on its assets, do not take effect as a charge as from the date of their issue, but only from the date of the appointment of a receiver on behalf of the debenture-holders, and then subject to the existing equities. A trader dealing with the company in the ordinary course of its business has an inchoate right of set-off against debts owing by him to the company before such date, even though he has notice of the issue of the debentures.

Where there is a claim for goods paid for but not delivered, the property in the goods not having passed, the claim becomes one for money had and received, upon a failure of consideration, and becomes a liquidated demand, and is a proper subject for set-off.

A company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and strangers dealing bonâ fide *with such persons have a right to assume that they have been duly appointed.*

Appeal from a decision of North, J.

Rowatt's Wharf, Limited, was a company incorporated in 1892.

In March, 1893, the company made an issue of 6 per cent. first mortgage debentures of £100 each.

The company thereby charged with the payment of principal and interest "all its real and personal property, present and future, and the undertaking, goodwill, and business of the company, and all its uncalled capital for the time being."

The debentures were subject to a condition (*inter alia*) that the charge thereby created was to be a floating security, and should attach as a fixed charge only if the company went into liquidation, or made default in payment of any of the principal moneys secured thereby, or made default for three months in the payment of any interest, and should not pay the sums due within one month after receiving notice to remedy such default.

The principal sums due under the debentures were payable on the 1st of January, 1900, but the company might pay them sooner on giving certain notice; and they were payable forthwith if the company made default in payment of interest or went into liquidation.

In May, 1893, Harvey, Brand, & Co. imported a cargo of petroleum oil, which was delivered at the wharf of the defendant company, and stored there by them for Harvey, Brand, & Co. at a rent of 3d. per ton of oil per week, subject to a deduction for any leakage from the oil which might take place at the wharf.

By the custom of the trade the rent was payable when the oil was finally removed from the wharf, but the wharfinger was not bound to allow the amount of oil in tank to be reduced below a value representing the amount of rent owing.

In November, 1893, Harvey, Brand, & Co. purchased through the defendant company 7,000 barrels, which were intended to be used for the delivery of oil, at the price of 3s. 6d. a barrel, and they paid the amount of the purchase money, £1,225, to the company.

The barrels formed part of the general stock of barrels at the wharf belonging partly to the defendant company and partly to their customers, and were to be used by the company when oil of Harvey, Brand, & Co. was to be put into barrels for delivery by the company to the order of Harvey & Co.

In October, 1894, the above actions were brought by holders of debentures of the company to enforce their security, and on the 30th of October, 1894, an order was made appointing Mr. Howard to be receiver and manager of the business of the company on behalf of the debenture holders.

Harvey, Brand, & Co. received notice of his appointment on the 31st.

In November, 1894, the company passed resolutions for a voluntary winding up, and on the 5th of November, 1894, Mr. Howard was appointed liquidator.

In October, 1894, there was oil belonging to Harvey, Brand, & Co. still remaining at the wharf of the defendant company, and the receiver claimed a lien upon it in respect of rent due from them to the company, amounting after a deduction for leakage to about £550.

Harvey, Brand, & Co. claimed to set-off against this sum a sum of £677 5s., being 3s. 6d. per barrel in respect of 3,870 of the 7,000 barrels which had never been delivered to them by the defendant company.

The question was whether this sum of £677 5s. could be so set off, having regard to the existence of the debentures issued by the company, and on the 24th of April, 1895, Harvey, Brand, & Co. took out a summons for the determination of the question.

There was a second question raised by the summons, whether certain debts owing to the company had been validly hypothecated to Harvey, Brand, & Co.

In the latter part of October, 1894, Harvey, Brand, & Co. were pressing the company for security for the money owing them by reason of the non-delivery of the barrels, and the company were in need of money for payment of wages.

On the 22nd of October a meeting took place between the three directors of the company and Harvey, Brand, & Co., at which it was agreed that if Harvey, Brand, & Co. would advance money for the wages, the company would as security for such advances and the debt owing to Harvey, Brand, & Co. give to them (amongst other things) letters hypothecating to them certain debts owing to the company.

On the 23rd of October Mr. Davey, one of the directors, signed a number of letters addressed to the different debtors to the company, telling them that all charges due or to become due from them on goods at the company's wharf were hypothecated to Harvey, Brand, & Co. These letters were signed by Davey, as managing director, on behalf of the company, in the presence of one of the other directors, and were given to Harvey, Brand, & Co.

Under the articles of the company the quorum of directors was three, and the directors had power to appoint a managing director, and to authorise him to exercise all their powers except the signing of bills of exchange and promissory notes. There were three directors of the company. There was no minute of any resolution of the appointment of Davey as managing director; but he appeared to have acted as managing director, and to have been recognised as such by his co-directors. The question was whether or not the hypothecation of the debts was binding on the company, having regard to the fact that Davey

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

had not been formally appointed managing director when he purported to act in that capacity.

North, J., held that the debentures ceased to be a floating security, and the charge thereby created attached on the appointment of the receiver; but the claim of Harvey, Brand, & Co. was a claim for unliquidated damages, being a claim for the wrongful conversion of the barrels, and such damages could not be set off against the amount of the rent.

On the second question he held that Harvey, Brand, & Co. did not rely on the powers of Davey as *de facto* managing director, and therefore could not support their claim on that ground.

Harvey, Brand, & Co. appealed.

Swinfen Eady, Q.C., and *F. Wright*, for the appellants.—The company had the money and did not deliver the barrels, so that the remedy of the appellants is an action for money had and received upon a consideration which has failed. The claim would be for a liquidated amount, the price of the barrels, which could be set off against the rent due to the company. The debentures would only take effect subject to all equities existing on the 30th of October, 1894, and so subject to the right of set off. On the second point, Davey was acting as managing director, and the appellants had no notice that there was any informality in his appointment, and were acting *bonâ fide*: *County of Gloucester Banking Co.* v. *Rudry, Merthyr, &c., Colliery Co.*, 43 W. R. 486, [1895] 1 Ch. 629, and *Attorney-General* v. *Great Eastern Railway Co.*, 28 W. R. 769, 5 App. Cas. 473. [KAY, L.J., referred to *Smith* v. *The Hull Glass Co.*, 8 C. B. 668, 11 Ib. 897.] [LOPES, L.J., referred to Lindley on the Law of Companies, 5th ed., pp. 159 and 160.]

Cozens-Hardy, Q.C., *Upjohn*, and *W. H. Cozens-Hardy*, for the debenture holders.—There has not been a total failure of consideration, and the appellants' claim must be for wrongful conversion. That is a claim for unliquidated damages, which cannot be set off against the rent. If they put their claim for a liquidated sum in respect of the price of the barrels, the answer is that the debt was incurred after the issue of the debentures, by which all the assets were assigned. [KAY, L.J.—Is notice of a debenture which is a mere floating charge notice of an assignment?] There was an actual charge created by them, though until they matured the company remained in possession of the assets. Debenture holders would take in priority to execution creditors, even before the appointment of a receiver, and that could only be on the ground that the debentures created a charge: *In re The Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627; *In re Opera, Limited*, 39 W. R. 705, [1891] 3 Ch. 260; and *Taunton* v. *Sheriff of Warwickshire*, 43 W. R. 579, [1895] 2 Ch. 319. The right of set off under the statutes relating to set off (2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 4) only arises in some proceeding in which it can be asserted. The debts must have been incurred in the same transaction, and be such as would before the statutes have given rise to cross actions. The right had not arisen in this case when the receiver was appointed. On the second point, these so-called letters of hypothecation, amount to no more than notices given by the managing director. There was no resolution of the board authorizing him to charge the assets of the company in this way, and to hold this transaction good would be an extension of the principle of *The Royal British Bank* v. *Turquand*, 6 E. & B. 327, 4 W. R. Dig. 148. In *County of Gloucester Banking Co.* v. *Rudry, Merthyr, &c., Colliery Co.* the seal of the company had been actually fixed to the document in question. That is a different case from this.

No reply was called for.

LINDLEY, L.J.—The first question is as to the set-off. The company issued debentures in the ordinary form, which were a floating security creating an equitable charge upon the assets of the company, such assets being of necessity uncertain in amount. The debentures did not interfere with the company carrying on its business in the ordinary way, but the debenture holders could in certain events take possession by means of a receiver. The appellants owed the company a sum of over £500 for rent for storage of oil, and they have a cross claim against them to which I will refer later. It is an important fact that the appellants and others owed money to the company, as on the credit of that and other such debts the company obtained facilities for carrying on its business, and for dealing beyond what they otherwise would have done. It would be disastrous to companies if it could be said that because they had issued debentures they could not incur debts in respect of which a right to set off might arise. That would be equivalent to saying that they could not carry on their business. It is very much to the interest of the debenture holders that they should be able to do so, as without that they could not earn any money.

The appellants bought from the company some 7,000 barrels, for which they paid £1,225. They never received some of the barrels, and to the extent to which there was a short delivery they were creditors of the company for the price of every barrel which was undelivered, there being to that extent a total failure of consideration, which would enable them to have the price back or set off the amount of it against any debt owing by them to the company. They claim the right to set off that amount against the rent which they owe to the company, and they say that that right being an existing right when the debenture holders obtained the appointment of the receiver on the 30th of October, 1894, the debenture holders cannot now interfere with it. The answer of the debenture holders is, in the first place, that the claim is really one for unliquidated damages for a breach of contract, and that cannot be a set-off against the rent. I do not think that that is so. The barrels were not earmarked in any way, and the property in them did not pass. It is not a case for an action of trover, and the appellants were right in making their claim on the ground of short delivery for the price of the barrels not delivered. That is a claim for a liquidated sum.

Then the debenture holders say that, even so, this debt cannot be set off against the rent, because when it was incurred the appellants had notice of the assignment of all the assets of the company made by the debentures. That is a very important question. No doubt, in an ordinary case, when a debt has been assigned and notice of it has been received by the debtor, no right to set off in his favour can arise as against the assignee. On behalf of the debenture holders it is said that there is no difference in this respect between an ordinary assignment and an assignment made by debentures such as these; but I think that there is. If there were not, a company could not obtain credit without the consent of its debenture holders, and the right of a company to carry on its business in the ordinary way would be so crippled by the issue of debentures that it could not after that carry on its business at all. One means by which a company could earn money would be lost if it could not deal with people upon such terms that a right to set off cross debts could arise between them. That view of the effect of debentures would be mischievous. There is no authority for it, and it is contrary to principle, and contrary to the bargain

made by the debenture holders that until they take possession their debtors can continue to carry on their business. It appears to me that this view is untenable, and if adopted would be commercially disastrous. The right to set off which the appellants claim is, in my opinion, established.

The second question is whether the appellants are under the letters of hypothecation entitled to the debts dealt with by them. It is said that the company was not bound by the letters because Mr. Davey had no authority to pledge the debts. Persons who deal with directors of companies must look to see what powers the directors have under their articles, and in this case the articles show that the directors could appoint a managing director to exercise all their powers other than the signing of bills of exchange and promissory notes. So far, therefore, as the appellants knew, Mr. Davey had all the powers which he claimed. He was managing director, and might have had those powers. They were not bound to inquire into the books of the company to see whether his appointment was validly made. It is sufficient for persons who deal with a managing director of a company in the ordinary course of business and *bonâ fide* if the articles of the company show that he might have the powers which he purports to have. In the absence of notice that he had not the powers which his co-directors might have conferred on him, persons dealing with him would have a right to assume that he had such powers. That that is so, is shown by a long string of cases. I think the appellants were entitled to assume that Mr. Davey had the power which he exercised.

LOPES, L.J.—Where there is a claim in respect of goods paid for but not delivered the claimant may adopt either one or the other of two courses. He may, on the one hand, sue in trover and recover the goods or damages for their conversion, which would be unliquidated damages. I very much doubt whether in this case that would have been successful, as the property in the barrels had not passed. They were not earmarked, and an action in trover does not lie except for specific property. On the other hand, the claimant might waive the conversion, and sue for the money which he had paid, and for which he had received no consideration, as money had and received, which would be a liquidated demand. Counsel for the respondents said that to enable a person to succeed in the second kind of action which I have mentioned, the failure of consideration must be complete. That, however, is not correct in a case like this, where the consideration is severable. In my opinion the appellants had a good right to set off. It was further said that such a right is not good as against the assignee of a debt where notice of the assignment is given to the debtor before the right to set off arose, and that that was so even where the assignment was made by a debenture security such as those issued by this company. No doubt, in the case of an ordinary assignment of a debt that would be so, but in the case of debentures such as these it is different. If the contrary view could be maintained, it would be monstrous. In that case debtors who were also creditors of their creditor would be precluded from availing themselves of a right to set off after they had notice of an assignment of a debt which was a mere floating security, and which in its nature contemplated the business of the debtor being carried on in the ordinary way, with power for him to mortgage or sell his assets so long as it was done in the ordinary business way. If an assignment by a debtor such as this could prevent a right to set off accruing, it would be a serious thing for companies. They would be crippled in their business by the issue of debentures, and would not be able to obtain credit, the result of which would be that the debenture holders would not receive their interest. Everything, in the interests of both parties, must depend upon the company being able to carry on its business in the usual way. On this point, therefore, I think that the decision of North, J., was wrong.

Upon the question of the hypothecation, I think, upon the evidence, that Mr. Davey was in fact managing director, and that he acted in that capacity. The articles of association of the company show that it was within the power of the board to delegate to a managing director the powers which Mr. Davey has exercised. There was no doubt an irregularity in the way in which it was done; but the question is whether, the delegation being *intra vires*, the irregularity was sufficient to make the acts done in pursuance of it invalid. Upon that I will read a passage at pp. 159 and 160 of the 5th ed. of Lindley on the Law of Companies: "In *Smith* v. *The Hull Glass Co.* it was held that a company registered under 7 & 8 Vict. c. 110 was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorized by the directors to order the goods in question. Maule, J., went further than this, and his judgment is an authority, for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority, and that strangers dealing *bonâ fide* with such persons have a right to assume that they have been duly appointed." The principle there enunciated is applicable to this case. It cannot be said that Mr. Davey was not acting within the limits of his apparent authority, nor that the appellants were not acting *bonâ fide*, nor that they had no right to assume that Mr. Davey was duly appointed. I think that the appeal must succeed on this point also.

KAY, L.J.—The appellants owed the company a considerable sum as a simple contract debt, and the company owed the appellants what was in my view a debt of a liquidated amount, from which circumstances a right to set off would arise. Before North, J., it was argued that the claim of the appellants was for unliquidated damages, in which case it would be difficult to assert a right to set off. But the claim was for 3s. 6d. per barrel, for 3,870 barrels which had not been delivered or set apart for the appellants, and the property in which had not passed to them. There was a short delivery, and to that extent there was a total failure of consideration. That is a claim for a liquidated amount, a claim for money had and received due from the company to the appellants.

Then comes the question whether the right to set off can be asserted against the debenture holders. The argument was that the debentures were issued before the debt was incurred, that they charged all the assets of the company, and that the appellants had notice of them, and that a debtor cannot, after notice of the assignment of his debt, set off any claim of his against it. Does that apply in the case of debentures such as these? Counsel hesitated to go so far as that. But they said that there was no right of set off because no action had been brought in which it could have been asserted. I think that that is not so. I think that if at the time of the assignment there was an inchoate right to set off, it can be asserted after the assignment, as the assignment is subject to the rights then in existence. The question is whether the assignment took place at the date of the issue of the debentures, or at the date of the

appointment of the receiver. It is well established that in the case of a floating charge like this, made by a company, the company can deal with all its property in the ordinary way of business until the debenture holders intervene. When they intervene their charge becomes crystalized, and they can take possession of the assets of the company. Therefore the date to be regarded is not the date of the issue of the debentures, but the date of taking possession. It would be most unfortunate for the debenture holders themselves if it were otherwise. It would be fatal to the business of the company, if an equitable right such as the right to set off could not be asserted against the company after the debentures had been issued. In that case the business of the company would be paralyzed in a way which would be disastrous to the company, and also to the debenture holders who would naturally wish the company to have all possible facilities for carrying on its business. In my opinion there was in this case an inchoate right of set off at the time of the appointment of the receiver. The assignment effected by the debentures only became complete at that time, and then took effect subject to the equities then existing, one of which was this inchoate right of set off.

On the second point I have no doubt that Mr. Davey was managing director; whether he was formally appointed or not, he acted as such, and persons dealing with the company had a perfect right to deal with him on that footing. The articles show that the directors had power to depute to a managing director all their powers except that of signing bills, so that in giving the letters of hypothecation Davey was doing nothing *ultra vires* of a managing director. It was within the power of the directors to give him authority to sign them, and it would be extraordinary if persons dealing for value with a company like this were bound to inquire whether a managing director had in fact had delegated to him the powers which his co-directors might have delegated to him. There is a series of cases which show that such persons are not bound to make such inquiry, but can assume that a managing director is doing what is within his power, if it was within the power of the directors to delegate it to him. Then it was said that in this the intention was that the letters of hypothecation should be the act of the board, and not of the managing director. At all events the board were aware of what had been done, and there was a meeting of the board on the next day at which no objection to it was taken. The appellants had a right to assume, and the court will assume in their favour, that the managing director had power to sign the documents as he did, and they were justified in relying on the authority which they had a right to assume that he had to act in that way; and there has been in my opinion a complete hypothecation of the debts in their favour.

Appeal allowed.

Solicitors, *Waterhouse, Winterbotham, Harrison, & Harper; Morgan & Upjohn.*

High Court of Justice.

Chan. Div. North, J. — March 21.

Re TOTTENHAM.
TOTTENHAM *v.* TOTTENHAM. (*a.*)

Practice — Indorsement of claim — Title of action — Plaintiff suing on behalf of himself and others — R. S. C., ord. 3, *r.* 4.

The fact that a plaintiff is suing in a representative capacity on behalf of himself and others ought to appear in the title of the action, and not buried in the statement of claim.

Eyre *v.* Cox, 24 *W. R.* 317, *distinguished.*

Motion for judgment.

This was an administration action, and it neither appeared from the writ nor in the title to the statement of claim that the plaintiff was suing on behalf of himself and all other creditors; but in the prayer, the plaintiff, "suing on behalf of himself and all other creditors," claimed administration of the real and personal estate of the testatrix in the event of the defendant not admitting assets.

C. C. Tucker, for the plaintiff, cited *Eyre* v. *Cox*, 24 W. R. 317.

NORTH, J., held that it was not shown sufficiently what was the nature of the action, and that the statement that the plaintiff was suing in a representative capacity ought to appear in the title to the statement of claim; distinguishing *Eyre* v. *Cox* because that case dealt with the amending of the writ, and that the title of the statement of claim in that case sufficiently showed in what capacity the plaintiff was suing. Here neither the writ nor title to the statement of claim showed it.

Solicitors, *J. Harwood; H. D. Booth.*

Chan. Div. North, J. — March 14.

In re CHARRIERE.
DURET *v.* CHARRIERE. (*b.*)

Dower—Intestates Estates Act, 1890 (53 *&* 54 *Vict. c.* 29), *ss.* 2, 4—*Priority.*

The widow's dower out of the real estate of an intestate is subject to abatement in respect of the proportionate part to be borne by the real estate of the charge of £500 created by the Intestates Estates Act, 1890.

Further consideration.

J. L. Charriere died in May, 1893, intestate, leaving a widow, but no issue. He possessed personal estate of greater value than £500, and also real estate, out of which the widow was entitled to dower.

The question was whether the charge of the widow of an intestate under section 2 of the Intestates' Estates Act, 1890, 53 & 54 Vict. c. 29, was or was not paramount to her right to dower.

Rawlins, Q.C., and *Brabant*, for some of the next of kin.

Swinfen Eady, Q.C., and *C. E. E. Jenkins*, for the widow.

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

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made by the debenture holders that until they take possession their debtors can continue to carry on their business. It appears to me that this view is untenable, and if adopted would be commercially disastrous. The right to set off which the appellants claim is, in my opinion, established.

The second question is whether the appellants are under the letters of hypothecation entitled to the debts dealt with by them. It is said that the company was not bound by the letters because Mr. Davey had no authority to pledge the debts. Persons who deal with directors of companies must look to see what powers the directors have under their articles, and in this case the articles show that the directors could appoint a managing director to exercise all their powers other than the signing of bills of exchange and promissory notes. So far, therefore, as the appellants knew, Mr. Davey had all the powers which he claimed. He was managing director, and might have had those powers. They were not bound to inquire into the books of the company to see whether his appointment was validly made. It is sufficient for persons who deal with a managing director of a company in the ordinary course of business and *bonâ fide* if the articles of the company show that he might have the powers which he purports to have. In the absence of notice that he had not the powers which his co-directors might have conferred on him, persons dealing with him would have a right to assume that he had such powers. That that is so, is shown by a long string of cases. I think the appellants were entitled to assume that Mr. Davey had the power which he exercised.

LOPES, L.J.—Where there is a claim in respect of goods paid for but not delivered the claimant may adopt either one or the other of two courses. He may, on the one hand, sue in trover and recover the goods or damages for their conversion, which would be unliquidated damages. I very much doubt whether in this case that would have been successful, as the property in the barrels had not passed. They were not earmarked, and an action in trover does not lie except for specific property. On the other hand, the claimant might waive the conversion, and sue for the money which he had paid, and for which he had received no consideration, as money had and received, which would be a liquidated demand. Counsel for the respondents said that to enable a person to succeed in the second kind of action which I have mentioned, the failure of consideration must be complete. That, however, is not correct in a case like this, where the consideration is severable. In my opinion the appellants had a good right to set off. It was further said that such a right is not good as against the assignee of a debt where notice of the assignment is given to the debtor before the right to set off arose, and that that was so even where the assignment was made by a debenture security such as those issued by this company. No doubt, in the case of an ordinary assignment of a debt that would be so, but in the case of debentures such as these it is different. If the contrary view could be maintained, it would be monstrous. In that case debtors who were also creditors of their creditor would be precluded from availing themselves of a right to set off after they had notice of an assignment of a debt which was a mere floating security, and which in its nature contemplated the business of the debtor being carried on in the ordinary way, with power for him to mortgage or sell his assets so long as it was done in the ordinary business way. If an assignment by a debtor such as this could prevent a right to set off accruing, it would be a serious thing for companies. They would be crippled in their business by the issue of debentures, and would not be able to obtain credit, the result of which would be that the debenture holders would not receive their interest. Everything, in the interests of both parties, must depend upon the company being able to carry on its business in the usual way. On this point, therefore, I think that the decision of North, J., was wrong.

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KAY, L.J.—The appellants owed the company a considerable sum as a simple contract debt, and the company owed the appellants what was in my view a debt of a liquidated amount, from which circumstances a right to set off would arise. Before North, J., it was argued that the claim of the appellants was for unliquidated damages, in which case it would be difficult to assert a right to set off. But the claim was for 3s. 6d. per barrel, for 3,870 barrels which had not been delivered or set apart for the appellants, and the property in which had not passed to them. There was a short delivery, and to that extent there was a total failure of consideration. That is a claim for a liquidated amount, a claim for money had and received due from the company to the appellants.

Then comes the question whether the right to set off can be asserted against the debenture holders. The argument was that the debentures were issued before the debt was incurred, that they charged all the assets of the company, and that the appellants had notice of them, and that a debtor cannot, after notice of the assignment of his debt, set off any claim of his against it. Does that apply in the case of debentures such as these? Counsel hesitated to go so far as that. But they said that there was no right of set off because no action had been brought in which it could have been asserted. I think that that is not so. I think that if at the time of the assignment there was an inchoate right to set off, it can be asserted after the assignment, as the assignment is subject to the rights then in existence. The question is whether the assignment took place at the date of the issue of the debentures, or at the date of the

appointment of the receiver. It is well established that in the case of a floating charge like this, made by a company, the company can deal with all its property in the ordinary way of business until the debenture holders intervene. When they intervene their charge becomes crystalized, and they can take possession of the assets of the company. Therefore the date to be regarded is not the date of the issue of the debentures, but the date of taking possession. It would be most unfortunate for the debenture holders themselves if it were otherwise. It would be fatal to the business of the company, if an equitable right such as the right to set off could not be asserted against the company after the debentures had been issued. In that case the business of the company would be paralyzed in a way which would be disastrous to the company, and also to the debenture holders who would naturally wish the company to have all possible facilities for carrying on its business. In my opinion there was in this case an inchoate right of set off at the time of the appointment of the receiver. The assignment effected by the debentures only became complete at that time, and then took effect subject to the equities then existing, one of which was this inchoate right of set off.

On the second point I have no doubt that Mr. Davey was managing director; whether he was formally appointed or not, he acted as such, and persons dealing with the company had a perfect right to deal with him on that footing. The articles show that the directors had power to depute to a managing director all their powers except that of signing bills, so that in giving the letters of hypothecation Davey was doing nothing *ultra vires* of a managing director. It was within the power of the directors to give him authority to sign them, and it would be extraordinary if persons dealing for value with a company like this were bound to inquire whether a managing director had in fact had delegated to him the powers which his co-directors might have delegated to him. There is a series of cases which show that such persons are not bound to make such inquiry, but can assume that a managing director is doing what is within his power, if it was within the power of the directors to delegate it to him. Then it was said that in this the intention was that the letters of hypothecation should be the act of the board, and not of the managing director. At all events the board were aware of what had been done, and there was a meeting of the board on the next day at which no objection to it was taken. The appellants had a right to assume, and the court will assume in their favour, that the managing director had power to sign the documents as he did, and they were justified in relying on the authority which they had a right to assume that he had to act in that way; and there has been in my opinion a complete hypothecation of the debts in their favour.

Appeal allowed.

Solicitors, *Waterhouse, Winterbotham, Harrison, & Harper; Morgan & Upjohn.*

High Court of Justice.

Chan. Div. North, J. — March 21.

Re TOTTENHAM.
TOTTENHAM *v.* TOTTENHAM. (*a.*)

Practice — Indorsement of claim — Title of action — Plaintiff suing on behalf of himself and others — R. S. C., ord. 3, r. 4.

The fact that a plaintiff is suing in a representative capacity on behalf of himself and others ought to appear in the title of the action, and not buried in the statement of claim.

Eyre *v.* Cox, 24 *W. R.* 317, *distinguished.*

Motion for judgment.

This was an administration action, and it neither appeared from the writ nor in the title to the statement of claim that the plaintiff was suing on behalf of himself and all other creditors; but in the prayer, the plaintiff, "suing on behalf of himself and all other creditors," claimed administration of the real and personal estate of the testatrix in the event of the defendant not admitting assets.

C. C. Tucker, for the plaintiff, cited *Eyre* v. *Cox*, 24 W. R. 317.

NORTH, J., held that it was not shown sufficiently what was the nature of the action, and that the statement that the plaintiff was suing in a representative capacity ought to appear in the title to the statement of claim; distinguishing *Eyre* v. *Cox* because that case dealt with the amending of the writ, and that the title of the statement of claim in that case sufficiently showed in what capacity the plaintiff was suing. Here neither the writ nor title to the statement of claim showed it.

Solicitors, *J. Harwood; H. D. Booth.*

Chan. Div. North, J. — March 14.

In re CHARRIERE.
DURET *v.* CHARRIERE. (*b.*)

Dower—Intestates Estates Act, 1890 (53 *&* 54 *Vict. c.* 29), *ss.* 2, 4—*Priority.*

The widow's dower out of the real estate of an intestate is subject to abatement in respect of the proportionate part to be borne by the real estate of the charge of £500 created by the Intestates Estates Act, 1890.

Further consideration.

J. L. Charriere died in May, 1893, intestate, leaving a widow, but no issue. He possessed personal estate of greater value than £500, and also real estate, out of which the widow was entitled to dower.

The question was whether the charge of the widow of an intestate under section 2 of the Intestates' Estates Act, 1890, 53 & 54 Vict. c. 29, was or was not paramount to her right to dower.

Rawlins, Q.C., and *Brabant*, for some of the next of kin.

Swinfen Eady, Q.C., and *C. E. E. Jenkins*, for the widow.

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

(*b.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Redman for the heir.

NORTH, J. had no difficulty in deciding that the widow's charge on the real estate came first. Under section 2 of the Intestates' Estates Act, 1890, the widow took £500 paramount to everything. Then under section 4, her share of the residue was the same as if the £500 had not been part of the estate. She could not, of course, take the £500 from the estate without being in a somewhat worse position as to her other interests under the intestacy. His lordship declared that the widow's dower was subject to the charge for £500.

Solicitors, *F. A. Brabant; White & De Buriatte.*

Chan. Div. }
Romer, J. } March 12.

AINSWORTH *v.* WILDING. (*a.*)

Practice — Judgment by consent — Order passed and entered by the registrar—Consent given under mistake —Motion to vary judgment—Power of court to alter judgment—R. S. C., ord. 28, *r.* 11—*Fresh action to set aside judgment.*

A court can only, except possibly with the consent of all parties to the action, interfere with a judgment passed and entered (not being an order made on an interlocutory application) (1) in the case of an accidental slip which can be rectified under R. S. C., ord. 28, *r.* 11; (2) *where the court finds that the judgment as drawn up does not state what it decided and intended.*

The proper remedy for a party who has consented to a judgment under a mistake is to proceed by a fresh action to set aside such judgment.

Motion.

This was a motion in this action on the part of John Wilding, one of the defendants, that an order made by consent in the said action on the 23rd of November, 1894, and which had been passed and entered, might be set aside, and that the action might be reheard, on the ground that the consent of the plaintiffs and defendants to such order was given by mistake and that such order did not express the true intention of the parties thereto, and that in any case the consent of the defendant John Wilding to such order was given by mistake or under misapprehension as to the effect thereof. The facts of the case were as follows.

The action had been brought by the plaintiffs as second mortgagees against the said John Wilding and R. Wilding, since deceased, as first mortgagees in possession, to obtain accounts of what was due from John Smith, the mortgagor, to the said first mortgagees, and for redemption of the premises mortgaged.

The action came on for trial before Romer, J., on the 23rd of November, 1894, when a declaration was made by his lordship with consent, and certain accounts and inquiries were directed to be made. This judgment was passed and entered by the registrar.

The question in dispute was as to the footing on which the accounts were to be taken. On the 4th of December, 1895, the Court of Appeal made an order in the action on the construction of the consent order to the effect that the accounts were to be taken on the footing of a cash account. The applicant in his affidavit in support of the motion denied that he had ever given authority to his counsel or solicitors to the accounts being taken otherwise than as mortgagees' accounts.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Hopkinson Q.C., and *J. G. Butcher*, for the applicant.—Although the order has been passed and entered, the court has in a proper case judgment to review it: *Davenport* v. *Stafford*, 8 Beav. 503; *Huddersfield Banking Co.* v. *Lister & Son*, 43 W. R. 567, [1895] 2 Ch. 273; *In re Swire, Mellor* v. *Swire*, 33 W. R. 785, 30 Ch. D. 239.

Neville, Q.C., and *O. Leigh Clare*, for the respondents.—The court has no jurisdiction when a judgment has been drawn up and entered to deal with it, unless a fresh action is brought. Formerly, no doubt, the Court of Chancery had power in a proper case to deal with a decree, even after it had been enrolled; but this does not apply to the present practice under the Judicature Acts: *Emeris* v. *Woodward*, 38 W. R. 346; 43 Ch. D. 185. In *Huddersfield Banking Co.* v. *Lister & Son* Vaughan Williams, J., refused to hear the application on motion. The matter came before the Court of Appeal in a different form. They referred to the report of the case, 39 SOLICITORS' JOURNAL 448.

Macnaghten, for another defendant.

Hopkinson, Q.C., replied.

ROMER, J.—This is a motion to discharge a judgment given at the trial of the action, notwithstanding that such judgment has been passed and entered. The application is made in the action in which judgment was given, on the ground that the judgment, which was based on the consent of the parties at the trial, was consented to by the applicant under a mistake. In answer, the respondents have taken the objection that the court has no jurisdiction to discharge the judgment on such a motion, and that it has now no power to deal with its judgment on the grounds raised by the applicant unless a fresh action is brought to set aside the judgment. If I overruled the objection, it would be necessary to go into evidence on which the applicant might support his case. Speaking for myself, I am sorry that I do not see my way to overrule the objection, as my not doing so will cause expense and probably some delay. But I think that a fresh action must be brought, and that I have no jurisdiction to try the question on motion except with the consent of all the parties. I have offered to hear it if all the parties will consent, but the required consent has been refused. I should only be glad to find, if the case went to the Court of Appeal, that my grounds for refusing the application were insufficient. As the authorities now stand I have no option but to refuse the motion. The court has no jurisdiction after the judgment at the trial has been passed and entered to rehear the case. That is clear. The Court of Chancery had formerly power to rehear cases which had been tried before it, even after the decree had been entered; but that is not so since the Judicature Acts. So far as I know the only cases in which the court can interfere after the passing and entering of the judgment are these: (1) Where there has been an accidental slip in the judgment which has been drawn up, in which case the court has power to rectify it under ord. 28, r. 11; (2) where the court finds that the judgment, as drawn up, does not correctly state what the court actually decided and intended. I am not now speaking of cases where the court acts by the consent of the parties. If the parties had consented I might have had jurisdiction, but even that is not free from doubt; and I am not speaking now of merely interlocutory orders, even if drawn up, as to which different considerations apply, as was pointed out by the late Master of the Rolls in *Mullins* v. *Havell*, 11 Ch. D. 763, 27 W. R. Dig. 158.

This being so, is the applicant's case brought under either of the two heads of exceptions to the rule that after the judgment has been passed and entered the court has no power to alter it? In my judgment the case does not fall within either exception. In the first place I do not think that it would be putting a fair interpretation on ord. 28, r. 11, to say that this case was within that rule. It is not the case of a clerical mistake or an error arising from an accidental slip or omission. I say that, although it is quite true that the rule would apply in a proper case where there had been a mistake in fact, on which the judgment was obviously founded. In this case I cannot, without going into evidence and really trying the matter out, decide at once that there has been an accidental slip or omission, and it is clear that this case is not within ord. 28, r. 11. And certainly it is not within the second exception. The order, as drawn up, simply expressed what the parties consented to, and contains the words consented to, and I cannot say that the judgment does not carry out what the court decided and intended to decide. Having stated the principles to be applied, I will now call attention to the cases which are in support of the application.

The first case in point of date is *Davenport* v. *Stafford*. That was a case under the old practice, when the Court of Chancery had the inherent power of rehearing cases even after the drawing up and the passing of the decree. *Davenport* v. *Stafford*, however, merely decided that in the opinion of the then Master of the Rolls the court in the exercise of its discretion would not rehear the case after the decree had been entered on the ground of fraud; but would rehear it in the case of a mere mistake. That case has no application to the modern practice under the Judicature Acts.

The next case is *In re Swire*. That case decided this, viz., that even when a judgment had been drawn up, passed, and entered, it might still be altered if the court saw that it did not truly represent the judgment. In deciding that case, Cotton, L.J., says, 30 Ch. D. 243: "In my opinion the court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the court has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will, in a proper case, exercise to correct its record, that it may be in accordance with the order really pronounced." That case has no bearing on the case before me; because it cannot truly be said that here the judgment does not truly express the meaning and intention of the court. *Mullins* v. *Howell*, to which I have already referred, was a case of an order made on an interlocutory application, and that was the very ground taken by Sir George Jessel, M.R., for entertaining the jurisdiction to discharge the order, though he states a further ground. It was a case of attachment, and the court has, as he stated, a discretion as to issuing an attachment, and would not in that case exercise it. That case is no authority for me here. Then I come to *Barker* v. *Purvis*, 56 L. T. 131, 35 W. R. Dig. 106. That was a case of slip, which was corrected under ord. 28, r. 11. The last case is *Hickman* v. *Berens*, [1895] 2 Ch. 638. There the compromise made was more in the nature of a compromise in an interlocutory proceeding, and no order was drawn up. No objection then was taken on the ground that the compromise could not be set aside on motion, but only in a fresh action; and it is clear that an objection of that kind must be taken at once, as is pointed out in *Gilbert* v. *Endean*, 27 W. R. 252, 9 Ch. D. 259. The decision in that case therefore affords no reason for thinking that a judgment which has once been passed and entered can be set aside on motion.

There were two other cases cited, which as far as they go are against the applicant's contention. One is the *Huddersfield Banking Co.* v. *Lister & Sons*. In that case Vaughan Williams, J., refused to upset an order for a compromise on motion, on the ground that he had no jurisdiction to do so. When that case was before the Court of Appeal it appears that the Court of Appeal did not entertain the appeal in its then form, but gave leave to bring an action, which was accordingly brought and resulted in the judgment being set aside. That case is directly opposed to the applicant's contention. As to *Emeris* v. *Woodward* it is not clear on the report what the facts were. I cannot gather whether the order had been entered or not. If it had been, it is an authority against the applicant. If it had not, it goes beyond what the respondents ask me to decide here, for North, J., held that he could not entertain such an application by motion. But that case was before the decision in *Hickman* v. *Berens*, and, having regard to *Hickman* v. *Berens*, I doubt if it would now be held that an action to set aside a compromise was in every case necessary, even although the order had not been drawn up. I cannot help thinking that if the order had not been passed and entered the court could entertain a motion to discharge it on proper grounds. I do not say that even when the order is not drawn up the court would always entertain a motion; for example, I doubt if it would do so when from the nature of the ground on which the application was based conflicting evidence had to be gone into or *viva voce* evidence considered. In many cases the court might decline to set aside a compromise on motion, even if it had jurisdiction to do so. So far as the authorities go I think they show the principles I laid down at the beginning of my judgment, and I must dismiss this application with costs. This will not, of course, prejudice the right of the applicant to bring a fresh action to set aside the judgment.

Motion dismissed.

Solicitors, *Robbins, Billing, & Co.; Bower, Cotton, & Bower*, for *Ainsworth, Sanderson, & Howson*, Blackburn; *P. G. Robinson.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills, J.)

May 19.

COOK (*Appellant*) *v.* HAINSWORTH (*Respondent*). (*a*.)

Local government—Bye-laws—Validity—New buildings—Powers of corporation to disapprove of plans—Leeds Improvement Act, 1893 (56 & 57 *Vict. c. ccx.*), *s. 57—Notice to stop building disregarded—Penalty.*

The Corporation of Leeds under the powers given them by certain local improvement Acts made bye-laws relating to new buildings in the city.

Bye-law 61 *provided that any person who shall erect a new building without having the plans previously approved of by the Corporation shall be liable to a penalty.*

C., a building owner, sent in plans, which the Corporation, within twenty-one days, gave written notice to C. of their refusal to pass, on the ground, as stated in their notice, that the provisions of section 57, *sub-sections* (1) *and* (3), *of the Leeds Improvement Act*, 1893, *would not be complied with by the proposed plan.*

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

C. thereupon commenced to erect the buildings in accordance with the plans, and was summoned by the Corporation and convicted under bye-law 61.

Held, that, although bye-law 61 *purported to give an absolute power to the Corporation to sue for a penalty whenever a building was commenced without their previous approval having been obtained, yet, as the Corporation had not used that power capriciously, but had stated the grounds for their disapproval, the conviction was right and must be affirmed.*

Special case stated by C. Milner Atkinson, Esq., a stipendiary magistrate for the city of Leeds.

The material facts set forth in the case were these. An information was laid by Davidson Hainsworth, the respondent, an inspector of new buildings for the city of Leeds, acting on behalf of the corporation, charging George Cook, the appellant, that he in September, 1895, did "unlawfully erect certain new buildings, to wit, a house and shops in Otley-road and Wood-lane, Headingley, in the said city, without having the plans thereof previously approved by the corporation, as required by bye-law No. 61 of the bye-laws relating to new streets and buildings duly made and ordained by the Council of the city." On the 14th of June, 1895, the appellant had given the corporation notice of his intention to erect the premises in question, and deposited plans and sections indicating in detail the buildings which it was proposed to construct. On the 24th of that month the corporation gave the appellant written notice that the plans were disapproved of by them, inasmuch as a back road, in accordance with section 57 of the Leeds Improvement Act, 1893, was not provided, and as the back of the proposed house and shops would be less than 19ft. 6in. from the boundary of the property, contrary to sub-section 3 of that section. In spite of this notice, the appellant in September, 1895, began erecting buildings on the site, which were admittedly in accordance with the plans sent in.

Proceedings were thereupon taken by the corporation against the appellant, the building owner.

The magistrate convicted the appellant under bye-law 61, and imposed a penalty of £3, inclusive of costs.

The building owner appealed, and the question for the opinion of the court was whether the conviction was right.

Bye-law No 61, under which the proceedings were instituted, directs that any person who shall erect any new building without giving twenty-one days' notice in writing to the corporation, and previously delivering plans and sections showing in detail the situation, character, and size of the proposed new buildings, or without having the plans approved by the corporation, or erecting buildings in any wise contrary to plans and sections as approved, shall be liable for each offence to a penalty.

By bye-law 63 it is provided that the corporation shall give notice of their approval or disapproval of the proposed new buildings to the building owner within twenty-one days after the plans have been sent in by him.

Lawson Walton, Q.C. (with him *Bairstow*), for the appellant.—The bye-law is unreasonable and bad, because it gives an absolute power of veto to the corporation whether the provisions of the bye-law as to the plans are complied with or not. Here admittedly the plans meet the requirements of the bye-law, for no alterations were directed to be made in them before the sanction of the corporation would be given. In the case of *Reg.* v. *Mayor of Newcastle-upon-Tyne*, 60 L. T. N. S. 963, 53 J. P. 788, the corporation disapproved of plans solely on the ground that the new buildings in their opinion were undesirable, and the court held that the corporation had no absolute discretion to disapprove of plans sent in, but could do so only where there would be a breach of a statute or of a bye-law as to new buildings. The bye-law is, moreover, *ultra vires*, as it contains provisions unauthorized by any statute.

Forbes, Q.C. (with him *Sir George Morrison*), for the respondent.—The bye-law is not *ultra vires*, for it is expressly authorized by certain local Acts. See section 51 of the Leeds Improvement Act, 1866; section 26 of the Leeds Improvement Act, 1872; and section 40 of the Leeds Improvement Act, 1877. The corporation have given good and sufficient grounds for objecting to the new buildings, and therefore the case of *Reg.* v. *Mayor of Newcastle* does not apply: *Baker* v. *Mayor of Portsmouth*, 25 W. R. 677, 3 Ex. D. 4; *Hall* v. *Nixon*, 23 W. R. 612, L. R. 10 Q. B. 152; and *Robinson* v. *Local Board of Barton Eccles*, 32 W. R. 249, 8 App. Cas. 798. The building owner, moreover, instead of commencing to erect the houses after receiving notice from the corporation that the plans were not approved, might, if he thought himself aggrieved at the decision the corporation had arrived at, have appealed to the quarter sessions under section 128 of the Leeds Improvement Act, 1866, the provisions of which are incorporated with the Leeds Improvement Act, 1877; or he might have applied to the High Court for a *mandamus* to compel the corporation to pass the plans.

LORD RUSSELL OF KILLOWEN, C.J.—The principle of law raised by this appeal is one of importance, and the question we have to decide is whether bye-law No. 61 is valid or not. The corporation had expressed their disapproval of certain plans sent in by the appellant relating to some houses he proposed to erect; and it must be noted that the corporation, in deciding not to pass the plans, gave the reasons for their disapproval in a notice to that effect sent by them to the building owner within the time prescribed for doing so in the Act. The building owner disregarded that notice, and was summoned by the corporation. When the matter came before the stipendiary magistrate the building owner contended that the bye-law was bad; and the corporation took up this ground—not that they could, by virtue of the bye-law, without stating any reason for so doing, disapprove of plans, not that their decision, whether right or wrong, was binding—but that they had given certain reasons for their disapproval, and that the magistrate was not the judge to determine whether those grounds of objection were good or bad, but that he was bound to impose a fine on the building owner for having committed a breach of the bye-law. There was, no doubt, a remedy open to the building owner by appeal to quarter sessions, or by a *mandamus*, if properly pursued, if their disapproval of the plans was arbitrary or unreasonable. The facts show that the building owner has done that which made him incur a penalty under the bye-law; but it seems to me to be a fallacy to suggest that the power of the corporation is limited in such matters to the powers vested in them by the bye-laws alone, and that the validity of their decision depends on whether the bye-law is reasonable or unreasonable, when the bye-laws were made under express powers given by Acts of Parliament, which the corporation are bound to take into consideration when giving their decision. The magistrate, in my opinion, was right in convicting the appellant, and the conviction ought to be affirmed.

WILLS, J.—I think that any bye-law which purports to give an unqualified and absolute power to a

corporation to apply for a penalty merely because a building has been begun without their approval having been first obtained, under all circumstances, would be an unreasonable one, looking at the general legislation applicable in other places. Indeed, in face of the decision given in *Reg.* v. *The Justices of Newcastle-upon-Tyne* it would be impossible to hold any bye-law reasonable which gave a corporation an absolute discretion to disapprove of plans submitted to them, on the simple ground that in their opinion the building was not desirable. The party aggrieved by the adverse decision of the Leeds corporation is not necessarily bound by that decision, for there is an express provision made for his pursuing a remedy both in the bye-laws themselves and in the Local Improvement Acts. In my judgment therefore the bye-law is reasonable, and the magistrate was right in convicting the building owner.

Appeal dismissed.

Solicitors for the appellant, *Torr, Gribble, & Co.*, agent for *Middleton & Sons*, Leeds.

Solicitors for the respondent, *Patersons, Snow, Bloxam, & Kinder*, agents for *John Harrison*, town clerk for Leeds.

Q. B. Div.
(Grantham and Collins, JJ.) May 14, 15.

DERBYSHIRE COUNTY COUNCIL (*Respondents*) *v.* MAYOR, &C., OF DERBY (*Appellants*). (*a.*)

Practice—Discovery—Penal or criminal matter—Pollution of Rivers Act, 1876 (39 & 40 *Vict. c.* 75), *s.* 10.

By the Pollution of Rivers Act, 1876, *s.* 10, *the county court has power, where any offence against the Act is committed within its district, by summary order, to require any person to abstain from the commission of such offence, and, where the offence consists in default to perform a duty under the Act, to require him to perform such duty in the manner in said order specified. The county court has, under the same section, the further power, in case of default being made in complying with any such order, of ordering the payment of a penalty.*

Held, that proceedings instituted to obtain the former order were not proceedings in a penal or criminal matter, and that an order for discovery made in them was right.

Appeal from the decision of the judge of the Derbyshire County Court.

The appellants (the Mayor and Corporation of Derby), who were the sanitary authority for Derby, formerly discharged their sewage into the River Derwent. The respondents (the Derbyshire County Council) took proceedings in the county court, under section 10 of the Rivers Pollution Act, 1876, to compel the appellants to stop the discharge of sewage into the river. In the course of those proceedings the respondents obtained an order for discovery of documents and for the administration of interrogatories. The appellants appealed against that order, on the ground that the proceedings were in a criminal or penal matter, and that there was therefore no power to order discovery.

Section 10 of the Rivers Pollution Act is as follows: "The county court having jurisdiction in the place where any offence against this Act is committed may by summary order require any person to abstain from the commission of such offence, and where such offence consists in default to perform a duty under this Act may require him to perform such duty in manner in the said order specified. The court may insert in any order such conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think just, and generally may give such directions for carrying into effect any order as to the court seems meet. Previous to granting such order the court may, if it think fit, remit to skilled parties to report on the best practicable and available means and the nature and cost of the works and apparatus required, who shall in all cases take into consideration the reasonableness of the expense involved in their report.

"Any person making default in complying with any requirement of an order of a county court made in pursuance of this section shall pay to the person complaining, or such other person as the court may direct, such sum, not exceeding £50 a day, for every day during which he is in default, as the court may order; and such penalty shall be enforced in the same manner as any debt adjudged to be due by the court . . ."

Graham, for the appellant.—This was a proceeding in a penal matter, and the respondents were therefore not entitled to discovery: *Hummings* v. *Williamson*, 32 W. R. 267, 11 Q. B. D. 533; *Mellor* v. *Denham*, 5 Q. B. D. 467, 28 W. R. Dig. 163; *Reg.* v. *Whitchurch*, 7 Q. B. D. 534; *Jones* v. *Jones*, 37 W. R. 479, 22 Q. B. D. 425; and *Reg.* v. *Buchanan*, 15 L. J. Q. B. 227. Though the proceedings in question were not to recover a penalty, the ultimate result of them would be a penalty, and therefore they were proceedings in a penal matter. The discovery obtained in these proceedings would be of use to the respondents in the ultimate proceedings for the penalty.

Stanger, Q.C., and *Carver*, for the respondents.—The proceedings here were initial proceedings, but they were not in themselves penal proceedings. The ultimate order for the payment of the penalty in the event of disobedience to the first order was within the discretion of the county court to make or refuse. No case went so far as to say that where an order may be given, and disobedience to that order may be followed by an order imposing a penalty, the proceedings to obtain the first order were penal proceedings: *Fisher* v. *Owen*, 26 W. R. 581, 8 Ch. D. 645; *Martin* v. *Treacher*, 34 W. R. 315, 16 Q. B. D. 507; *Adams* v. *Batley*, 35 W. R. 437, 18 Q. B. D. 625; *Downing* v. *Falmouth United Sewerage Board*, 36 W. R. 437, 37 Ch. D. 234; *Saunders* v. *Wiel*, 40 W. R. 594, [1892] 2 Q. B. 321; *Reg.* v. *Ambergate Railway Co.*, 17 Q. B. 957.

GRANTHAM, J.—There is no decision upon this point. It seemed difficult to say that a proceeding which would ultimately result in a penalty was not a criminal proceeding, and, if so, that it did not come within *Reg.* v. *Whitchurch*. But, on considering the terms of the Act, I have come to the conclusion that it altered the form of procedure from criminal to civil. The Legislature had that object in view in order to obviate the difficulty formerly experienced of enforcing the old common law rights where sewage was poured into a stream. The cases cited for the appellant followed *Mellor* v. *Denham*, and in each case the Act under which the proceedings were taken directed that the proceedings should be taken under the Summary Jurisdiction Acts. But under this Act the proceedings were to be taken in the county court. The procedure provided by the Act was clearly inconsistent with the proceedings under the Act being criminal proceedings.

COLLINS, J.—I am of the same opinion. It seems

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

to me, *primâ facie*, looking at section 3, that it may well be that a person who "knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter" may be deemed to have committed a misdemeanour. But it has been held in two cases that the use of the word "offence" does not necessarily imply a criminal offence. One must look at the consequences of the act, and if an act, though described as an offence, is yet not followed by a punishment, then it is not a crime. We find that the Legislature has thought fit to put a stop to what persons might otherwise have had a right to do. Persons might have acquired a right to pour sewage into the river in such a way that they could not be restrained from doing so by persons occupying land lower down. It would be a hardship to turn such persons into criminals. It was not even necessary that the acts prohibited by the statute should amount to public nuisances. It would have been a strong thing to have done to turn such acts into crimes. Provision was made in the Act that the county court should deal with offences against the Act. It was to hold inquiries and to make summary orders restraining persons from committing offences against the Act, or requiring them to perform duties under the Act, and it had the power of putting limitations upon such orders. It was to take steps to see what were the "best practicable means," and what would be the expense involved. That was all it had to do at first. It was not till something else happened that any penal consequences were to ensue, that is to say, when any person against whom an order was given, made default in complying with it. Then the county court might order the payment of a sum of money. That penal enactment was the only means of enforcing the order, which was an order in the nature of an injunction. Having regard to the circumstances that the procedure provided was of a civil nature, and that, instead of appointing the justices to administer the Act, the Legislature had referred the matter to a civil court, and having regard also to the fact that the Court of Appeal have entertained appeals from orders made under the Act, which they could only do on the assumption that they were civil matters, I cannot doubt that the proceedings are essentially civil, and not criminal.

Appeal dismissed.

Solicitors for the appellants, *Satchell & Chapple*, for *H. Gadsby*, Derby.

Solicitors for the respondents, *Wynne, Holme, & Wynne*, for *Hughes-Hallett*, Derby.

Q. B. Div. (Wills and Wright, JJ.) Feb. 25.

ESCRITT AND OTHERS *v.* TODMORDEN CO-OPERATIVE SOCIETY. (*a.*)

Industrial society—Deceased member's property—Intestacy—Distribution—Discretionary power—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *s.* 27.

The power given to the committee of an industrial society by section 27 *of the Industrial and Provident Societies Act*, 1893, *of distributing the property of a member who has died intestate to the next of kin without letters of administration is a discretionary power, and an action will not lie to compel the committee to exercise their discretion.*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Appeal of the defendant society from the County Court of Yorkshire, holden at Todmorden.

The plaintiffs were the next of kin of David Escritt, deceased, and claimed from the defendant society the sum of £10, part of a sum of £100 which had been deposited with the society by David Escritt.

In 1885 David Escritt nominated the £100 in favour of his ten children equally. He died in May, 1891, intestate.

Nine of the ten nominees had been duly paid their shares by the society.

The present action related to the share of John Escritt, one of the children of David Escritt. John Escritt had left England some years before his father's death, and was last heard of in January, 1884.

The plaintiffs contended that John Escritt must be presumed to have died before his father, and that therefore they were entitled on an intestacy to the lapsed share of John Escritt.

The society declined to presume that John Escritt had died before his father.

The county court judge gave judgment for the plaintiffs. In the course of the hearing he amended the claim by adding the administratrix of David Escritt as a plaintiff.

The defendant society appealed.

The Industrial and Provident Societies Act, 1893, s. 27 (1), enacts that if any member of a registered society entitled to property therein in respect of shares, loans, or deposits, not exceeding in the whole at his death one hundred pounds, dies intestate, without having made any nomination thereof then subsisting, the committee may, without letters of administration, distribute the same among such persons as appear to them, on such evidence as they deem satisfactory, to be entitled by law to receive the same.

C. A. Russell, for the defendant society.—In the circumstances which have arisen in this case the society is under no obligation to pay this £10 to the plaintiffs. Under section 27 of the Act of 1893 the society has a discretionary power. The section says: "The committee may . . . distribute." In the former enactment, the Industrial and Provident Societies Act, 1876, s. 11, sub-section 6, the language was different, for the word "shall" was used. The inference to be drawn from this change of language is in favour of the society's contention.

Herbert Lush, for the plaintiffs, admitted that an action would not lie against the society under section 27.

WILLS, J.—I am of opinion that the contention of the defendant society as to the construction of section 27 is right. Assuming a state of facts which would entitle the committee of the society to act at all, action by them under the section is purely discretionary. Unless a member of the society has died intestate without any nomination of his property in the society subsisting at the time of his death, they cannot act under it at all; but even if these facts are proved, the section goes on, "the committee may" distribute the funds among such persons as appear to them entitled by law to receive the same. The change of language from that of section 11, sub-section 6, of the Act of 1876, which dealt with the same subject, is very significant, for in that section the word "shall" was used, and it appears to me that the change of language from "shall" to "may" was intentional and deliberate. The decision, however, does not and cannot relieve the society of the real difficulty in the case, which is the doubt that may remain whether the nominee was dead, and

died without issue before David Escritt died. The committee can only act under section 27 if the nominee be out of the way. Whether they act under that section or not—if even by the judgment of a court they pay the administrator or next of kin of David Escritt, on the supposition that the nominee's claims are out of the way—and it turns out that they are wrong, they would have under sections 25 and 26 to pay over again.

The action of the committee under section 27 is, however, clearly discretionary.

WRIGHT, J.—I agree. I think the committee are entitled to require that they should be satisfied in the proper way both of the intestacy and of the fact that no nomination subsisted at the date of the death of the intestate; and even then I do not think that they can be compelled by action to exercise the discretion given to them by section 27.

The court made no order on the appeal, counsel for the society undertaking that the £10 should be paid to the plaintiffs.

Solicitors for the plaintiffs, *Emmet, Son, & Co.*, for *Ingham*, Todmorden.

Solicitors for the defendant society, *Bower, Cotton, & Bower*, for *Aston, Harwood, & Somers*, Manchester.

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) May 4, 6.

Re HANCOCK.
MALCOLM *v.* BURFORD HANCOCK. (*a*.)

Power—Appointment—Irrevocable appointment to children—Subsequent appointment to wife—Subsequent appointment inoperative.

A settlement contained a power enabling the tenant for life to appoint the trust funds in favour of his children, subject to a proviso enabling him to appoint one-fourth of the income to "his wife" for her life. The tenant for life, who was married at the date of the settlement, in exercise of this power, irrevocably appointed the trust funds to his children, subject to his own life interest and "subject and without prejudice to" an appointment of one-fourth of the income to his wife for life, "if the same should take effect." His wife having died, on his remarriage he purported to appoint one-fourth of the income to his second wife for her life. His second wife survived him.

Held, that the words "his wife" meant the wife he had at the date of the settlement. But even if this were not so, the irrevocable appointment in favour of the children, being subject only to his own life interest and the appointment in favour of his then wife and not reserving any power of appointing to a second wife, precluded him from making any further appointment.

Decision of Kekewich, J., ante, *p.* 426, *affirmed.*

Appeal from a decision of Kekewich, J. (reported *ante*, p. 426, where the facts will be found fully set out), holding that an appointment by a tenant for life to a second wife, under a power contained in a settlement, was ineffectual by reason of a prior exercise of the power in favour of the children of a first marriage.

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

The facts for the purposes of the appeal are sufficiently stated in the judgment of Lindley, L.J.

Farwell, Q.C., and *Austen Cartmell*, for the appellant, Lady Hancock.—The children's interest is subject to the power to jointure, which overrules the power to portion (Sugden on Powers, 8th ed., pp. 484-490). The words "his wife" are not confined to any particular wife: *Isaac* v. *Hughes*, L. R. 9 Eq. 191, 18 W. R. Ch. Dig. 94.

Renshaw, Q.C., and *Ingle Joyce*, for the children of the first marriage.—*Re Parrott, Walter* v. *Parrott*, 34 W. R. 553, 33 Ch. D. 274, shows that a devise or bequest to the wife of A. is confined to that particular wife (Jarman on Wills, 5th ed., p. 303). The case of a settlement is stronger than that of a will. Here the donee has done something inconsistent with the power of appointing, and consequently the power is gone: Farwell on Powers, 2nd ed., p. 15: *Smith* v. *Death*, 5 Madd. 371.

C. E. E. Jenkins, for the trustees.

Farwell, Q.C., replied.

LINDLEY, L.J.—The case is one which admits of argument, and has been exceedingly well argued by Mr. Farwell and Mr. Cartmell; but after all, there is such a thing as common sense, in the construction of a power, and it strikes me that common sense will enable us to see our way on the present occasion. The case stands thus.

By a settlement made in 1872 a certain sum of money which is referred to as the son's share, the son being Henry James Burford Hancock, was settled. The subject matter of the settlement was money. At the date of the settlement the son had a wife and three children, or at all events some children; and the children to whom he had a power of appointment were his children, not necessarily his children by his then wife. If she had died and he had married again, I do not doubt that the power of appointment would have been exercisable in favour of any of his children. Then in the settlement, after settling the fund on the son for life, there is this proviso: "Provided always that it shall be lawful for the said Henry James Burford Hancock by deed or by will or codicil to appoint that after his own death, or the determination of the trust hereinbefore declared in his favour, one-fourth part of the annual income of the said son's share shall be paid to his wife for her life or for any less period, and upon such conditions and with such restrictions as he shall think fit."

That is the proviso which we have to construe first of all, and the first question which arises is what is the meaning of this: "Provided that it shall be lawful for Henry Hancock by deed or will to appoint that after his own death, or determination of the trust in his favour, one-fourth part shall be paid to his wife." Does that extend to any wife that he might have, he having one at the time, or is it confined to the one which he had? It is most important to observe that this is a power to appoint not by will to his widow; that is not it at all, or at all events only part of it. It is to appoint by deed or will to his wife, the events contemplated being not only the event of his death, but another event, that is his bankruptcy or attempt to dispose of his property, in which case his power is to appoint to his wife. This has been likened to a power to jointure; but it is different, because the power to jointure applies to a widow, and this is something more. I think this means his then wife. I feel that very strongly; but it is possible by the exercise of a certain amount of ingenuity to throw a doubt on that, not in the events which have happened, but in the events which might possibly happen. Therefore I go on, and assume

that the clause means something more than I think it does, and that under this clause under some conceivable circumstances another wife might take.

Let us now see what has been done. On the 26th of January, 1885, a deed of appointment was executed by the son, then Sir Henry Hancock, and he appoints thus. He refers to the instrument or settlement which I have just been quoting, and he says that he is desirous of making such appointment as hereafter mentioned, and then he appoints absolutely and irrevocably, subject and without prejudice to and from and after the determination of the said trust by the said indenture declared in his favour in the income of the same, if at the determination of the last-mentioned trust his wife Hannah shall be then living, that there shall be paid to her during the remainder of her life one equal fourth part of the income. That is to say, he irrevocably appoints to his then wife and makes a provision for her for life. Then comes a further witnessing part of the deed, which is an appointment subject and without prejudice to and from and after the determination of the said trust by the said indenture declared in his favour in the income of the same, and subject also and without prejudice to the trust in favour of his said wife under the appointment which he had just made, to his children. There is not a word there of any reservation of any power on his part to appoint thereafter to any wife. There is no reason to suppose that he thought of such a thing, and accordingly the deed ends there, except a power to revoke the shares of one of the children. That is in 1885. Now what is the effect of that? Could he after that, without having therein signified any intention whatever of altering that disposition, make another appointment to another wife, substituting so far as his children are concerned, a young life in front of them, instead of the life of their own mother? The effect is very startling, so far as the children are concerned. Whereas under this they might naturally think, that subject to the life interests of their father and mother, they were provided for, yet if it was competent for their father in the event of the death of their mother to make a provision for another wife who might be a very young woman, then their position would be different.

Now, Lady Hancock having died in 1893, Sir Henry Hancock married again and made an appointment in favour of his second wife. That is contained in a deed not very material to refer to. It simply says it is supplemental to the appointment which I have already referred to, "Whereas this deed is supplemental to two deeds poll respectively of the 26th of January, 1885," and it makes an appointment in favour of the second Lady Hancock.

Now comes the question, Was it competent for him to do that? I assume for the present purpose that the word "wife" in the original settlement of 1872 was not confined to the then Lady Hancock, as I have said I think it is. This is said not to be to the prejudice of the children, and it is put in this way, and it is very ingenious and arguable. It is said to be an elementary principle of the law of conveyancing as applied to powers, that you should read this appointment of January, 1885, into this settlement of March, 1872, and you will see that it is possible still to hold that that provision in favour of the wife is consistent with what has been done. Now, it appears to me, I confess, that what we are asked to do is this: to construe the two deeds without regard to the manifest intention of the appointor who executed the deed of January, 1885. That is where the formidable difficulty appears to arise. We are asked to do that which was never dreamt of by anybody, and to do a gross injustice to the children, who have acted on the faith, of course, that they were provided for by the appointment of January, 1885. I dare say that Lady Hancock is disappointed, and she has been led to suppose that the appointment in her favour was good; but if you look at it all round, it is inconsistent with the intention of the appointor to read these deeds in such a manner as to uphold the second, and I do not think any technical law would bind us to do it. If you want a technical answer, it is to be found in the doctrine laid down in Mr. Farwell's book on Powers, 2nd ed., at p. 15: "All powers, other than powers coupled with a trust or duty, may be suspended or destroyed either wholly or in part by the donees thereof." That rule applies to limited powers—namely, powers in favour of a wife or children. Then he says: "Any dealing with the estate inconsistent with its exercise must determine the option." If you put those two together, I confess what was done in January, 1885, was inconsistent with the good faith and intention on the part of the appointor to appoint to anybody else other than those for whom he was then providing. He was not doing a dishonest thing, but an honest thing, and never dreamt of altering his mind I think the appeal must be dismissed, with costs.

LOPES, L.J.—After the very able argument I have listened to, perhaps it is presumptuous in me to say that I have no doubt of the way in which this case should be decided. Why not give effect to the words according to their ordinary and true meaning, notwithstanding that they may be contained in a deed or power to appoint? I have often thought that, courts of equity, *pace* my learned brothers Lindley and Kay are disposed to refine these things more than necessary, and to overlook the ordinary common-sense meaning of words when they are in deeds. Now take this deed. [His lordship stated the facts, and continued:—] The question in this case is whether the appointment in favour of Sir Henry's second wife was valid or not, whether the power of appointing in favour of Sir Henry's wife was strictly in favour of his then wife, whether it was not so restricted as to be exhausted by the appointment in favour of Sir Henry's first wife. It is said that the power of appointment to his wife included any wife. The court is entitled to regard the state of things existing at the time of the execution of the deed. Sir Henry was then married, and in my judgment the wife contemplated and intended was the existing wife, and none other. If not, it would include any number of wives, and the interest of the children would be indefinitely postponed, and it would be only competent for them to deal with their vested interest subject to contingencies the extent of which could not be calculated upon. If Sir Henry exercised the power of appointment in favour of the first wife, speaking for myself, I should have thought it was so entirely in favour of that wife that he could not have exercised it in favour of any other. It is a question of construction, and I can only thus construe the power. To hold it could be exercised *toties quoties* would be most unjust to the children, and I cannot find anything in the deed to justify it. The appointments to the children and wife are made at the same time, and I observe that Sir Henry Hancock never intended to reserve to himself a power to defeat a grant made to his children. But assuming that I am wrong in that construction of the deed, I think he has exercised the power in favour of the first wife, and in my judgment the power is thereby exhausted. I think the appeal should be dismissed.

KAY, L.J.—The deed of the 30th of March, 1872, seems to have been a post-nuptial settlement. By it certain funds, £28,000 Consols, were settled upon certain trusts; and the deed contained, besides the

power of appointment to the children of Sir Henry Hancock, the settlor, a power by way of proviso, which has been read by Lindley, L.J., of appointing by deed or will after his own death, or the determination of the trusts thereinbefore declared in his favour, one-fourth part of the annual income to his wife for life. Now, at the time of this deed he was married and had a wife, and the first question that arises is whether the power of appointing to his wife for life means to any wife which he might have or only to a wife which he had at the date of the deed. As has been already observed, it is not a power to appoint to his widow or to appoint after his death a life interest to a wife, but a power to appoint after his death or after the determination of the interest thereby reserved to himself. He had reserved to himself by this deed a life interest, and that life interest was determinable in the case of bankruptcy or alienation or other events, and therefore it is that this power to appoint to a wife is by deed as well as by will, and to take effect on the determination of that life interest. I do not pause now to inquire whether the mode of limiting the life interest was applicable to a case of bankruptcy, because no bankruptcy happened, and the question does not now arise. What occasions the first question of some difficulty upon this deed is whether those words "his wife for her life" can *primâ facie* mean anything but the wife to whom he was then married. It is absolutely necessary for the court construing a deed of this kind to pay regard to the state of things at the time; and the state of things, as far as this point is concerned, which is most material, is the fact of Sir Henry having then at the date of the deed a wife, and of this power not referring to "any wife" or to the widow whom he might leave, which, of course, would be susceptible of a different construction, but only to "his wife." I feel the difficulty of saying absolutely that that can mean only the wife he had at the time, and not someone whom he might marry after the death of that wife. Supposing it to happen that he had made no appointment in favour of the wife he had at the time and had married again, and then for the first time exercised his power in favour of his second wife, I do not like to say positively now, that such an appointment would be an invalid appointment, which would be the case if we were to read the words "his wife" as referring only to the wife he had at the date of this deed. I feel the question is of some difficulty and doubt, but I think the proper mode of construing this deed is to refer to the wife that he then had, and not to include any wife whom he might afterwards marry.

I will assume, however, that any wife that he might afterwards marry might come within the terms of this power, which is inserted by way of proviso. What are the facts? While his first wife was still living Sir Henry by deed poll (which has been referred to, and therefore I will not mention it at length again) did make what he calls on the face of the deed an irrevocable appointment in favour of his wife for her life, and after her death for his children. Now, suppose any child, on the faith of that appointment, settled his share or dealt with his share, it would be an extraordinarily hard thing on that child to say afterwards, that Sir Henry having married again, although he had exercised his power in favour of his existing wife that did not exhaust the power, and he may now exercise it again in favour of his second wife, and thereby postpone the children to a wife who might have a young life and might live a great many years after his own death. That would be a very hard thing indeed on the children who had relied on the terms of this appointment as giving them an absolute vested and irrevocable interest. Such an appointment to the second wife would be a revocation *pro tanto* of the original appointment. Was that the meaning of the deed of appointment? I cannot satisfy my mind that it was. It is said that you ought to read this appointment into the original settlement, and in this order, that the appointment to the wife comes before the appointment to the children. I agree that that is so, as far as the appointments are valid appointments. Suppose you followed that rule in this case, you might have to read into this settlement first of all the appointment to his first wife, and then you must read in the appointment to the second wife, not as a remainder after the appointment to the first wife, but as an alternative appointment to the appointment of the first wife. Is that legitimate, and is that according to any rule or practice of the court in dealing with appointments of the kind? The result would be this, that I appoint to my first wife after the determination of my estate; if she should not be then living, then I appoint to my second wife after the determination of my estate; and, subject to those alternative life interests, I appoint to my children. Is that consistent with the appointment which he did actually make, irrevocably in favour of his first wife and children? I cannot bring myself to believe that it is; and therefore, even if the first point be as argued in favour of the appellants that this power of appointment to a wife would extend to any wife, yet having exercised it in this way by deed in favour of his existing wife it seems to me entirely contrary to the plain meaning and intention of that deed that he should afterwards, having married again, postpone the interests which he had given to the children by that deed of appointment, to the life of another wife, which certainly was not a thing within his contemplation when that deed of appointment was made. I therefore think that the learned judge was right in the decision at which he arrived, and that this appointment was so complete an exercise of the power of appointment that he had, in favour of the wife as to make it impossible for him after that appointment to make an appointment in favour of another wife, which I think would be entirely inconsistent with the terms of that deed of appointment.

The appeal therefore fails, and must be dismissed, with costs.

Solicitors, *J. Rogers; Rowcliffes, Rawle, & Co.; H. P. Spottiswoode.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) April 25, 27, 28.

EDWARDS *v.* WALTERS. (*a.*)

Promissory note—On demand—Maturity—Gift—Renunciation—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 62, 89.

A promissory note payable to a specified person without the words "order" or "bearer" is a negotiable instrument within the meaning of the Bills of Exchange Act, 1882. *Such a note, when made payable "on demand," is "at maturity" as soon as it is made, and therefore, under sections* 62 *and* 89 *of the Act, if the holder of the note desire to renounce all rights in it, the renunciation must be in writing, unless the note is delivered to the acceptor in person, though possibly delivery to the acceptor's legal personal representatives will suffice.*

Accordingly, where the holder of a note made a parol

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

renunciation of all rights in it and delivered the note to one of the devisees of the real estate of the acceptor, who by his will had charged his real estate with payment of his debts, the renunciation was held to be insufficient.

Appeal from Kekewich, J.

This was a question arising upon the construction of the Bills of Exchange Act, 1882.

On the 1st of August, 1865, the Rev. Abraham Edwards lent £200 to his brother-in-law, Mr. Walter Walters. For this sum Mr. Walters gave Mr. Edwards a promissory note payable on demand, with interest at 4 per cent. per annum. The note was made payable simply to Mr. Edwards without the words "or order."

Mr. Walters died in 1866, leaving the debt of £200 unpaid. By his will he devised some real estate in Cardiganshire specifically to his son and daughter, Thomas Walters and Annie Evans, and he also charged his real estate with the payment of his debts. His executors wound up his estate and paid his debts, with the exception of the debt of £200, of the existence of which they were ignorant.

In October, 1894, Mr. Edwards died, and in 1895 this action was brought by his administratrix against the executors of W. Walters, and against Thomas Walters and Annie Evans as the devisees of the real estate of W. Walters, for the purpose of obtaining payment of the £200 with interest out of the devised real estate.

The evidence showed that the defendants Thomas Walters and Annie Evans had during the life of Mr. Edwards voluntarily made him some payments by way of interest at 4 per cent. on the £200, the first of these payments being in 1878 and the last in 1889.

There was also evidence that in 1891, when Mrs. Evans was on a visit to her uncle, Mr. Edwards, he delivered up the promissory note to her, saying that he gave it to her.

The Bills of Exchange Act, 1882, s. 8 (4), provides that: "A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable."

By section 62 (1): "When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing unless the bill is delivered up to the acceptor."

By section 83 (1): A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person or to bearer."

By section 89 (1) (with certain exceptions): "The provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes"; (2) "In applying those provisions the maker of a note shall be deemed to correspond with the maker of a bill."

Kekewich, J., was of opinion that if a parol renunciation was sufficient, the evidence proved a renunciation sufficient to discharge the defendants. But he held that the note, being payable "on demand," was at maturity immediately on its being made, and that consequently, the delivery up not having been made to the maker, the renunciation was inoperative because it was not in writing. He accordingly gave judgment for the raising of the £200 with interest out of the devised real estate.

The defendants Thomas Walters and Annie Evans appealed.

Renshaw, Q.C., and *Butcher*, for the appellants.—The Act shows that the delivery must be to the acceptor, but cannot mean to the acceptor personally. It must be taken to mean anyone who represents the acceptor for the purposes of the bill. If this be not so, the result is that a renunciation by delivery to the legal personal representatives who are not interested is good, while delivery to the devisees who are interested is worthless. We suggest that the renunciation is good, provided the bill is given up. This is a claim which ought not to be enforced in equity.

In the course of the argument the following cases were referred to: *Foster* v. *Dawber*, 6 Ex. 839; *Taylor* v. *Manners*, 14 W. R. 154, L. R. 1 Ch. App. 48; *Storm* v. *Sterling*, 4 W. R. 543, 3 E. & B. 832, affirmed *sub nom.*; *Cowie* v. *Sterling*, 6 E. & B. 333; *Rex* v. *Box*, 6 Taunton 325; and also Byles on Bills, 11th ed., pp. 53 and 79, and 15th ed., 264.

Bramwell Davis, Q.C., and *Griffith Jones*, for the plaintiff.—The estate in the appellants' hands is liable for the debt. [LINDLEY, L.J., referred to *Crowe* v. *Clay*, 2 W. R. 304, 9 Ex. 604.] By payment of interest in respect of the debt the debt is kept alive, and the plaintiff can sue for money lent. The renunciation to be effective must be in the manner pointed out by the statute. If delivery up of the note is to amount to a discharge of the debt, the delivery must be to a person liable on the note. The word "acceptor" would include his legal personal representatives, but it is a great extension to make it include devisees.

They referred to *Roddam* v. *Morley*, 5 W. R. 510, 1 De G. & J. 1; *Re Hollingshead*, 36 W. R. 660, 37 Ch. D. 651; *Re England*, 43 W. R. 491, [1895] 2 Ch. 100.

Renshaw, Q.C., replied.

LINDLEY, L.J., after stating the facts, said: Walters' devisees contend that Edwards in his lifetime released the debt. What he did was this. In April or June, 1891, he gave the note to Mrs. Evans, who was one of the devisees, telling her in effect that he should never make any claim under it, and that she might keep it. Mrs. Evans has kept it from that time until now. The note was not indorsed to her, nor was there any writing at the time throwing any light on this transaction. What, then, is the effect of this transaction? It is contended that it is a release in law, or, at all events, in equity. A release at law is sought to be established by the law merchant apart from the Bills of Exchange Act, 1882, and if not by the law merchant, then by section 62 of that Act. The law merchant is stated in *Foster* v. *Dawber*. I do not understand that it applied to bills or notes not negotiable; but this difficulty is removed by section 8, sub-section 4, to which I have already alluded. The law merchant is adopted with modifications in section 62 of the Bills of Exchange Act. The modification introduced is the necessity for writing unless the bill is given up to the acceptor. In this particular the law merchant is inconsistent with the express provisions of section 62. The appellants' argument, based on section 97, sub-section 2, and on the law merchant, which before the Act formed part of the common law of England, cannot be supported.

Reliance is then placed on section 62 of the Act. This section, though in terms applicable to bills of exchange, is by section 89 made applicable to promissory notes payable to a particular person without the addition of the words "or order or bearer" (section 8, sub-section 4). Section 62, therefore, applies to the promissory note which is in question here. The maker of a promissory note corresponds with the acceptor of a bill (section 89, sub-section 2). A promissory note payable on demand is payable at once without any demand, and may be sued upon

accordingly. Such a note therefore "matures" within the meaning of section 62 as soon as the note is made and delivered to the payee: *Re George*, 38 W. R. 617, 44 Ch. D. 627. I will now paraphrase section 62 and apply it to a promissory note payable on demand. The section will run thus: "When the holder of a promissory note payable on demand absolutely and unconditionally renounces his rights against the maker the note is discharged. The renunciation must be in writing unless the note is delivered up to the maker." In the present case there was no renunciation in writing. Can it, then, be said that it was delivered up to the maker? The maker had long been dead; but I am not prepared to say that the legal personal representatives of an acceptor or maker would not be included in the word acceptor or maker. The ordinary use of language and the general understanding of business men as well as of lawyers warrant such an interpretation of the word acceptor or maker in such a context. As Lord Macclesfield said in *Hyde* v. *Skinner*, 2 P. Wms. 196, "The executors of every person are implied in himself" (Byles, 11th ed., p. 53). But I cannot go further, and say that acceptor or maker in this section means or includes a legatee or devisee. Such an interpretation is not warranted either by the ordinary use of language or by the general understanding of business men or of lawyers. Consequently section 62 does not justify the contention that this note was discharged by the gift of it to Mrs. Evans.

In the course of the argument I expressed a doubt whether as the plaintiffs were not the holders of the note they could sue the maker's representatives either on the note or for money lent to the maker (see *Crowe* v. *Clay*, 20 W. R. 364, 9 Ex. 604); but as the devisees themselves hold the note and are not liable to be sued upon it by anyone, the reasoning on which that case was decided does not apply.

I come therefore to the conclusion that there has been no release or discharge at law of the debt due to Edwards' estate from Walters' estate. The defence founded on the Statute of Limitations fails as regards the devisees of the real estates by reason of their payment of interest: see *Re Hollingshead*, 36 W. R. 660, 37 Ch. D. 651.

There remains only the question whether the devisees of the real estate have been discharged in equity, though not at law. Edwards in his lifetime made no claim against Walters' executors, but there is no evidence to show that the devisees have been prejudiced by the mode in which the personal estate has been dealt with. There is no evidence that there was any personal estate. Moreover, the devisees for many years paid interest on the £200, and, apart from the gift of the note to Mrs. Evans, there is no ground for saying that Edwards so conducted himself as to render it inequitable on his part to insist on payment of his debt out of the real estate devised to those who recognized his demand. The gift of the note to Mrs. Evans is unquestionably strong evidence of an intention to forgive the debt; but unfortunately the note was not endorsed by the payee. Mrs. Evans could not therefore sue on it in her own name. Nor was there any consideration for the transaction, no consideration to support an agreement not to sue. There is, in fact, nothing except an intention not carried out. Such an incomplete transaction does not amount to a gift of the debt nor to an equitable release of it. In *Taylor* v. *Manners*, 14 W. R. 154, L. R. 1 Ch. App. 48, Turner, L.J., expressed a doubt whether a gift by a secured creditor of his security to the debtor might not amount even at law to a release of the debt if such was the intention of the creditor; but I confess I cannot adopt this suggestion. Turner, L.J., came to the conclusion that there was an agreement to release and a consideration for such agreement. Knight Bruce, L.J., differed. The decision therefore does not really assist the plaintiff. At law exoneration before breach need not be under seal, but a release must be under seal except in the cases provided by section 62 of the Bills of Exchange Act. A release in equity is often spoken of as something easy to establish. But I am not aware of any circumstances which amount to a release in equity and not at law except an agreement for valuable consideration to give a release or not to sue. Such an agreement, unless there is some reason for not enforcing it, has in equity the effect of a release. Again, a creditor may so conduct himself as to preclude him from obtaining equitable relief, and even from enforcing a legal demand. This I understand to have been Turner, L.J.'s, meaning when he said (L. R. 1 Ch. App., at page 56) he was not satisfied that there might not be considerations which would in this court prevent a debt from being enforced, although it might be subsisting at law. But to call such conduct a release in equity suggests false analogies and misleads.

In this case there is no release or discharge at law or in equity, and no conduct on the part of Mr. Edwards which precludes his representatives from obtaining payment from the devisees. An intention to discharge them from their liability is established, but that unfortunately is insufficient to afford them a defence to the claim made against them. A court of equity cannot enforce a mere intention to give or to forgive.

The appeal must be dismissed, with costs.

LOPES, L.J.—I will not recapitulate the facts which have already been stated in the judgment of Lindley, L.J. This note is payable to a person designated without the addition of the word "order" or "bearer," and would not have been negotiable before the statute. The old law, therefore, as laid down by Byles, J., in his book on bills, would be inapplicable. It was contended that the statute of 1882 did not apply because this note was not a negotiable instrument, but that contention cannot be maintained if section 8 of the statute is looked at. Besides, section 83 refers to a note and clearly covers a note made payable to a specified person. This note is therefore within the statute, and the case is governed by section 62. [His lordship then read that section and continued:] According to this section the note must be mature; a note such as this, payable on demand, is at maturity immediately it is made. In my opinion, however, the holder in the present case has by parol absolutely and irremediably renounced his rights against the acceptor. But the statute says the renunciation must be in writiug, unless the bill or note is delivered up to the acceptor. There was no writing, and the bill was not delivered up to the acceptor, in this case to the maker. It was delivered up to the devisees of the maker, who were no parties to the note, and could not have been sued on it. I am clearly of opinion that this is not within either the words or the meaning of the statute. It may be that the word "acceptor" or the word "maker" would include any person liable on the bill, as, for example, the personal representatives of the acceptor or maker, but I am quite clear that it cannot include the maker's devisees. The case is taken out of the Statute of Limitations by the payment of interest by the devisees of the real estate. There has been no release at law, and in my opinion there has been no discharge in equity. I think, therefore, that the appeal should be dismissed with costs.

KAY, L.J.—The administrator of a man named Edwards has brought this action against the executors and against the devisees of real estate of a person named Walters, to recover a sum of £200 lent in 1865 by Edwards to Walters. Walters died in 1866. By his will he charged his real estate with payment of his debts. His executors were ignorant of the existence of this debt, and have completely administered his personal estate; but the devisees of the real estate of Walters paid interest for some years, and up to 1889. The defence is that the debt has been released. It appears that Walters gave a promissory note to Edwards for the amount, and that in April or June, 1891, Edwards gave up to the devisees the promissory note with the intention of releasing the debt. The learned judge has found this to be the fact, and there seems no reason to doubt it. [His lordship then read section 62 of the Bills of Exchange Act, 1882, and continued:—] By section 89 the provisions of the Act apply with the necessary modifications to promissory notes. Therefore in section 62 we must read in this case "maker" instead of "acceptor." The difficulty is to say that this note has been delivered up to the maker. The actual maker, of course, was Walters, and it was not delivered up to him; but, if it had been delivered up to his executors after his death, I should think that would do, because they might have been sued on the note as standing in the place of the maker. The devisees of his real estate are not in the same position as his executors for this purpose. There is nothing in the Act to bring them within the definition of makers of the note. They might be joined with the executors in an action to make the real estate, which they took under the will of the maker of the note, liable for its payment, as has been done in this case. Payment on account by them would keep this right against the real estate alive, as was determined in the case of *Roddam* v. *Morley* and in *Re Hollingshead*. But these considerations do not authorize the court to say that the devisees of the real estate of the maker are themselves makers within the meaning of section 62 of this statute, or that they stand in the position of the deceased maker as his executors may be said to do. Before the statute the liability of any party to the note might be discharged by an express renunciation without writing and without consideration. This was by the law merchant (*Foster* v. *Dawber*, 6 Ex. 839), but it only applied to those who were parties to the note. The statute has altered this by requiring the renunciation to be in writing. I have no doubt that if the renunciation was made as required by the Act the debt would be completely discharged, and no action could be maintained on the note or to recover the loan. It is argued that the case does not come within the Act at all; that the renunciation contemplated by the Act is only against the maker, and if these defendants are not makers the matter may be treated as outside the statute, and that the loan has been effectually released, as far as they were concerned. The only authority cited for this was a case of *Taylor* v. *Manners*, where Turner, L.J., intimated, rather doubtfully, an opinion that the giving up of a policy of insurance which was the security for a debt might operate as a total release of the debt. Knight Bruce, L.J., dissented from this opinion. I do not see how this could be a release in equity, unless there was a valuable consideration for the release, and no case has been cited in which such a transaction has been held to be a release at law.

Then it was said that no one could sue for the debt in this case unless he was in a position to hand over the note to the defendants, and that would undoubtedly be so if there was any chance of the defendants being exposed to the risk of being sued upon the note by the holder. But no such danger can possibly arise, because the note is in the defendants' own hands.

With every desire to assist the defendants in a case in which it seems clear that the payee of the note intended to release all claim against them, I feel bound to hold that he has not carried out that intention effectually. He might have made the renunciation in writing, in which case I incline to think it would have been sufficient. He has not done this; he has made an attempt to give up the claim, which, being without consideration and not complying with the statute, in my opinion has not discharged the real estate devised to those defendants from liability.

Appeal dismissed.

Solicitors, *Minshall, Parry, Jones, & Co.*, for *Smith & Davies*, Aberystwith; *Robins, Billings, & Co.*, for *C. Owen*, Pwllheli, Carnarvon.

From Chan. Div. (Lord Herschell; and A. L. Smith and Rigby, L.JJ.) } Nov. 15; March 30.

Re DE HOGHTON.

DE HOGHTON *v.* DE HOGHTON (No. 1). (*a*.)

Inland Revenue—Legacy duty—Annuity—Accumulations—Term of years to secure—Annuitant tenant for life subject to term—Legacy Duty Act, 1845 (8 & 9 *Vict.* c. 76), *s.* 4.

A testator devised estates to trustees for a term of 500 years upon certain trusts, and subject thereto to certain persons successively for life. The trusts of the term were (inter alia) *to pay to the person who for the time being should, subject to the term, be entitled under the will to the possession or receipt of the rents and profits of the devised estates a certain annuity. Subject to that trust, the trustees were directed, during the period of twenty-one years from the testator's death, to accumulate the rents and profits arising from the hereditaments comprised in the term, and apply the same, with the accumulations, upon trust to purchase land and settle the same as nearly as possible in the same manner as the estates devised by the will, and after the determination of the period of twenty-one years upon trust to pay the rents and profits to the person or persons for the time being entitled to the hereditaments comprised in the term and the reversion expectant on the term.*

The testator died on the 2nd of November, 1875, and upon the death of C. D., on the 12th of April, 1893, J. D. became entitled to receive from the trustees an annuity of £3,000, and became tenant for life subject to the term.

Held, affirming the decision of Stirling, J., 43 *W. R.* 630 (Rigby, L.J., *dissenting*), *that, having regard to the substance rather than the conveyancing form of the gift, the annuity to which J. D. became entitled was not one charged upon his own estate, and that consequently legacy duty was payable upon it by virtue of* 8 & 9 *Vict.* c. 74, *s.* 4, *and not succession duty.*

Shirley *v.* Earl Ferrers, 1 *Ph.* 167, *distinguished.*

This was an appeal from the decision of Stirling, J., 43 W. R. 630, [1895] 2 Ch. 517. The facts are stated in the previous report and in the judgments of Lord Herschell and of Rigby, L.J. Stirling, J., held that legacy, and not succession, duty was payable (see the report, 43 W. R 630).

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

The Commissioners of Inland Revenue appealed.

Sir R. B. Finlay, S.G., and *Vaughan Hawkins*, for the appellants.—The decision of Lord Lyndhurst in *Shirley* v. *Earl Ferrers*, 1 Ph. 167, where the facts were in substance the same as in this case, applies. Sir James De Hoghton became tenant for life of the estate, and legacy duty is not payable.

They referred to 36 Geo. 3, c. 52; 45 Geo. 3, c. 28, s. 4; 55 Geo. 3, c. 185, Schedule 3; and 8 & 9 Vict. c. 76, s. 4.

Graham Hastings, Q.C., and *Ingle Joyce*, for the respondent.—*Shirley* v. *Earl Ferrers* does not apply, for the £3,000 is not paid out of Sir James De Hoghton's estate. [Lord HERSCHELL.—Could he live in the mansion-house?] *Hickley* v. *Strangways*, 35 W. R. 83, 34 Ch. D. 423, seems to show that he could not, nor could he exercise the powers of a tenant for life. See Settled Land Act, s. 2, sub-section 5. In *Shirley* v. *Earl Ferrers* the lady actually took the accumulations. Here they are to be laid out in the purchase of land. The gift is clearly an "annuity," and therefore within the words of the Act.

Sir R. B. Finlay, in reply.—It is not the case that Sir James de Hoghton could not exercise the powers of a tenant for life. See Settled Land Act, 1882, ss. 56 and 58, and *Re Clitheroe*, 34 W. R. 169, 28 Ch. D. 378, 31 Ch. D. 135.

Cur. adv. vult.

Lord HERSCHELL.—The question in this case is whether legacy duty is payable under the following circumstances. Sir Henry De Hoghton, who died on the 2nd of December, 1876, by his will devised his estates to trustees, their heirs and assigns, to the use of the same persons, their executors, administrators, and assigns, for the term of 500 years, to commence from the testator's decease, upon the trusts hereinafter declared concerning the same, and, subject to that term and to the trusts thereof, to the use of Sir Charles De Hoghton and his assigns for life, with certain remainders to his issue in tail, with remainder to the use of Richard De Hoghton for life, with similar remainders in tail, with remainder to the use of Sir James De Hoghton for life. The trusts of the term were (*inter alia*) to pay to the person who for the time being should, subject to the term, be entitled under the will to the possession or receipt of the rents and profits of the devised estates an annuity which was, according to the age of the recipient, to be £1,000, £2,000, or £3,000 a year. Subject to that trust, the trustees were directed, during the period of twenty-one years from the testator's death, to accumulate the rents and profits arising from the hereditaments and premises comprised in the term, and apply the same, with the accumulations, upon trust to purchase land and settle the same as nearly as possible in the same manner as the testator's estates thereby devised, and, after the determination of that period of twenty-one years, to pay the rents and profits to the person or persons for the time being entitled to the hereditaments and premises comprised in the term and the reversion expectant on the term. The will contained the usual powers of leasing. These were to be exercisable during the period of twenty-one years just referred to, as well as during the minority of any tenant for life or tenant in tail, by the trustees of the term. It may be added that the successive tenants for life were empowered to charge the estate with a rent-charge in favour of a wife and portions in favour of children, and any appointment under these powers was to take effect in priority to the trust for accumulations. It was provided that no charge under any such appointment should take effect unless the person so charging, or some issue of such person, should become entitled to the rents and profits of the estate; but, for the purposes of such proviso, the will was to be construed as if the term of 500 years had not been limited therein. Richard De Hoghton died in August, 1892, and Sir Charles De Hoghton on the 12th of April, 1893. The respondent, Sir James De Hoghton, thereupon became entitled to receive from the trustees an annuity of £3,000, and became tenant for life, subject to the term. Stirling, J., held that legacy duty was payable in respect of this annuity.

The statute 8 and 9 Vict. c. 76, by section 4, provides that every gift by any will which shall be payable out of, or charged or rendered a burden upon, the real or heritable estate of the testator, whether such gift be by way of annuity or in any other form, shall be deemed to be a legacy. It cannot be denied that the gift in question comes *primâ facie* within these words. But it is said to have been decided that where the gift, whether by way of annuity or otherwise, is charged upon or payable out of the estate of the person to whom the gift is made, the case is not within the statute. Since the Succession Duties Act came into operation, there would in such a case be, it is said, a duty payable in respect of a succession under that Act, and prior to that Act it is said that no duty would have been payable in such a case. I will refer presently to the decision relied on. It has been often said that, in considering whether the case is within the Act relating to legacies or within the Act relating to successions, the substance of the matter must be looked at, and not the mere method of conveyancing by which the disposition of the testator's estate is provided for. This is the more necessary inasmuch as the Acts relate to Scotland as well as England, and the system of conveyancing and the rules by which it is governed are by no means identical in the two countries.

Now, I should certainly not be disposed to dissent from the proposition that there may be cases in which a gift, being charged on and payable out of the estate of the person entitled to the gift, is therefore not subject to legacy duty. But the question is whether, in the present case, when the substance of the matter is looked at and conveyancing forms are disregarded, the annuity to which the respondent is entitled is charged on or payable out of his estate in any sense which can give rise to such an exemption. When I speak of disregarding conveyancing forms, I am, of course, alive to the fact that the language used must be looked at to see what is taken under a will, and that such language must have its natural legal effect. I merely wish to emphasize the point that you must get behind all that is technical, and find out what the substantial effect of the disposition is.

The case is put for the appellants in this way. Sir Sir James De Hoghton, it is said, is tenant for life of the estate, subject indeed to the term, but that is a mere piece of machinery to facilitate the scheme of the testator; the annuity is charged none the less on the estate of which he is life tenant. Now there may, no doubt, be many cases in which, notwithstanding a prior term, it would be quite proper for the purpose we are dealing with to regard the estate as that of the person entitled subject to the term, and to speak of an annuity charged on it as being payable out of his estate. But what is the state of things in the present case during twenty-one years from the death of the testator? The respondent (Sir James De Hoghton) is not entitled to enter into possession; he has no right to receive any of the rents or profits; the management of the estate

is vested by the will in the trustees; its administration does not rest with the respondent. As far as I can see his right is to receive an annuity of £3,000 a year, and no more. During the period of twenty-one years from the testator's death he can receive no more benefit from it than if he were a stranger to it altogether, and, unless he is alive at the expiration of the twenty-one years, no such right or benefit will ever accrue to him. He has indeed a power to charge the estate for certain purposes, but this is a power expressly conferred to charge the inheritance, and not merely his life estate. He acquires it by the express terms of the will, and does not derive it from the fact that, subject to the term, he is made life tenant. Under these circumstance, looking at the substance of the matter, I find myself quite unable to say that the annuity to which he is entitled is charged upon or payable out of his own estate in the sense to which I have referred.

It is said that the effect of the will is the same as if the respondent had been entitled to receive the rents and profits of the estate, and to retain for his own use each year £3,000 thereof. I do not think this is so. He would then, at least, have been entitled to enter upon a receipt of the rents and profits, which he is not under the testator's will. The rights which the respondent, in fact, possesses might, no doubt, have been conferred upon him in different ways, If the estate had been devised to the trustees absolutely, with directions to pay an annuity of £3,000 a year and accumulate the surplus income during twenty-one years, and then to settle the estate in such a way that the same persons who are made tenants for life and in tail under the will should become tenants for life and in tail, the position of the respondent would have been in substance the same as at present. He would have received just the same benefit; his annuity would have been secured in the same way. But it would have been then impossible to contend that the annuity was charged on or payable out of his estate. If in that case he would have got just the same pecuniary benefit as at present, it seems to me to follow that in substance the estate on which his annuity is charged, and out of which it is payable, cannot for the purpose we are considering be regarded as his estate.

It is true that, if *Re Clitheroe Estate* be correctly decided, the respondent may be in the position of a tenant for life within the meaning of the Settled Land Act, so that the power of leasing conferred on the trustees by the will cannot be exercised without his consent. I must in this court take that case to have been rightly decided. I do not think the decision touches the question which we have to determine. I think it is impossible to hold that, if this case could not have been regarded before the Settled Land Act was passed, as one in which the annuity was payable out of the respondent's own estate so as to exempt it from legacy duty, it can be differently regarded now. If this be the result, it would be a strange effect, indeed, of legislation dictated by quite different considerations. In my opinion the utmost effect of the Settled Land Act would be to add the respondent for some purposes to the trustees of the will as a *quasi*-statutory trustee, whose consent is necessary to certain dealings with the property.

The case relied on by the appellants is *Shirley* v. *Earl Ferrers*, decided by Lord Lyndhurst. It arose under the earlier Act relating to legacy duty, the 58 Geo. 3, c. 184, but there is no distinction for the present purpose between that and the later statute. In that case a testator devised estates to the use of trustees for the term of 500 years, and subject thereto to other trustees to preserve contingent remainders, with remainder to the first and other sons of Caroline Shirley (then an infant), with divers remainders over. He directed that the trustees of the term should, after paying certain annuities, apply so much of the rents and profits of the estates as they should think fit (not exceeding in any one year a specified amount) to the maintenance and education of Caroline Shirley until she should attain twenty-one or marry, and that they should accumulate the surplus rents for the benefit of Caroline Shirley when she should attain twenty-one or marry, and, if she should die under twenty-one and unmarried, then for the benefit of the persons entitled under the subsequent limitations, and that, upon her attaining twenty-one or marrying, they should during her lifetime pay the surplus rents, after payment of the annuities, to her for her separate use. Lord Lyndhurst held that legacy duty was not payable. Nothing, he said, but what is a charge upon the estate of another person will come within the statute. It is quite true that in that case unless Miss Shirley attained the age of twenty-one or married she would have taken nothing under the will but the allowance referred to, and this is naturally relied on in the present case. But what are the reasons which Lord Lyndhurst gives for holding that the estate on which the legacy was charged was her estate? He says: "The direction merely does what this court would have done without it. The petitioner would have been entitled, at all events, to maintenance out of the rents and profits of the real estate. It is true the trustees have a discretion to allow a portion of the rents, not exceeding a certain amount, for that purpose, but still the estate out of which the allowance is to come is her estate." Now, Lord Lyndhurst may have been right or wrong in thinking that the direction merely did what the court would have done without it, and that the infant would be entitled to maintenance out of the rents and profits. It is suggested that he was mistaken in this view, but, however that may be, I think it was one of the reasons, if not the main reason, why he regarded the estate as hers. No such grounds exist in the present case, and I am by no means satisfied that Lord Lyndhurst would have disposed of it in the same way. At all events, it does not seem to me to be an authority which compels us to hold that the annuity is exempt from legacy duty because it is charged upon and payable out of the respondent's estate. I do not, of course, for a moment question that the respondent is tenant for life, subject to the term, and that he has, as such, certain rights. He could, as suggested, in some circumstances join in barring the entail, and, when that was done, join in putting an end to the trust for accumulation. But the statute creating the legacy duty applies in terms to the annuity in question; there is no exception in the statute which excludes it. In *Shirley* v. *Earl Ferrers* an exception was implied where the annuity was charged on and payable out of the annuitant's estate. I am bound to admit this exception in such a case as was then in question. In the present case I do not think the annuity was charged on or payable out of the respondent's estate in any sense in which such an exception could reasonably be engrafted upon the plain words of the statute which we have to construe.

A. L. SMITH, L.J.—The question in this case is whether the Crown is entitled to call upon Sir James De Hoghton to pay legacy or succession duty, he having, in the year 1893, become entitled under the following circumstances to receive an annuity of £3,000 a year. Sir James De Hoghton admits that he is liable to pay legacy duty, and Stirling, J., has held that this was the duty payable. The Crown, however, contends that he must pay succession duty,

and not legacy duty. [His lordship stated the facts, and continued:] The point in dispute is this, Is this £3,000 a year to the enjoyment of which Sir James became entitled upon the death of Charles on the 12th of April, 1893, until the expiration of the twenty-one years, apart from form, in substance a gift by way of annuity payable out of the rents and profits of real estate to which he is entitled, in which case it has been held not to be a legacy within the meaning of section 4 of 8 and 9 Vict. c. 76 (*Shirley* v. *Earl Ferrers*); or is it, in substance, an annuity payable by another, in which case it would be a legacy, and within the terms of the Act.

It is not denied, either by the advisers of the Crown or of Sir James De Hoghton, that in inquiring what duty is to be paid the substance and not the form of the instrument is to be looked at; one reason for this, I apprehend, being that the taxing acts refer to both England and Scotland, in which the conveyancing forms differ; the other being that a subject is to pay duty upon that which he in reality comes into the enjoyment of, and not upon that which he may appear to come into upon paper. Now, when the substance and not the form is looked at, how do matters stand? The term of 500 years is vested in trustees with the obligation imposed upon them of collecting the rents and profits of the devised estates. In many cases the creation of a term is a mere conveyancing contrivance, but in this case the creation of the term is a reality, one object being by means thereof, as far as possible, to keep the tenant for life out of the settled estates for the contemplated period of twenty-one years. Sir James, until the expiration of the twenty-one years, is no more entitled to collect the rents than any stranger to the estate. The trustees are to do this, not Sir James. The trustees, out of the rents and profits which they alone are to collect, are to pay Sir James an annuity of £3,000 a year and nothing more, and all rents and profits of the estate of whatever kind after making this payment are, up to a period of twenty-one years from the death of the testator, to be accumulated by the trustees and laid out by them in the purchase of land. If Sir James happens to die before the expiration of the twenty-one years, he will take no benefit whatever from the accumulations. It is true that by the terms of the will Sir James, subject to the term of 500 years and the trusts declared, takes a life estate; but what, until the expiration of the twenty-one years, is the tangible interest which he takes? What, apart from form, in substance does he come into? He is not entitled to receive a single sixpence of the rent; the amenities, such as shooting and fishing, are not his. If these are capable of being let for value, I apprehend the trustees under the will, notwithstanding the Settled Land Act, are bound to let them. At any rate, Sir James could not enjoy them without obtaining the sanction of the court; and whether this could be obtained I have not to decide.

In these circumstances, what is it that Sir James came into the enjoyment of upon the death of Sir Charles in 1893? In substance, did he come into a present enjoyment of a life interest in his own estate with a limitation as to its enjoyment, or into a gift of an annuity payable out of the rents to be received by the trustees of the term? There is obviously a vast distinction, when considering a taxing matter, between the case of a man coming into a present actual enjoyment of a life interest in an estate, even though subject to a limitation as to its enjoyment, and that of a man who is only entitled to have doled out to him a certain fixed sum of money out of rents and profits which he is not to receive, but which are to be received by others out of an estate the amenities of which he cannot enjoy without the leave of the court, if obtainable.

In the one case it appears to me that the man is in possession in truth and in fact of his own estate with a limitation as to its enjoyment; in the other case, though in form it may be his estate, it is not so in substance when considering upon what he is to be taxed, he having no effective interest whatever therein, being only entitled to receive a money payment from another, and nothing more.

The point in the case of *Re Clitheroe Estate* was whether the trustees of a term created by the will of the late Duke of Buccleugh were entitled to effectually exercise the powers of sale contained in the will without the consent of Lord Henry Scott, who was tenant for life of the devised estates, and it was held that they could not do so, for by the Settled Land Act, 1882, his consent was necessary; but it appears to me that this was no decision upon a taxing Act, nor, in my opinion, do the provisions of the Settled Land Act, which undoubtedly gives largely extended powers to a tenant for life, really affect the question now in hand. That Act was passed *alio intuitu*, and not for the purpose of affecting a taxing Act.

The Crown sought to rely upon the case of *Shirley* v. *Earl Ferrers*, in which Lord Lyndhurst, when Lord Chancellor, held that sums to be annually applied by the trustees of a term of 500 years out of the rents and profits of an estate towards the maintenance of a minor were not chargeable with legacy duty, he holding that for legacy duty to become payable under the Act (which was an Act for this purpose the same as the 8 & 9 Vict. c. 76, s. 4) there must be that which is a charge upon the estate of another, or in other words a person is not to pay legacy duty upon coming into the enjoyment of an estate which is his own. Lord Lyndhurst in that case held that the allowance payable to Caroline Shirley was payable to her for maintenance, to which in any event she was entitled, and consequently it could not be said that the allowance did not come out of her own estate, and this is where I think the present case differs from that. Nor does the case cited by the respondents of *Hickley* v. *Strangways* apply to this case, for there, by the terms of the will, the tenant for life took no estate or interest in possession until the termination of the term thereby created.

I cannot think that the Settled Land Act of 1882 really affects what we have to determine. It gives, it is true, larger powers to the tenants for life than they theretofore enjoyed, but this cannot, I think, alter the way in which a taxing Act is to be applied. Then, looking not to the form but to the substance of this case, it appears to me that the £3,000 a year is not payable to Sir James out of any estate which in reality he came into the enjoyment of.

The only thing Sir James is entitled to until the expiration of the twenty-one years is an annual money payment of £3,000, and nothing more; and this seems to me in substance, apart from form, to constitute a gift by way of annuity payable out of the estate created by the term, and not a limitation upon the tenancy for life which, for the reasons given above, is not enjoyed by Sir James.

In my judgment Sir James must pay legacy duty upon the £3,000 a year, and succession duty is not the duty now payable.

I therefore am of opinion that Stirling, J.'s, judgment is correct, and that this appeal should be dismissed.

RIGBY, L.J.—At the time of making his will the testator, Sir Henry De Hoghton, was without male issue, but had brothers, Charles and Richard, and

numerous half-brothers, of whom Sir James, the present baronet, was the eldest. The scheme of the will is to settle the property dealt with in strict settlement, so as to go along with the baronetcy, and only to go to the testator's female issue and collateral female relatives after the failure of successors to the baronetcy. But the testator was desirous, at the expense of the successive owners of the freehold, to raise a fund for the purchase of additional lands to be settled to the same uses as the property devised. It cannot be supposed that he knew personally how far this could be done, but the scheme of the will, so far as is material for the present purpose, is exactly what would have resulted from instructions to settle the property so as to go as long as possible with the baronetcy, but to apply the income of the successive owners of the estate, with the exception of sums varying according to their ages, but in no case exceeding £3,000, in the purchase of additional property. The law would not allow of such an accumulation for more than twenty-one years, and if the leading idea—that the sucessive baronets were to be owners of the estate for the time being—were followed, the directions for accumulation must be of necessity more or less precarious. On the expiration of preceding estates of freehold each successive tenant for life and tenant in tail under the actual limitations takes, notwithstanding the term of 500 years, the seisin in possession of the immediate freehold. His position is essentially different from that of a reversioner or remaindermen, and is correctly described as that of the freeholder in possession, subject to the term, just as an owner in fee simple who has made a lease for years is the immediate owner of the fee simple, though subject to the lease. The rents and profits of the property, except in so far as they are expressly withdrawn and diverted from him, go to the freeholder because he is freeholder.

In the present case a portion of those rents is withdrawn and diverted from the freeholder to meet annuities to other people, and the rents and profits made subject to the trust for accumulation are also withdrawn and diverted during twenty-one years if, but only if, the settlement lasts so long. The tenant for life in possession, subject to the term, is, however, the person who under the old law would have made a tenant to the *præcipe*, and is now protector of the settlement, and he and the first remainderman in tail could, by a disentailing deed, make themselves entitled to the whole fee simple, subject only to charges taking effect in priority to their estates, and so put an end altogether to the trusts for accumulation during the residue of the term of twenty-one years, if they are so minded. At the same time they could put at end to the trusts for payment of an annuity to the immediate freeholder. Precisely the same questions would arise if a tenant in tail under the limitations were in receipt of the annuity. But he, without consulting anybody, could bar the entail and get rid of the trust for accumulation at his pleasure. That the immediate freeholder, whether tenant for life or in tail, takes his annuity in that capacity is clear from the terms in which it is given to him. He will be entitled to it only so long as he retains his freehold estate. If, under the name and arms clause, he forfeits his freehold, or if he grants away his freehold, the annuity limited to him as freeholder ceases to be payable to him. Meanwhile, and before any of the aforesaid events happen, the rents and profits to the extent of the annuity are not taken away from him, as the other rents and profits are, but constitute the residue to which he remains entitled of the rents and profits incident to his freehold estate. But that the mere power to receive the rents, or the vesting of powers of management in trustees, would not affect the essential position of the tenant for life as owner of the immediate freehold, except to the extent to which trusts not exclusively in his favour are declared of the rents received, would seem to be clear. His estate might be equitable, and not only all powers of management, but the legal ownership of the freehold might be vested in the trustees, and still he would be in the full sense tenant for life. If, however, it can be a matter of importance, it would seem that, as the Settled Land Act, 1882, came into force before Sir James became entitled in possession, the nature of his interest cannot be treated independently of that Act, under which he, and he alone, would have all powers of management, leasing, sale, and conversion given by the Act, to the entire exclusion of the trustees of the term unless he thought fit to consent to their exercising their powers, though similar powers are by the will directed to be exercised by the trustees of the term. See *Re Clitheroe Estate*. The successive legal owners of estates for life or in tail under this will are in a very different position from that which would have been the position under an executory devise contained in a direction to settle at a future date, as in *Hickley* v. *Strangways*. For myself I can see no escape from the conclusion that Sir James, being, on the death of his brother Charles, seised in possession of the immediate estate of freehold, the annuity given to him is nothing more than a return of part of the produce of his life estate so as to take effect out of the life estate limited to him.

I think, therefore, that the principle laid down in *Shirley* v. *Earl Ferrers* applies, and that legacy duty is not payable.

Appeal dismissed.

Solicitors, *Solicitor of Inland Revenue; Rowcliffes, Rawle, & Co.*

High Court of Justice.

Chan. Div. }
Chitty, J. } June 11.

JACKSON v. THE RAINFORD COAL CO. (LIMITED). (a)

Company—Borrowing power—Mortgage of uncalled capital—Power to mortgage—Companies Act, 1862, *s.* 50.

In the articles of a company limited by shares, incorporated in 1866, *was a clause enabling the company "to borrow from time to time at interest upon mortgage of the freehold, copyhold, and leasehold hereditaments, machinery, works, and other property and effects for the time being of the company, or any of them, or any part thereof respectively, or upon bonds or debenture notes of the company, or in such other manner as the company may determine."*

Held, that while, according to Stanley's case, 12 *W. R.* 894, 4 *De G. J. & S.* 407, *and* In re Sankey Brook Co., 18 *W. R.* 914, *L. R.* 10 *Eq.* 381, *the words in the first part of the clause did not authorise a charge on uncalled capital, yet reading the last part, and having regard to the wide meaning of the word "manner," on the proper construction of the clause as a whole, such a charge was thereby authorised.*

Held, also, that even if the clause in the articles did not comprise a power to charge uncalled capital, yet the company might, under section 50 *of the Companies Act*, 1862, *by a special resolution, alter the clause so as to make it comprise an authority to charge uncalled capital.*

(a) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Motion.

The defendant company was incorporated on the 10th of August, 1866, under the Companies Act, 1862.

The capital of the company was £100,000, divided into 100 shares of £1,000 each. Of these shares eighty-five had been issued, sixty being fully paid up. Of the remaining twenty-five £850 per share had been called up, leaving a balance of uncalled capital to the amount of £3,750.

It was proposed by the company to mortgage the uncalled capital; and this was a motion by the plaintiff Jackson and another, who were joint proprietors of shares, numbered 52 and 53, to restrain the defendant company from pledging or attempting to pledge the uncalled capital of the company, and from passing or attempting to pass any resolution purporting to authorize them to do so.

The memorandum of the company contained nothing about borrowing powers; but article 56 of the articles of association empowered the company "to borrow from time to time at interest upon mortgage of the freehold, copyhold, and leasehold hereditaments, machinery, works, and other property and effects for the time being of the company, or any of them, or any part thereof respectively, or upon bonds or debenture notes of the company, or in such other manner as the company may determine, such sum or sums of money . . . as the company shall from time to time think proper."

E. C. Macnaghten, for plaintiff.—Though in the memorandum of the company there is nothing about borrowing, there is an article limiting the power, and it does not authorize the company to charge uncalled capital.

He referred to *In re British Life and Fire Assurance Society, Stanley's case*, 12 W. R. 894, 4 De G. J. & S. 407; *In re Sankey Brook Coal Co.*, 18 W. R. 914, L. R. 10 Eq. 381; *Re the Phœnix Bessemer Steel Co.*, 44 L. J. Ch. 683, 23 W. R. Dig. 45; *Newton* v. *Debenture-holders of the Anglo-Australian Investment, Finance, and Land Co.*, 43 W. R. 401, [1895] A. C. 244.

W. R. Sheldon, for the defendant company, submitted that the words in the article as to borrowing "or in such other manner as the company may determine" included power to borrow on any security. [CHITTY, J.—The word "manner" is a word of large import, and is so treated in powers of appointment.] The word "manner" is used where the largest possible meaning is wanted. The clause in the article must be read as a whole, and there is no other manner left in which the company could borrow other than on uncalled capital.

CHITTY, J.—The motion raises two points: (1) Whether the company, as the articles now stand, has power to raise money on the security of uncalled capital? (2) Whether the company, assuming that it now has no such power, could by a properly passed special resolution confer this power on itself?

With regard to the second question I have no doubt. The memorandum is silent on the question of borrowing, and were it not for the articles, the company would, as a trading company, have power to borrow upon any security; but there is an article defining the power to borrow. On this second point I entirely adopt what was said in the Privy Council in *Newton's case*, in the judgment delivered by Lord Macnaghten. This is no case of altering any bargain made between the shareholders so that the principle might intervene which precludes certain shareholders from taking away any rights which had been conferred by existing articles on other classes of shareholders, such as a right to preferential dividends or the like. But, seeing that the memorandum is silent as to borrowing, and that in the articles there is a special power to borrow, I see no reason why section 50 of the Companies Act, 1862, should not apply and the company be justified in extending their articles, if necessary. It is true that in *Newton's case* the articles of association had been altered, and the decision turned on the special resolution. It does not appear whether there was or was not any article in the original articles defining the borrowing power; but this would seem from their lordships' judgment to be immaterial. In my opinion, with regard to this second point, the company has power to alter the articles to supply this defect in their borrowing powers, if there be such a defect.

Then I have to consider the present state of things, and whether as the articles now stand, the borrowing power is limited, so that the contemplated charge would not be authorized. The first part of the article defining the borrowing power authorizes the company "to borrow from time to time at interest upon mortgage of the freehold, copyhold, and leasehold hereditaments, machinery, works, and other property and effects for the time being of the company, or any of them, or any part thereof respectively." Having regard to *Stanley's case* and that of *The Sankey Brook Co.*, those words are not sufficient to justify charging uncalled capital. *Stanley's case* has not been overruled, and these decisions are binding on me. Then the rest of the clause runs thus: "or upon bonds or debenture notes of the company, or in such other manner as the company may determine, such sum or sums of money at such rate or respective rates of interest, and repayable at such time or respective times, and upon and subject to such terms and conditions as the company shall from time to time think proper." This contains in point of form two other alternatives. First, power to borrow on bonds or debenture notes; this is general, and does not import any charge on any property, as bonds or debenture notes might be so given. Then there is the other, the third alternative, that is "or in such other manner as the company may determine."

No doubt the right mode of construing this clause is to consider the three parts of it separately up to a certain point and then together as a whole. In the case in the Privy Council the words were "to receive money on loan or deposit or otherwise, and upon any security of the company, or without giving security," and their lordships had no hesitation in coming to the conclusion that these words authorized a charge on uncalled capital. In that case in the clause in question the larger term preceded the lesser, it being first "any security of the company," and secondly "or on the security of any property of the company," and the Privy Council decided on the combined effect of the different parts of the clause. It is suggested that in the present case the words "or in such other manner" have some reference specially to bonds or debenture notes, though the words occur as an alternative. I do not see why I should thus apply these words "in such other manner" to the bonds or debenture notes. The word "manner" is a word of large import, and has been so treated in powers of appointment, though perhaps to refer to them would be too technical for this case. I read the clause as a whole, as empowering the company to borrow in the particular manner specified, and in such other manner as the company may determine, and there seems no other manner in which the company could borrow except by borrowing on uncalled capital. I think I am justified in thus reading this clause as a whole, and in saying that these words are of a wide import,

and entitle the company to borrow on uncalled capital, and the motion therefore fails.

Motion refused.

Solicitors, *Collyer-Bristow, Russell, Hill, & Co.*, for *Millington & Simpson*, Boston.

Chan. Div. }
Chitty, J. } May 13.

In re HORNER.
FOOKS *v.* HORNER. (*a.*)

Interest—Sum payable at a certain time—Time fixed by reference to death—3 & 4 Will. 4, c. 42, s. 28.

A sum payable by virtue of a written instrument within a fixed time after the death of the party chargeable is payable at a certain time within the meaning of 3 & 4 Will. 4, c. 42, s. 28, and in case of default of payment within such time the court will allow interest on the sum from the expiration of such time until payment.

Knapp *v.* Burnaby, 9 *W. R.* 765, *followed.*

Summons.

By indenture, dated in 1891, the above-named testator covenanted that within six calendar months after his death his executors or administrators should pay to trustees the sum of £2,000 upon certain trusts, and by his will, dated in 1893, confirmed the settlement made by the said indenture, and died in 1894. The £2,000 was not paid until some time after the expiration of the six calendar months.

This was a summons on behalf of the tenant for life of the fund under the said indenture to determine whether any interest was payable out of the estate of the said testator in respect of the said sum of £2,000, and, if so, from what date. A payment was made in respect of interest for the six months next after the testator's death, as was alleged, under a mistake of fact; but the question argued was whether interest was payable from the expiration of the six months to the time when the fund was paid by the executors.

Stewart Smith, for the summons.—Interest was payable from the end of the six months after the death until the £2,000 was paid. The £2,000 was a sum certain, payable by virtue of a written instrument at a certain time within section 28 of 3 & 4 Will. 4, c. 42, which shows that interest ought to be allowed in such a case: *Knapp* v. *Burnaby*, 9 W. R. 765.

Alfred Adams, contra.—There is no time certain within the statute here, and consequently interest should not be given: *Merchant Shipping Co.* v. *Armitage*, 22 W. R. 11, L. R. 9 Q. B. 99; *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co.*, 40 W. R. 194, [1892] 1 Ch. 120, [1893] A. C. 429, 42 W. R. Dig. 33.

Stewart Smith, in reply.—The time need not be a particular named day to satisfy the statute.

CHITTY, J.—The testator's covenant is to pay a sum within six calendar months after his decease. The question is whether that is a sum "payable at a certain time" within the 3 & 4 Will. 4, c. 42, s. 28. The point made is that the sum is not payable at a certain time.

The point came before Lord Hatherley in *Knapp* v. *Burnaby*, where a testatrix had covenanted that a sum should be paid within one month after her death, and default was made in payment; and he held that interest at 5 per cent. was payable as from the end of the month. I am not aware that his decision has ever been overruled or questioned, and I think that it is founded on good sense.

But *Merchant Shipping Co.* v. *Armitage* and *London, Chatham, and Dover Railway Co.* v. *South-Eastern Railway Co.*, approving that case, are said to have the effect of overruling *Knapp* v. *Burnaby*; but *Knapp* v. *Burnaby* was not cited in either of those cases, and it was not applicable. No reasons are given for the judgment of the Exchequer Chamber in *Merchant Shipping Co.* v. *Armitage*, but they are not difficult to see. The event by reference to which the time for the payment there was fixed was not a certain event, but an event which might or might not happen. The stipulation was that the money should be paid on an event that might never happen, and it was therefore held not to be payable at a time certain. This is well put by Kay, L.J., [1892] 1 Ch., at p. 148. That is sufficient ground for distinguishing *Armitage's case* and this.

Death is not a contingent event, it is a certainty, and so many days after death is a time certain for the purposes of the statute. The statute does not require the exact day to be named, and it is rightly admitted that it makes no difference that the money is to be paid not on a particular day, but within a certain time. A covenant to pay within six months after death is in law a covenant to pay on the last day of the six months.

Solicitors, *Devonshire, Monkland, & Co.*; *R. C. Adams Beck.*

Chan. Div. }
North, J. } June 5, 6.

In re WEEDING.
ARMSTRONG *v.* WILKIN. (*a.*)

Will—Construction—"Shares"—Debentures.

A testatrix bequeathed her shares in the Grand Trunk Railway to A. absolutely. At the date of her will and at her death she held debenture stock of the Grand Trunk Railway, but she never had any shares.

Held, that the debenture stock passed under the bequest.

Adjourned summons.

This summons raised the question whether certain debenture stock of the Grand Trunk Railway of Canada, entitled "Perpetual Five per Cent. Debenture Stock Great Western Borrowed Capital" passed under a bequest in the will of Jane Elizabeth Weeding, "To Annie Wilkin, the wife of Herbert Wilkin, my shares in the Great Western Trunk Railway of Canada absolutely," or whether the same stock passed under the bequest of the said testatrix's residuary personal estate, and whether any and what property passed under the bequest. The testatrix never had any shares in the Grand Trunk Railway, but held the above-mentioned debentures both at the date of her will and of her death.

Popham, for the trustees.

Jenkins, for Mrs. Wilkin.—As the testatrix held no shares, it is clear that she intended the debenture stock to pass. In *In re Bodman*, 40 W. R. 60, [1891] 3 Ch. 135, the testator held both shares and stock. *In re Nottage, ante*, p. 22, [1895] 2 Ch. 657, is very similar to the present case.

Bardswell, for the children of Mrs. Wilkin who

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

were interested in the residuary bequest.—I do not rely on the misdescription, but say a bequest of "shares" cannot pass stock. If the testatrix had had a couple of shares in the company in addition to the debentures, the case would not be arguable: *In re Gray*, 35 W. R. 795, 36 Ch. D. 205; *In re Lane*, 28 W. R. 764, 14 Ch. D. 856; *Dillon* v. *Atkins*, 17 L. R. Ir. 636.

Jenkins, in reply, cited *Gallini* v. *Noble*, 3 Mer. 691; *Selwood* v. *Mildmay*, 3 Ves. 306; and *In re Dobson*, 3 Ves. 308 N.

Cur. adv. vult.

June 6th.—NORTH, J., after dealing with the facts, said that *In re Bodman* was a case in which the testator held both shares and stock both at the date of the will and at the time of his death, and that case was therefore distinguishable. If in the present case the testatrix had held both descriptions of property, he might have had to hold that case applicable, although it might seem peculiar that the accident of the testatrix holding or not holding shares should affect the matter. In *In re Nottage* Rigby, L.J., said ([1895], 2 Ch. p. 664), "You have got a long way towards a specific gift if you come to the conclusion that he (the testator) is trying to describe something which he has." In the present case his lordship was satisfied that the testatrix intended to dispose of all her interest in the Grand Trunk Railway of Canada. The point was not of much importance, as Mrs. Wilkin would take the stock for life with remainder to her children even if it passed under the residuary gift, but she was entitled to have the point decided, and in his lordship's opinion she took absolutely.

Solicitors, *Woodcock, Ryland, & Parker*, for *Preston & Francis*, Bournemouth; *Snow, Snow, & Fox.*

Chan. Div. } March 7.
Stirling, J. }

In re SAMPSON.
SAMPSON *v.* SAMPSON. (*a.*)

Will—Construction—Gift of income of residue until alienation—Time of vesting.

A testator gave certain property to trustees upon trust after the death of his wife to pay to his son A. during his life so much of the income thereof "as would not, although the same were payable to him, be by his act or default or by operation or process of law so disposed of as to prevent his personal enjoyment thereof, and to apply so much of the income as would, if the same were payable to my said son, be disposed of as last aforesaid for the benefit of" B. and her children, at the discretion of the trustees and in manner thereinafter expressed.

After the death of the testator's widow the trustees' solicitors wrote to A. informing him that they had a sum of money in their hands, the income of the trust fund, payable to him. A. replied asking that the money should be paid to him, but was informed by the same solicitors that the trustees had since been served with a garnishee order nisi *attaching the same. B. thereupon served the trustees with notice not to part with the income; but the trustees, the garnishee order having been made absolute, paid it over to the husband's creditors.*

On a summons taken out by B. asking for payment to her of the income attached as aforesaid,

Held, that, unless A. had by his own act or default or by process or operation of law been deprived of the enjoyment of the income, he was entitled to receive the same the moment it came into the hands of the trustees; that such right could not be affected by subsequent events —e.g., the garnishee order; and that therefore B. never became entitled to the benefit of the discretionary trust.

This was a summons by the wife of William Henry Sampson against the executors of the surviving trustee of the will of the testator and against the said William Henry Sampson asking for payment to her on her separate receipt of a sum of £152 7s. 5d., admitted to have been received by the executors in respect of income of the real and personal estate of the testator, and claimed by plaintiff to have become payable to her in the events which happened.

The testator by his will devised and bequeathed his real and personal estate to trustees upon trust after the decease of his wife (who died before the date of this summons) to apply the income of the trust property accruing due in the lifetime of his son (the defendant William Henry Sampson) in accordance with the trusts thereinafter expressed concerning the same, those trusts being "upon trust to pay to my said son so much of the same . . . income as would not, although the same were payable to him, be by his act or default or by operation or process of law so disposed of as to prevent his personal enjoyment thereof, and to apply so much of the same . . . income as would, if the same were payable to my said son, be disposed of as last aforesaid, for the benefit of his wife and children and other issue for the time being in existence, or some one or more of those objects, if any, or if none for the benefit of the person or persons for the time being entitled, or presumptively or expectantly entitled, to the income of my trust property in such proportions as my trustees shall, in their discretion, think fit."

There was no issue of the marriage of the plaintiff and the defendant William Henry Sampson.

On the 16th of April, 1895, after the death of the testator's widow, the solicitors of the defendants the executors wrote to William Henry Sampson, enclosing an account and informing him that they had in their hands income to the amount of £132 7s. 5d. payable to him.

He assented by telegram to the account, and asked for the money to be paid to him.

In reply to this he received another letter from the same solicitors, dated the 17th of April, informing him that the trustees had been served with a garnishee order *nisi* (which had been obtained by the said solicitors acting for creditors of W. H. Sampson) attaching the said sum.

The garnishee order was made absolute on the 24th of April, the plaintiff having on the 18th of April served notice on the said solicitors not to pay the fund over to the husband's creditors.

The executors having paid the creditors, this summons was taken out.

Graham Hastings, Q.C., and *Marcy*, for the summons.—The garnishee order effected a forfeiture of the interest, which took effect from the time of the service thereof: *Hamer* v. *Giles*, 27 W. R. 834, 11 Ch. D. 942. The object of the testator was to prevent his son from anticipating his income. Mr. Sampson could not enforce payment of the income when the result would be that the enjoyment of the income would pass to his creditors: *Hood Barrs* v. *Cathcart*, 42 W. R. 628, [1894] 2 Q. B. 559; *Loftus* v. *Heriot*, [1895] 2 Q. B. 212, 43 W. R. Dig. 112. The limitation is valid. It is not a gift over after an absolute gift, but a gift for life or until alienation —*i.e.*, so long as Mr. Sampson could personally enjoy it. It never was a debt due to him, as if it were, he would have been able to demand payment from the trustees. As a matter of fact,

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

however, he could not demand payment, because he could not show the trustees that he would be able to enjoy it personally. Whilst the judgment subsists the future income is not liable to be attached: R. S. C., 1883, ord. 45, r. 5; *Roberts* v. *Death*, 30 W. R. 76, 8 Q. B. D. 319.

Buckley, *Q.C.*, and *E. Beaumont*, for the personal representatives of the last surviving trustee.—This is an attempt to restrain anticipation in the case of a man, and consequently is not valid. *Hood Barrs* v. *Cathcart* was the case of a married woman, and is not applicable to the present matter. The result of the letter of the 16th of April and the telegram from Mr. Sampson was to vest the £132 7s. 5d. in him, and he could have sued the trustees for the money. Consequently it was validly attached by the garnishee order. Subsequent instalments of income are not affected, and the gift over has not come into operation.

Marcy, in reply.—Although a man cannot be restrained from anticipation, the same result may be achieved in some other way: Davidson's Precedents, 2nd ed., vol. 3, p. 93. [STIRLING, J.—This is nothing but an attempt to give the son a personal right of enjoyment, notwithstanding alienation.] Certainly; but that is a lawful object. It is not a fraud on creditors, nor is it inconsistent with the law; for a gift may be valid although its object is to defeat creditors: *Twopenny* v. *Peyton*, 10 Sim. 487; *Godden* v. *Crowhurst*, *ib.* 642.

STIRLING, J.—[His lordship stated the facts as above set out, and, after expressing an opinion that it was to be regretted that the solicitors of the trustees should have also acted for the creditors of W. H. Sampson in the matter of the garnishee order, he continued:—] The trusts declared of the income of the testator's estate during the life of W. H. Sampson are to me novel in form, and apparently have not hitherto been the subject of judicial consideration. They are not altogether happily expressed, but the object of the testator appears to be that a vested right or interest should not arise in the income except as it accrued due—*i.e.*, such right or interest was not to arise as to any portion of the income until (at the earliest) such portion came to the hands of the trustees, and then only as to such portion. The testator directs this portion to be dealt with in one of two ways, according as the son has or has not done or suffered any act which would prevent his personal enjoyment of it. If he has not, this portion of the income is to be paid to him; if he has, then it is to be applied at the discretion of the trustees for the benefit of the wife and children of the son. There is therefore in effect a series of alternative limitations declared of the successive instalments of income which reach the hands of trustees. These limitations must all take effect during the lifetime of the son, and do not offend against the rule against perpetuities, neither do I see that they can be treated as objectionable on the ground of repugnancy or otherwise, and in my judgment they are valid in law.

It is next to be considered at what precise period of time one or other of these alternative limitations is to take effect. It is contended on behalf of the plaintiff that the son takes no vested right or interest in any portion of the income until it has actually reached his hands; and in support of this view the recent decisions of the Court of Appeal in *Hood Barrs* v. *Cathcart* and *Loftus* v. *Heriot* are relied on. It must be taken to be established (unless and until the House of Lords decides otherwise) that the restraint on anticipation in the case of a married woman is operative until the fund affected by the restraint has actually reached her hands.* This, however, is not a case of the rights of a married woman for whose benefit the restraint on anticipation was designed, nor is it in strictness one in which anticipation or alienation is restrained. The question rather is whether the son ought to be treated as having acquired any title to any portion of the income until it has actually reached his hands, or whether a right to income in the hands of the trustees vests in him at an earlier date. There is a class of cases which have not infrequently been considered by the courts, and appear to me to have some bearing on this point. I mean those in which there has accrued a gift over on the death of a legatee before actually receiving his legacy, and among them I may mention *Hutchin* v. *Mannington*, 1 Ves. 366; *Gaskell* v. *Harman*, 11 Ves. 489; *Law* v. *Thompson*, 4 Russ. 92; *Martin* v. *Martin*, 14 W. R. 986, L. R. 2 Eq. 404; *Minors* v. *Battison*, 25 W. R. 27, 1 App. Cas. 428; *Johnson* v. *Crook*, 28 W. R. 12, 12 Ch. D. 639; *Re Collison*, 28 W. R. 391, 12 Ch. D. 639; *Bubb* v. *Padwick*, 28 W. R. 382, 13 Ch. D. 517; *Re Chaston*, 29 W. R. 778 18 Ch. D. 218; *Re Wilkins*, 29 W. R. 911, 18 Ch. D. 634; *Wilks* v. *Bannister*, 33 W. R. 922, 30 Ch. D. 512. These cases are not entirely consistent among themselves, but this at least they establish—*i.e.*, that whether or not a testator can effectually cause a vested gift to be divested before it has actually come to the hands of the legatee, such an intention ought not to be attributed where the words are not clear, and in cases where the words are susceptible of such an interpretation the court has held that the period over which the operation of a divesting clause of this kind is to extend ought not to be held to continue beyond the time at which the legacy is *de jure* receivable. The courts always favour early vesting, regarding it as undesirable that rights and interests should depend on the degree of diligence with which trustees perform their duties.

The cases to which I have referred are not direct authorities, and the question must be determined on the consideration of the terms of this particular will. So regarding it, I think that the epoch at which the destination of any instalment of income is to be determined is the moment when that instalment either "accrues due," or is in the hands of the trustees ready for application in accordance with the trusts of the will. For the present case it is not necessary to determine which of these points of time is to be regarded. If at the instant any instalment of income is in the hands of the trustees the son has not by his own act or default, or by process or operation of law, been deprived of the enjoyment of the income, I think he is entitled to receive it. The trustees have not conferred on them by the will any discretion to retain it in their hands with a view to its application at a later period, and it seems to me that this right of the son to receive, cannot be affected by subsequent events.

This being so, it follows that William Henry Sampson's title to the sum mentioned in the summons accrued on the 16th of April, 1895 (previous to the service of the garnishee order), and that the plaintiff consequently never became entitled to the benefit of the discretionary trust. The summons must therefore be dismissed.

Solicitors, *Field*, *Roscoe*, *& Co.*, for *C. F. Dean*, Slough; *Bell*, *Brodrick*, *& Gray*, for *Rodgers*, *Thomas*, *& Sandford*, Sheffield.

* The House of Lords in *Hood Barrs* v. *Heriot* (*No.* 1), *ante*, p. 481, [1896] A. C. 174, has decided otherwise; for it has in that case been held that the restraint on anticipation ceases the moment the fund has become payable, even although it has not actually been paid, to the married woman.

Chan. Div.
Kekewich, J. } March 25.

HORNSEY DISTRICT COUNCIL *v.* SMITH. (*a*.)

Local government—Street—Paving expenses—National schools—Charge on schools—"Owners"—Trustees—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257—*School Sites Act*, 1841 (4 & 5 *Vict. c.* 38), *s.* 6.

The trustees of premises conveyed to them for the purposes of a school under section 6 *of the School Sites Act*, 1841, *are "owners" within section* 4 *of the Public Health Act, and the local authority is entitled to a charge on the premises for the proportionate amount of the expenses of paving the street fronting the premises.*

Adjourned summons.

This was an application by the plaintiffs to obtain a declaration that the proportionate part of the expenses incurred by the plaintiffs in paving the street fronting the defendant's school was a charge thereon in priority to any mortgages thereon, and for an order for sale.

The applicants had, in accordance with their powers under section 150 of the Public Health Act, 1875, paved the street in which the Holy Innocents' National Schools, of which the defendants were the trustees, was situate, and had apportioned to be paid by the trustees, as owners of the schools, the sum of £111 15s. 11d.

A notice was served by the plaintiffs on the trustees demanding payment, but they did not pay the same.

The school premises were vested in the trustees under the provisions of the School Sites Acts, 1841 and 1844, for the purposes of the said Acts.

E. Beaumont and *Frederick Low*, for the District Council.—The trustees are "owners" within section 4 of the Public Health Act, 1875. National schools are not included in the exceptions in section 151. Under section 257 the plaintiffs are entitled to a charge on the schools: *Corporation of Birmingham* v. *Baker*, 17 Ch. D. 782, 30 W. R. Dig. 121; *Bowditch* v. *Wakefield Local Board*, L. R. 6 Q. B. 567; *Wright* v. *Ingle*, 34 W. R. 220, 16 Q. B. D. 379; *Re Christchurch Inclosure Act, Meyrick* v. *Attorney-General*, 42 W. R. 614, [1894] 3 Ch. 209; *Guardians of Tendring Union* v. *Dowton*, 40 W. R. 145, [1891] 3 Ch. 265.

Dibdin, for the trustees.—There can be no charge, as there is no owner. Even if there is a charge, there can be no order for sale: *Great Eastern Railway Co.* v. *Hackney District Board of Works*, 31 W. R. 769, 8 App. Cas. 687.

E. Beaumont replied.

KEKEWICH, J.—The first question arises under section 4 of the Public Health Act, 1875, which defines "owner" as the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account, or as an agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent. It is said that that definition does not apply in a case in which no letting at a rack-rent is possible. Here the premises are conveyed for the purposes of a school only, under section 6 of the School Sites Act, 1841, and for no other purpose. The dedication to that purpose can only be set aside by another Act of Parliament, and therefore the premises can never be let at a rack-rent; and it is argued, that consequently the definition in the Public Health Act does not apply. But it seems to me, on the authority of both *Bowditch* v. *Wakefield Local Board of Health* and *Wright* v. *Ingle*, I must regard the respondents as "owners"; and if they are owners, then, according to the terms of section 257 of the Public Health Act, 1875, a charge may be made on the schools.

It was also suggested for the applicants that as there is an express exception of churches and burial grounds by section 151, there cannot be another exception of a similar character. I do not assent to this proposition. This is property which must be held on the trusts declared and for nothing else, and I see very great difficulty in making the charge effective by means of a sale, because the applicants cannot make a title, they cannot sell the property to anybody except for the purposes of a school to which it has been dedicated. At the same time I do not know why the statute should not create a charge which cannot be enforced by sale. The statute says it is to be a charge, and the applicants may have some remedy, though what the nature of the remedy is I cannot foresee. I declare that the sum claimed, with interest at the rate of 4 per cent., is a charge on the land and buildings, and the applicants may take liberty to apply to enforce the charge in chambers, and they may add their costs to their security.

Solicitors, *L. J. Tatham*; *Lee, Bolton, & Lee.*

(*a*.) Reported by F. T. DUKA, Esq., Barrister-at-Law.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.) } April 27; June 2.

REG. *v.* VESTRY OF ST. MATTHEW'S, BETHNAL-GREEN. (*a*.)

Metropolis — Sewer — Drain — Liability to repair — Approval of Metropolitan Board of Works of the construction of new sewer—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 69, 250.

A sewer which is a "sewer" within the meaning of section 250 *of the Metropolis Management Act*, 1855, *is repairable by the vestry of the parish or the board of works of the district in which it is situate, notwithstanding it was not made with the previous approval of the Metropolitan Board of Works as required by section* 69.

Application to make absolute a rule *nisi* for a *mandamus* commanding the Vestry of St. Matthew's, Bethnal-green, to repair a certain drain or sewer.

Section 250 of the Metropolis Management Act, 1855, defines "drain" and "sewer." It enacts that "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer in which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses, by a combined operation, under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain,' interpreted as aforesaid, applies."

Section 68 vests all sewers made or to be made within any of the parishes and districts scheduled in

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the Act, except sewers and works vested or to be vested in the Metropolitan Board of Works, in the vestry of such parish or the board of works of such district.

Section 69 enacts as follows: "The vestry of every parish mentioned in Schedule (A) to this Act, and the board of works for every district mentioned in Schedule (B) to this Act, shall (subject to the powers by this Act vested in the Metropolitan Board of Works) from time to time repair and maintain the sewers under this Act vested in them . . . ; provided always, that no new sewer shall be made without the previous approval of the Metropolitan Board of Works. . . . "

The drain or sewer in question was constructed in 1866, and received the drainage of several houses. It did not appear that the previous approval of the Metropolitan Board of Works was obtained for its construction. The houses drained by it were prior to 1866 undrained. In that year an epidemic of cholera took place, which carried off all the inhabitants of the houses but one. The landlord then constructed the system of drainage of which the drain or sewer in question formed a part. The property subsequently came into the possession of the School Board of London.

Bevan (*Jelf*, *Q.C.*, with him), for the Vestry, showed cause.

He referred to *Bateman* v. *Poplar Board of Works*, 33 Ch. D. 360, 35 W. R. Dig. 131.

R. C. Glen, in support of the rule, relied on *Kershaw* v. *Taylor*, *ante*, p. 28, [1895] 2 Q. B. 208, 471.

Cur. adv. vult.

The judgment of the court was delivered by

WRIGHT, J.—This is an application by the School Board for London against the Vestry of a metropolitan parish for a *mandamus* to compel the Vestry to repair a drain or sewer which was made in 1866, and receives the drainage and sewage of several houses within the meaning of the Metropolis Management Acts and repairable by the Vestry, as was held in *Kershaw* v. *Taylor*. The Vestry resist the application, mainly on the ground—which they contend was overlooked in *Kershaw* v. *Taylor*—that previous approval of the construction of the sewer does not appear to have been obtained from the Metropolitan Board of Works as was required by section 69 of the Metropolis Management Act, 1855, and other sections of that and the amending Acts. After the lapse of thirty years such consent ought, perhaps, to be presumed in the absence of clear disproof, but, even assuming it to be clearly disproved, we think that the objection must fail. The mere fact that the requisite consent was not obtained for the making of the sewer does not prevent it from being a sewer when made. Further, we think that from the circumstances stated in the affidavits and from the nature of the case it ought to be inferred that the Vestry knew and approved of the making of the sewer, and of its connection with their principal sewer in the adjoining street, and cannot now raise the objection.

The rule for a *mandamus* will be made absolute, with costs.

Rule made absolute.

Solicitor for the Vestry, *Robert Voss.*

Solicitor for the London School Board, *C. E. Mortimer.*

Q. B. Div.
(Wright and Collins, JJ.) May 13.

DRURY v. ARMY AND NAVY CO-OPERATIVE SOCIETY (LIMITED). (*a.*)

Metropolis — Building — Party wall — Wall extending above adjoining building — Wall dividing a building of the warehouse class extending to more than 250,000 cubic feet — London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 59 (1), 75.

By the London Building Act, 1894, *s.* 75, *it is enacted that buildings of the warehouse class above a certain size shall be divided by party walls.*

Held, that it was not intended that a wall which was a party wall for the purposes of the section up to a certain height should necessarily continue to be a party wall above that height, so as to be subject as to the upper portion, to the provisions of the Act with regard to party walls.

Case stated by a metropolitan police magistrate.

An information was filed against the respondents for erecting a building without regard to the provisions of sections 54 (3) and 77 (3) of the London Building Act, 1894.

Section 75 provides (*inter alia*) as follows: "Except as in this section provided, no building of the warehouse class shall extend to more than 250,000 cubic feet unless divided by party walls in such manner that no division thereof extend to more than 250,000 cubic feet."

Section 54 (3) provides that "an opening shall not be made in any party wall except in accordance with the provisions of this Act in relation thereto."

Section 77 (3) provides that an opening shall not be made in any party wall or in two external walls dividing buildings which, if taken together, would extend to more than 250,000 cubic feet except under certain conditions mentioned in the Act as to the size of the opening and the contrivances for closing it.

The building complained of was of the warehouse class, and extended to 657,408 cubic feet. It was divided by two party walls in accordance with the provisions of section 75. One portion of the building, separated by a party wall from the remaining portion, extended only to one story, while the rest of the building rose above it and extended to five stories. The wall separating the higher from the lower portion of the building, as to that part of it which extended to the first story, was admitted to be a party wall; but the respondents, maintaining that above the first story the wall ceased to be a party wall, and was therefore, as to that part of it, not subject to the provisions of the Act, made openings in it which did not comply with the requirements of the Act.

The magistrate dismissed the summons.

Section 59 (1) of the Act is as follows: "Every party wall shall be carried up of a thickness in a building of the warehouse class equal to a thickness of such wall in the topmost story, and in any other building of 8½in. above the roof, flat, or gutter of the highest building adjoining thereto to such a height as will give a distance (in a building of the warehouse class exceeding 30ft. in height) of at least 3ft., and (in any other building) of 15in., measured at right angles to the slope of the roof or 15in. above the highest part of any flat or gutter, as the case may be."

Horace Avory, for the appellant.—Section 59 (1) meant that a party wall must extend three feet above the highest adjoining building. It was therefore impossible for a wall to be a party wall as to its lower

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

part, and not a party wall as to the part above. These provisions as to party walls were made with a view to diminish the danger from fire. There was a skylight in the lower building, and the danger of fire spreading from the lower building through openings in the upper part of the dividing wall was just what the Act was intended to obviate: *Weston* v. *Arnold*, 22 W. R. 284, L. R. 8 Ch. App. 1084, and *Knight* v. *Pursell*, 27 W. R. 817, 11 Ch. D. 412.

McCall, Q.C. (*R. C. Glen* with him), for the respondents.

WRIGHT, J.—The magistrate was right in refusing to convict. There were substantially the same enactments in the old Metropolitan Buildings Acts, and it was not contended that the decisions under those Acts were not right. This was a building extending to more than 250,000 cubic feet.

By virtue of section 75 it must be divided by what are called party walls. But it is obvious that party wall is not there used in a technical sense. The question is whether the enactment has been obeyed. It has been obeyed by the erection of dividing walls. But a certain part of the building is carried no higher than the first floor. Up to that point the walls are properly constructed in accordance with the Act. But above that point the wall has been pierced with windows.

Speaking for myself, I should say that section 59 does not bear the construction contended for. I do not think it was intended that a party wall should extend above the highest adjoining building. Where a man builds an external wall, and that wall adjoins his neighbour's house, which is lower than his own, so as to become a party wall, it ceases to be a party wall above the lower house.

But here the point arises under section 75, and the real ground of my decision is that section 75 has not the uncertain effect of making a wall a party wall above the point where it ceases to divide two buildings.

COLLINS, J.—But for section 75 the wall in question would not be a party wall. Mr. Avory says that the effect of that section is to constitute the wall a party wall. Now, I think if we are considering what is to be treated as a party wall, we must be guided by the definition of a party wall given in section 5. The true definition, according to that section, is a wall which separates the buildings of adjoining owners.

Mr. Avory relies on section 59, and says that that makes a party wall continue to be a party wall up to its full height. The decision in *Weston* v. *Arnold* is a decision that, apart from legislative enactment, there is no presumption that a wall which is a party wall is a party wall as to its whole height. But Mr. Avory returns to section 59, and says that that does carry up the party wall as such to its full height. That is not the case. All that the section means is that a party wall shall be carried up to a certain height. So far as a wall is a party wall it must comply with the statute, but so far as it is not, it is not fettered by the statute. You must first find out if the wall is a party wall. We are not bound by reason of section 59 to say that this wall or that is a party wall, when in fact it is an external wall.

Appeal dismissed.

Solicitor for the appellant, *Blaxland.*

Solicitors for the respondents, *Tyrrell, Lewis, & Broadbent.*

House of Lords.

From C. A. (England). } May 1.

GRAINGER *v.* GOUGH. (*a*).

Inland revenue—Income tax—Foreign trade—Agents in United Kingdom—Agent "having the receipt of profits or gains"—Assessment of agent in name of principal resident abroad—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 41 *and* 44—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *schedule D.*

A foreign wine merchant carrying on business at Rheims employed agents in this country to canvass for orders to be forwarded to him for execution if he thought fit. Upon acceptance of the order the principal invoiced the goods in his name to the customer and delivered them on board at Rheims at the expense and risk of the customer. The amounts due were usually forwarded direct by the customer to the principal, but in some cases received by the agents.

Held (Lord Morris *dissenting*), *that the foreign principal did not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts*, 1842 *and* 1853.

Semble, *that in section* 41 *of the Income Tax Act*, 1842, *the words "having the receipt of any profits or gains" should be read so as to apply to the words "factor" and "agent" as well as to the word "receiver."*

Decision of the Court of Appeal, 43 *W. R.* 184, [1895] 1 *Q. B.* 71, *reversed.*

This was an appeal by Messrs. Grainger from an order of the Court of Appeal (Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.), reported 43 W. R. 184, [1895] 1 Q. B. 71, affirming an order of the Divisional Court (Mathew and Cave, JJ.), upon a special case stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The facts are stated in the report below, and also sufficiently appear in the judgments.

Asquith, Q.C., and *Pyke, Q.C.* (*R. M. Bray* with them), for the appellants.—M. Roederer does not trade "within" the United Kingdom, though he trades "with" the United Kingdom. There is no contract made in England for delivery of this wine. It is delivered in France, and usually payment is made in France: *Sulley* v. *Attorney-General*, 8 W. R. 71, 5 H. & N. 711; *Colquhoun* v. *Brooks*, 38 W. R. 288, 14 App. Cas. 493. The appellants are not agents for the purpose of income tax assessment under section 41 of the Act of 1842. They could not know what the profits were, and have not the means of making a return. See sections 40 to 44 inclusive and section 51 of the Act of 1842, and the earlier Acts, 39 Geo. 3, c. 13; 43 Geo. 3, c. 122; and 46 Geo. 3, c. 65.

Sir R. B. Finlay, S.G., and *Danckwerts*, for the respondent (the Surveyor of Taxes).—The appellants carry on business in this country: *Brampton* v. *Beddoes*, 11 W. R. 268, 13 C. B. N. S. 538; *Tischler* v. *Apthorpe*, 33 W. R. 548, 52 L. T. N. S. 814; *Pommery* v. *Apthorpe*, 35 W. R. 307, 56 L. J. Q. B. 155; *Werle* v. *Colquhoun*, 36 W. R. 613, 20 Q. B. D. 753; *Erichsen* v. *Last*, 30 W. R. 301, 8 Q. B. D. 414. The appellants are agents, and assessable: Dowell's Income Tax Laws, p. 129; *Gresham Life Assurance Society* v. *Styles*, 41 W. R. 270, [1892] A. C. 309.

(*a*.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

Asquith, Q.C., replied.

The House took time for consideration.

Lord HERSCHELL.—The appellants are wine merchants, carrying on business in the City of London. They act as agents in this country, for certain purposes which will require careful consideration, for Louis Roederer, a wine merchant, whose chief place of business is at Rheims, in the Republic of France. Two questions arise for determination—first, whether Roederer exercises any trade, employment, or vocation within the United Kingdom; and next, whether, if so, he is liable to be assessed to the income tax in the name of the appellants as being his agents within the meaning of section 41 of 5 & 6 Vict. c. 35.

The first step to be taken is to ascertain with accuracy what are the facts in the present case. I say this because one of the learned judges in the Court of Appeal expressly relied on the fact that contracts were habitually made in this country by Roederer, and another member of the court seems to have regarded the finding in the case that "the appellants are agents in Great Britain for the sale of L. Roederer's wine" as involving a finding that sales by Roederer took place in this country. Standing by itself, the finding would probably have this meaning. But it does not stand alone. The whole of the facts found must be considered in conjunction with one another, as well those in the amended as in the original case. The nature of the appellants' agency is plain enough. They canvass for orders for Roederer's wine, and receive a commission on all orders from Great Britain, if executed. The functions of the sub-agents whom they appoint are the same. When orders are received they "are transmitted by the appellants to Louis Roederer at Rheims, and he exercises his discretion as to executing the said orders." This is the statement in the original case. In the amendment it is stated that "orders are sought by them as agents on behalf of Louis Roederer as their principal, that such orders are given by customers to Messrs. Grainger & Son and received by them, but the appellants allege that the said Louis Roederer, in his arrangement with them as his agents, has reserved a right to reject any particular order." The commissioners add that, in their opinion, this right is in fact intended to protect Roederer in cases where there is doubt as to the pecuniary position of the customer giving the order, and that no special notice is given to the customer of the right so reserved. The commissioners appended to the amended case certain documents produced by the appellants as specimens indicative of the manner and style of business transacted by them on behalf of Louis Roederer. One of them is an order addressed to the appellants. It commences, "Please ship per G. & J. Porter," and then specifies certain quantities and descriptions of Roederer's wine. The appellants in reply to this write: "In compliance with your obliging order of yesterday, we shall have much pleasure in requesting L. Roederer to ship for your account, through Messrs. G. & J. Porter, of Calais," the wine specified. Taking the findings together, I think it clear that no contracts to sell wine were ever made by the appellants on behalf of Roederer. All that they did was to transmit to him the orders received, and until he had agreed to comply or complied with them there was no contract. He was under no obligation to the persons giving the orders to the appellants to execute any one of them. I think the statement in the original case was, having regard to the documents, a perfectly correct one, and that it is not accurate to speak of Roederer's having reserved to himself a right to reject any particular order. An order given to a merchant for the supply of goods does not of itself create any obligation. Until something is done by the person receiving the order which amounts to an acceptance there is no contract. It is clear that the appellants in receiving an order did not accept or purport to accept it on Roederer's behalf so as to constitute a contract, and that they had no authority so to do. The learned Solicitor-General in his argument for the Crown did not contend that any contracts were made in this country by Roederer, either personally or through his agents; indeed, he admitted the contrary. Mr. Danckwerts did argue that there were such contracts. His argument was an ingenious one. He called attention to certain price lists which were distributed by the appellants amongst persons likely to give orders, and contended that as soon as an order was given to them by a person receiving one of those lists a contract to supply the specified quantity at the price named in the list was complete, subject only to a right on the part of Roederer to disavow it. I think it impossible to accede to this contention. In my opinion this would not be understood by anyone in the trade to be the effect of giving an order for goods specified in such a price list. The transmission of such a price list does not amount to an offer to supply an unlimited quantity of the wine described, at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited. I entertain, I confess, a very clear opinion that the Solicitor-General was quite right in arguing the case on the assumption that no sales were made in this country. Taken in connection with the facts stated, I think the finding that the appellants "are agents in Great Britain for the sale" of Roederer's wine means no more than this—that they are engaged by him to canvass for custom, to seek to obtain from persons in this country orders for his wine.

The wine is sold to the customers as it lies in Rheims cellar or *pris en cave*. The customer pays the cost of packing and carriage from the cellars, and takes all risk. The delivery to the purchaser, therefore, takes place in France. The wine is invoiced to the purchaser in Roederer's name as vendor, the invoice being sent to the appellants, and by them transmitted to the purchaser.

The amounts due in respect of the wines sold are sometimes collected by the appellants on behalf of Roederer, and sometimes remitted direct to him. When the payments are made to the appellants in cash, or in cheques on London banks, cashed by them, the moneys so received are credited to Roederer against the amount of the commission due to them and charges incurred by them on his behalf.

Taking it to be the fact, as in my opinion it undoubtedly is, that contracts for the sale of wine are not made by Roederer in this country, and that the delivery by him to purchasers always takes place in France, it appears to me that the case differs widely from any that have hitherto been decided. In all previous cases contracts have been habitually made in this country. Indeed, this seems to have been regarded as the principal test whether trade was being carried on in this country. Thus in *Erichsen* v. *Last* the present Master of the Rolls said: "The only thing which we have to decide is whether, upon the facts of this case, this company carry on a profit-earning trade in this country. I should say that whenever profitable contracts are habitually made in England by or for foreigners with persons

in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad."

All that the appellants have done in this country on behalf of Roederer has been to canvass for orders, to transmit to him those orders when obtained, and in some cases to receive payment on his behalf. Beyond this he has done nothing in this country, either personally or by agents. Does he, then, exercise his trade within the United Kingdom? It has been sometimes said that it is a question of fact whether a person so exercises his trade. In a sense this is true; but in order to determine the question in any particular case it is essential to form an idea of the elements which constitute the exercise of a trade within the meaning of the Act of Parliament. In the first place, I think there is a broad distinction between trading with a country and carrying on a trade within a country. Many merchants and manufacturers export their goods to all parts of the world, yet I do not suppose anyone would dream of saying that they exercise or carry on their trade in every country in which their goods find customers. When it is said, then, that in the present case England is the basis of the business, that the wine was to be consumed here, and that the business done would remain undone but for the existence of the customers in England, I cannot accept this as proof that Roederer carries on his trade in this country. It would equally prove that every merchant carries on business in every country to which his goods are exported. Moreover, the proposition would be just as true if English customers gave their orders personally at Rheims. Something more must be necessary in order to constitute the exercise of a trade within this country. How does a wine merchant exercise his trade? I take it, by making or buying wine and selling it again with a view to profit. If all that a merchant does in any particular country is to solicit orders, I do not think he can reasonably be said to exercise or carry on his trade in that country. What is done there is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods. Indeed, I do not think it was contended that the solicitation of custom in this country by a foreign merchant would in all cases amount to an exercise by him of his trade "within" this country. The learned counsel shrank from maintaining that if, for example, he sought custom only by sending circulars to persons residing here, or advertised in British newspapers, he could on that account be said, within the meaning of the statute, to be exercising his trade in this country. They relied on the circumstance that he had appointed agents in this country who regularly solicited and received orders and transmitted them to Roederer. If in each case the other circumstances are the same, the contract of sale being made abroad and the delivery taking place there, I find myself quite unable to see how the mode in which orders are solicited and obtained, whether by an agent or by circulars or advertisements, can make the difference and cause the trade in the one case to be exercised, and in the other not to be exercised, within this country. If the mere employment by a foreign merchant of an agent to solicit and to transmit orders does not amount to an exercise of his trade in this country, I do not think that it becomes an exercise of his trade here if, in addition, the agent in some cases receives the price of the goods sold for transmission to his principal; still less does it appear to me material that in the London Post Office Directory there was inserted by the authority and with the knowledge of Grainger & Son, "Roederer, Louis, Rheims, champagne merchants (Grainger & Son, agents, 21, Mincing-lane)."

For these reasons I have come to the conclusion that the taxing section does not apply in the present case. This view renders it unnecessary to decide the question whether the appellants are agents within the meaning of section 41 of 5 & 6 Vict. But I must say that, as at present advised, I cannot adopt the view that the words "having the receipt of any profits or gains" control the word "receiver" only, and not the words "factor" and "agent." The word "agent" obviously cannot extend to every agent for whatever purpose he may be employed, as, for example, to an advertising agent. This was felt by Cave, J., who said that it meant an agent "for the purpose of exercising the trade in question, if it was a trade." But if the word "agent" must be in some way controlled, why introduce words for the purpose, instead of treating it as controlled by the words which follow, and which may not only be made to control it without doing any violence to the language used, but seem to me to be naturally applicable to it, especially on a consideration of all the terms of the section? At the same time, I am not disposed to put so narrow a construction on the section as was contended for by the appellants. In the case of a trade exercised in this country, I think any agent who received for the foreigner exercising such trade moneys which included trade profit would be within the provisions of section 41.

It was said that if Mr. Roederer was not liable to income tax in this case, it would give foreigners an unfair advantage over British traders. This does not appear to me to be the case. I do not think such considerations can legitimately influence our decision; but if they are to be introduced, I think it would be much more prejudicial to British traders if we were to lay down that, though the sale and delivery of their goods takes place in this country only, they carry on business in every country from which they obtain orders for their goods through solicitation by an agent, or, indeed, in any other way; for I do not think it can logically or reasonably make any difference in principle what the method of soliciting custom may be.

I think the appeal should be allowed, with costs both here and in the court below.

Lord WATSON.—This appeal raises two questions upon the construction of the Income Tax Acts. Did Louis Roederer, who is a champagne merchant residing and carrying on business in France, during the years 1884, 1885, 1886, exercise his trade in this country, within the meaning of Schedule D of the Act of 1853? If so, did the appellants, Grainger & Son, act during that period as his agents, in such sense as to make them answerable, under section 41 of the Act of 1842, for doing everything necessary in order to the assessment and payment of duty upon the profits or gains arising from the exercise of his trade within the United Kingdom? The facts upon which the answers to be given to these questions depend have been stated by the Commissioners of Taxes for the City of London, in a special case which was amended by them upon a remit from the Queen's Bench Division.

Louis Roederer supplies large quantities of champagne from his cellars at Rheims to consumers in the United Kingdom. He has no place of business in this country, and keeps no stock of wine here, either by himself or by an agent. During the three years for which income tax is claimed his name was inserted in the London Post Office Directory, under the head "Trades," in these terms: "Roederer, Louis, Rheims, champagne merchant (Grainger &

Son, agents), 21, Mincing-lane, E.C.," that being the address of the appellants, who carried on business as wine merchants on their own account, and also acted, during the period in question, as his agents. Beyond receiving payment in cash or bills on account of Louis Roederer, as will be presently noticed, the appellants' agency was limited to soliciting orders for champagne, either by themselves or through sub-agents who were appointed by them. These orders, when received, were not accepted by the appellants, who had no authority to that effect, but were transmitted by them to Louis Roederer at Rheims, who invariably reserved the right to reject any order forwarded to him. The necessary result of that course of dealing was that until Roederer had accepted the order there was no contract which could bind him or afford a right of action against him to the person who gave it.

When an order was accepted, the wines were packed in Rheims at the expense of the customer, to whom they were then forwarded direct, at his cost and risk. An invoice was made out at Rheims, charging the price of the wine, according to current lists furnished to the customer by the appellants, together with expenses of packing, &c., which was sent to the appellants for transmission to the customer. Each invoice contained a slip, requesting those customers who preferred paying by bill or cheque on Paris to have these drafts made out to their own order, and then to indorse them to Louis Roederer, so as to enable him to identify each remittance with the customer who sent it.

The appellants were remunerated for these services by a commission upon the orders which they procured. In some cases customers of Louis Roederer made payment to them in cash; but the money thus received by them rarely exceeded the sum due to them as commission, and then only to a small amount. The appellants also received English and foreign drafts and cheques in favour of Louis Roederer, for which they gave acknowledgments to the customer. These drafts and cheques were forwarded by them to Louis Roederer, who then sent a receipt direct to the customer.

These facts appear to me to raise a question in regard to the nature of the trading connection between Louis Roederer and his customers in the United Kingdom which is not covered by any previous decision. In *Tischler* v. *Apthorpe* and in *Pommery* v. *Apthorpe* the foreign wine merchant traded in this country through an English agent, who sold his wine in England and received the price, making delivery to the buyer either from the stock which had been sent to him by his principal or by directing a consignment to be sent from Rheims. In *Werle* v. *Colquhoun* the decision of the Court of Appeal was based upon the express ground that the foreign wine merchant exercised his trade in England by making contracts there for the sale of his champagne through his English agent. *Erichsen* v. *Last*, although it did not relate to the wine trade, was a decision of the same class. The telegraph company whose profits were assessed to income tax had its principal seat of business in Copenhagen; but it had offices and agents in various parts of the United Kingdom, where its agents made contracts for the transmission of messages through its wires, and received payment for sending them. I agree with the opinion expressed in that case by the present Master of the Rolls, that whenever a foreigner, either by himself or through a representative in this country, "habitually does, and contracts to do, a thing capable of producing profit and for the purpose of producing profit, he carries on a trade or business"; and that the profits or gains arising from these transactions in the United Kingdom are liable to income tax.

There is, in my opinion, a very broad distinction between the case of a foreigner making contracts in England with his English customers for the sale of his wines, either personally or through a representative, and the case of his making similar contracts with these customers in his own country. In the present instance the orders forwarded to Louis Roederer were, in law, nothing more than offers to purchase until the contract between him and each offerer was completed by his acceptance at Rheims; and he fulfilled his part of the contract by making delivery of the wine sold to the purchaser, and at the purchaser's risk, in Rheims. The trade of Louis Roederer consists in the sales of his champagne, and it is from these sales that his profits or gains are derived. Accordingly, the first and main question to be considered in this appeal is, whether that which was actually done within the United Kingdom in relation to and for the promotion of his business by Louis Roederer, or by the appellants on his behalf, amounts to an exercise of his trade within the meaning of schedule D.

There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade here within the meaning of schedule D. In illustration of that view I may refer to *Sulley* v. *Attorney-General*, which was decided in the Exchequer Chamber by no less than six very eminent judges. An American firm carried on a business in New York, which consisted in the re-sale there of goods purchased on their account in England. One of the partners, who resided in Nottingham, bought the goods required by the firm, and paid for them with money remitted to him from New York. It was held, in these circumstances, that the firm did not exercise its trade in the United Kingdom in such sense as to bring its profits within the scope of the Income Tax Acts. One reason assigned for the decision was that the firm's transactions here did not involve any profits or gains, which were wholly dependent upon the re-sales effected by the firm on the other side of the Atlantic. The learned judges recognized the principle that purchasing stock in this country with the view of trading in it elsewhere does not of itself constitute an exercise of the trade in the United Kingdom, when that department of the business from which profits or gains are directly realized is carried on in another country.

If any substantial distinction could be drawn between canvassing through agents in this country for orders which are sent to Rheims for acceptance or rejection, and systematic purchase of goods in the English market for the purpose of trading with them in America, I am disposed to think that the distinction would not be unfavourable to the contention of the present appellants. There is no substantial difference between obtaining orders for wines according to the method pursued by Louis Roederer, and attracting customers to Rheims by advertising and sending circulars to the trade in England. Such things are done by British merchants in foreign countries, and are also done by foreign merchants in Britain, in the interest and for the promotion of their home business. If their business consists, as that of Louis Roederer does, in the sale of wines or other merchandise, neither the British nor the foreign merchant can, in my opinion, be said to exercise his trade beyond the limits of his own country, so long as all contracts for the sale of their goods, and all deliveries to the purchaser, are made within these limits.

The fact that some payments were made in cash to the appellants, and that they also received and forwarded drafts indorsed to Louis Roederer by buyers of his champagne, although it might have been of importance if he had exercised his trade in this country, does not appear to me to have a material bearing upon the question already discussed. When a trade is carried on in a foreign country, and British customers not only purchase but take delivery there, I do not think that the employment of an English agent to collect and remit the debts due to him by these purchasers can be regarded as an exercise of his trade in this country by the foreign merchant.

I am therefore of opinion that your lordships ought to reverse the judgments of the Appeal Court and of the Queen's Bench Division, and to find and declare that Louis Roederer did not, in the years 1884, 1885, and 1886 exercise his trade in the United Kingdom. In that view it becomes unnecessary to consider the question whether the appellants, as his agents, are responsible, in terms of section 41 of the Act of 1842. But, having heard a full argument upon the point, I desire to say that I am not prepared to hold with the learned judges in the courts below, that the words "having the receipt of any profits or gains," as they occur in that clause, refer only to a "receiver." The context of the Act appears to me to indicate that they ought to be read as applicable to each and all of the persons enumerated.

Lord MACNAGHTEN.—I have had an opportunity of considering the judgments which have already been delivered by my noble and learned friends, and I have nothing to add except that I concur in the motion proposed, and for the reasons which have been stated.

Lord MORRIS.—I am of opinion that the judgment of the Court of Appeal, affirming the judgment of the Queen's Bench Division, should be affirmed. It is unnecessary for me to repeat all the facts of the case. The first and main question is, Did Louis Roederer exercise a trade in England? There can be no definition of the words "exercising a trade." It is only another mode of expressing "carrying on a business"; but it certainly carries with it the meaning that the business or trade must be habitually or systematically exercised, and that it cannot apply to isolated transactions. There is no special legal meaning to the words "exercising a trade," and it must be considered with regard to what would be its ordinary or popular meaning, and that must in each case depend on the facts of that particular case; and we are not to canvass what might be a logical outcome from any decision when it is the facts of the particular case that are solely decided on. I have heard no suggestion of any plainer or more intelligible meaning for the words "exercise his trade" than the words themselves convey.

Now, the leading facts of the case are: Roederer is an extensive wine maker at Rheims, in France. He ships, and for years has shipped, large quantities of champagne to England. The appellants are his agents in England. The offers or proposals for the purchase of Roederer's wines are sought for and received by the appellants, from customers, as such agents. As between Roederer and the appellants, he reserves the right to reject any particular order—a right stated in the case as intended to protect Roederer in cases of doubt of the solvency of the customer. No special notice is given to the customer of such right being reserved. The invoices of the wine, when shipped, are sent by Roederer to the appellants, who forward them to the customers. Direct payments by draft or order are made to Roederer more frequently than they are made to the appellants, and the receipts are sent by Roederer direct to the customers. Exhibits 1, 2, and 5 show the mode of dealing. Exhibit 5 gives the initiation of the transaction. It is addressed by the appellants to the proposed customer, and states they are instructed by their principal, Roederer, to inform him, &c. It then goes on to say: "Mr. L. Roederer will be prepared to ship champagne," and solicits orders for the wines now offered by Roederer at the prices referred to in an accompanying list. Roederer's stamp is affixed at the foot. Exhibit No. 1 shows an order addressed to the appellants, and requesting shipment; while exhibit No. 2 gives the reply of the appellants thus: "In compliance with your obliging order of yesterday, we shall have much pleasure in requesting Mr. L. Roederer to ship for your account," &c. These exhibits thus evidence an offer by the appellants, as the agent of Roederer, of wines at fixed prices, an order from the customer for a certain quantity, and an acceptance by the appellants. There is thus a completed contract between the customer and Roederer through his agents, the appellants, controlled perhaps by the limit of authority given by Roederer to the appellants, which limit is unknown to the customer. The question in this case is not whether the customer could recover from Roederer on any breach of the contract by reason of the limit of authority; but whether, as a matter of fact, Roederer is exercising his trade—in other words, carrying on business—in England. I am very clearly of opinion on the facts that he is exercising his trade in England, and I consider the insertion in the directory is a most material and important fact; for the appellants, with whom we are dealing, authorize the statement in the Post Office Directory, under the head of "Trades, Wine Merchants," as follows: "Roederer, Louis, Rheims, champagne merchant (Grainger & Son, agents), 21, Mincing-lane, E.C."—an averment by the appellants that Roederer carries on the business of a wine merchant at 21, Mincing-lane, and that they are his agents there. On the facts stated in the special case I entertain no doubt, as the Queen's Bench Division and the Court of Appeal entertained no doubt, that Louis Roederer exercised his trade of a wine merchant within the United Kingdom, to wit in London.

On the other question, whether the appellants were agents within the terms of section 41 of 5 & 6 Vict. c. 35, I am not prepared to hold that the words "having the receipt of any profits or gains" are applicable only to their immediate antecedent word "receiver," and are not applicable to the word "agent." I consider they are applicable to and control the word "agent" as well as the word "receiver," and there is no reason why an agent should be chargeable who was not in receipt of profits or gains; but in the present case the appellants were in fact, as agents of their principal Roederer, in receipt of moneys which included profits and gains; and being so come within the operation of section 41 of 5 & 6 Vict. c. 35.

Lord DAVEY.—I am of opinion that this appeal should be allowed, for the reasons which have been already stated by your lordships who first addressed the House; and were it not that we are differing from the court below, and that your lordships are not unanimous, I should not find it necessary to add any observations of my own.

The question is whether, on the facts found in the original and amended cases stated by the commissioners, Roederer exercises a trade within the United Kingdom within the meaning of section 2, schedule D, of the Income Tax Act, 1853. I need not again analyze in detail the statements in the cases, but I

Son, agents), 21, Mincing-lane, E.C.," that being the address of the appellants, who carried on business as wine merchants on their own account, and also acted, during the period in question, as his agents. Beyond receiving payment in cash or bills on account of Louis Roederer, as will be presently noticed, the appellants' agency was limited to soliciting orders for champagne, either by themselves or through sub-agents who were appointed by them. These orders, when received, were not accepted by the appellants, who had no authority to that effect, but were transmitted by them to Louis Roederer at Rheims, who invariably reserved the right to reject any order forwarded to him. The necessary result of that course of dealing was that until Roederer had accepted the order there was no contract which could bind him or afford a right of action against him to the person who gave it.

When an order was accepted, the wines were packed in Rheims at the expense of the customer, to whom they were then forwarded direct, at his cost and risk. An invoice was made out at Rheims, charging the price of the wine, according to current lists furnished to the customer by the appellants, together with expenses of packing, &c., which was sent to the appellants for transmission to the customer. Each invoice contained a slip, requesting those customers who preferred paying by bill or cheque on Paris to have these drafts made out to their own order, and then to indorse them to Louis Roederer, so as to enable him to identify each remittance with the customer who sent it.

The appellants were remunerated for these services by a commission upon the orders which they procured. In some cases customers of Louis Roederer made payment to them in cash; but the money thus received by them rarely exceeded the sum due to them as commission, and then only to a small amount. The appellants also received English and foreign drafts and cheques in favour of Louis Roederer, for which they gave acknowledgments to the customer. These drafts and cheques were forwarded by them to Louis Roederer, who then sent a receipt direct to the customer.

These facts appear to me to raise a question in regard to the nature of the trading connection between Louis Roederer and his customers in the United Kingdom which is not covered by any previous decision. In *Tischler* v. *Apthorpe* and in *Pommery* v. *Apthorpe* the foreign wine merchant traded in this country through an English agent, who sold his wine in England and received the price, making delivery to the buyer either from the stock which had been sent to him by his principal or by directing a consignment to be sent from Rheims. In *Werle* v. *Colquhoun* the decision of the Court of Appeal was based upon the express ground that the foreign wine merchant exercised his trade in England by making contracts there for the sale of his champagne through his English agent. *Erichsen* v. *Last*, although it did not relate to the wine trade, was a decision of the same class. The telegraph company whose profits were assessed to income tax had its principal seat of business in Copenhagen; but it had offices and agents in various parts of the United Kingdom, where its agents made contracts for the transmission of messages through its wires, and received payment for sending them. I agree with the opinion expressed in that case by the present Master of the Rolls, that whenever a foreigner, either by himself or through a representative in this country, "habitually does, and contracts to do, a thing capable of producing profit and for the purpose of producing profit, he carries on a trade or business"; and that the profits or gains arising from these transactions in the United Kingdom are liable to income tax.

There is, in my opinion, a very broad distinction between the case of a foreigner making contracts in England with his English customers for the sale of his wines, either personally or through a representative, and the case of his making similar contracts with these customers in his own country. In the present instance the orders forwarded to Louis Roederer were, in law, nothing more than offers to purchase until the contract between him and each offerer was completed by his acceptance at Rheims; and he fulfilled his part of the contract by making delivery of the wine sold to the purchaser, and at the purchaser's risk, in Rheims. The trade of Louis Roederer consists in the sales of his champagne, and it is from these sales that his profits or gains are derived. Accordingly, the first and main question to be considered in this appeal is, whether that which was actually done within the United Kingdom in relation to and for the promotion of his business by Louis Roederer, or by the appellants on his behalf, amounts to an exercise of his trade within the meaning of schedule D.

There may, in my opinion, be transactions by or on behalf of a foreign merchant in this country so intimately connected with his business abroad that without them it could not be successfully carried on, which are nevertheless insufficient to constitute an exercise of his trade here within the meaning of schedule D. In illustration of that view I may refer to *Sulley* v. *Attorney-General*, which was decided in the Exchequer Chamber by no less than six very eminent judges. An American firm carried on a business in New York, which consisted in the re-sale there of goods purchased on their account in England. One of the partners, who resided in Nottingham, bought the goods required by the firm, and paid for them with money remitted to him from New York. It was held, in these circumstances, that the firm did not exercise its trade in the United Kingdom in such sense as to bring its profits within the scope of the Income Tax Acts. One reason assigned for the decision was that the firm's transactions here did not involve any profits or gains, which were wholly dependent upon the re-sales effected by the firm on the other side of the Atlantic. The learned judges recognized the principle that purchasing stock in this country with the view of trading in it elsewhere does not of itself constitute an exercise of the trade in the United Kingdom, when that department of the business from which profits or gains are directly realized is carried on in another country.

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I am therefore of opinion that your lordships ought to reverse the judgments of the Appeal Court and of the Queen's Bench Division, and to find and declare that Louis Roederer did not, in the years 1884, 1885, and 1886 exercise his trade in the United Kingdom. In that view it becomes unnecessary to consider the question whether the appellants, as his agents, are responsible, in terms of section 41 of the Act of 1842. But, having heard a full argument upon the point, I desire to say that I am not prepared to hold with the learned judges in the courts below, that the words "having the receipt of any profits or gains," as they occur in that clause, refer only to a "receiver." The context of the Act appears to me to indicate that they ought to be read as applicable to each and all of the persons enumerated.

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Lord MORRIS.—I am of opinion that the judgment of the Court of Appeal, affirming the judgment of the Queen's Bench Division, should be affirmed. It is unnecessary for me to repeat all the facts of the case. The first and main question is, Did Louis Roederer exercise a trade in England? There can be no definition of the words "exercising a trade." It is only another mode of expressing "carrying on a business"; but it certainly carries with it the meaning that the business or trade must be habitually or systematically exercised, and that it cannot apply to isolated transactions. There is no special legal meaning to the words "exercising a trade," and it must be considered with regard to what would be its ordinary or popular meaning, and that must in each case depend on the facts of that particular case; and we are not to canvass what might be a logical outcome from any decision when it is the facts of the particular case that are solely decided on. I have heard no suggestion of any plainer or more intelligible meaning for the words "exercise his trade" than the words themselves convey.

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On the other question, whether the appellants were agents within the terms of section 41 of 5 & 6 Vict. c. 35, I am not prepared to hold that the words "having the receipt of any profits or gains" are applicable only to their immediate antecedent word "receiver," and are not applicable to the word "agent." I consider they are applicable to and control the word "agent" as well as the word "receiver," and there is no reason why an agent should be chargeable who was not in receipt of profits or gains; but in the present case the appellants were in fact, as agents of their principal Roederer, in receipt of moneys which included profits and gains; and being so come within the operation of section 41 of 5 & 6 Vict. c. 35.

Lord DAVEY.—I am of opinion that this appeal should be allowed, for the reasons which have been already stated by your lordships who first addressed the House; and were it not that we are differing from the court below, and that your lordships are not unanimous, I should not find it necessary to add any observations of my own.

The question is whether, on the facts found in the original and amended cases stated by the commissioners, Roederer exercises a trade within the United Kingdom within the meaning of section 2, schedule D, of the Income Tax Act, 1853. I need not again analyze in detail the statements in the cases, but I

will merely state that the substance and effect of them appears to my mind to be shortly this. First, neither Grainger & Son nor the sub-agents appointed by them have any authority to make contracts for the sale of Roederer's wines. Their function in this part of the business is confined to soliciting and collecting orders for wine, which are forwarded to him in Rheims for execution by him if he thinks fit. Secondly, all contracts for the sale of wine are made in Rheims by Roederer himself, and the goods are invoiced in his name to the customer. In every instance they are delivered on board at Rheims at the expense and risk of the customer. The ordinary course is for the customers to pay Roederer direct in Rheims by cheques or drafts to his order. But Grainger & Son receive some cash and cheques on Roederer's account in London, though to an amount which rarely exceeds the commission due to them. Receipts for all money paid either to Roederer or through Grainger & Son are sent by Roederer to the customers direct. A form of receipt is annexed to the amended case.

Now, what does one mean by a trade, or the exercise of a trade? Trade, in its largest sense, is the business of selling, with a view to profit, goods which the trader has either manufactured himself or purchased. I cannot doubt, upon the facts found, that all Roederer's sales to his English customers are made at Rheims for delivery in that place, and the goods sold are in fact delivered to the customers in Rheims. So far as I can see, not a single bottle of wine is ever sold or delivered by Roederer either personally or through his agents in this country. It was, I think, admitted, and it cannot, in my opinion, be denied, that the mere fact of a foreigner selling his goods to English customers does not constitute an exercise of his trade within this country, although he is trading with this country. But it was argued that the habitual employment of agents to obtain orders and transmit them abroad constitutes the act of selling to English customers, an exercise of trade in this country. I am unable to accede to that argument. Canvassing for custom is no doubt ancillary to the exercise of trade, and it may be assumed that Roederer's trade with this country is increased by the employment of agents for that purpose, as it might be by systematic advertisement. But Roederer's trade is selling his champagne, and he exercises that trade where he makes his sales and the profits come home to him. Nor do I think it makes any difference that it is within the scope of Grainger & Son's authority to collect moneys for Roederer to the extent stated in the case. It is in my opinion no more than if Roederer were, for the convenience of his customers, to open a banking account in London, to which they might pay what they owe him.

I forbear to comment on the earlier cases which have been decided on this section, because they all differ in the vital respect that sales of goods were in those cases made in England. The case of *Sulley* v. *Attorney-General*, so far as it goes, is in the appellants' favour.

In the view which I take, it is not necessary to decide the other point which has been raised—whether Grainger & Son are such agents as described in section 41 of the Act of 1842. I will only say that I think the words "having the receipt of any profits or gains," &c., should grammatically be read with the words "factor, agent, or receiver," and not with "receiver" only, and that "having the receipt of any profits or gains" does not mean "any part of the profits or gains," but "the taxable profits or gains of any business," &c. I feel great doubt whether, on the facts of the present case, Grainger & Son were such agents; but it is not necessary to decide that.

Judgment appealed from reversed; respondent to pay the costs here and below.

Solicitors for the appellants, *Irvine* and *Borrowmas*.

Solicitor for the respondent, *F. C. Gore*, solicitor of Inland Revenue.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — June 15.

CARTER v. RIGBY. (*a*.)

County court—Practice—Parties—Joinder of plaintiffs—Action under Employers' Liability Act—County Court Rules, 1889, *ord.* 3, *r.* 1; *ord.* 44, *rr.* 18, 19.

The plaintiffs in an action brought in the county court under the Employers' Liability Act were the personal representatives of fifty deceased miners who were drowned in consequence of the flooding of a mine.

Held, on the authority of Smurthwaite v. Hannay, 43 *W. R.* 113, [1894] *A. C.* 494, *that, notwithstanding ord.* 3, *r.* 1, *and ord.* 44, *rr.* 18 *and* 19, *of the County Court Rules*, 1889, *the plaintiffs, having separate causes of action, could not properly be joined in one action.*

Appeal from the judgment of a Divisional Court on an appeal from the County Court of Staffordshire.

The action was brought under the Employers' Liability Act and Lord Campbell's Act to recover compensation in respect of the deaths of fifty miners who were drowned in consequence of the flooding of a coal mine in North Staffordshire. The plaintiffs were the personal representatives of the fifty deceased men, and they alleged that all the deceased men lost their lives by reason of the negligence of the defendants' servants, which resulted in the flooding of the mine.

The defendants applied for an order that the names of all the plaintiffs except one should be struck out.

The county court judge refused to make such order.

On appeal the Queen's Bench Division (Lord Russell of Killowen, C.J., and Wright, J.) held, on the authority of *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494, that the plaintiffs were not entitled to join in bringing one action, and granted the defendants' application.

The plaintiffs appealed.

Bigham, Q.C., and *C. A. Russell*, for the plaintiffs.—Ord. 3, r. 1, of the County Court Rules, 1889, says that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." In *Smurthwaite* v. *Hannay* the House of Lords held that under ord. 16, r. 1, of the Rules of the Supreme Court, which is in exactly the same terms, plaintiffs could not be joined in the same action where they had separate causes of action. But an action brought in the county court under the Employers' Liability Act, 1880, is in a different position from an action which is regulated solely by the Rules of the Supreme Court. The Employers' Liability Act, by section 6, sub-section 3, provided for the making of rules of procedure for actions brought under that Act. Rules were made under the power so created, and they were afterwards incorporated in the County Court

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Rules of 1889 as order 44. Rules 18 and 19 of that order deal with the case where several plaintiffs are joined in one action. At that time the interpretation of the rule as to joinder of parties was governed by the case of *Booth* v. *Briscoe*, 25 W. R. 838, 2 Q. B. D. 496, in which it was held that eight persons who had been affected by one libel and had joined in one action were rightly joined. Ord. 3, r. 1, ought to be read with ord. 44, rr. 18 and 19, as forming a separate code with regard to the joinder of parties in actions brought under the Employers' Liability Act. Although the House of Lords have put a particular interpretation upon the words of ord. 16, r. 1, of the Rules of the Supreme Court, yet the same words occurring in ord. 3, r. 1, of the County Court Rules have to be read with a context; and when they are so read a different interpretation ought to be put upon them. The code read as a whole clearly allows the joinder of these plaintiffs.

Jelf, *Q.C.*, and *W. Ellis Hill*, for the defendants, cited *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima*, [1895] A. C. 661.

Lord ESHER, M.R.—I am of opinion that the judgment of the Lord Chief Justice and Wright, J., is correct, and that it must be upheld. I come to this conclusion simply because we are bound by the decision of the House of Lords in *Smurthwaite* v. *Hannay*. Great difficulties have been raised by reason of that decision, and in this case Lord Russell says he wishes he could decide otherwise, and he hopes that the Rule Committee will alter the rule in question; but that he now submits to the decision of the House of Lords.

How does the case stand? The decision in *Smurthwaite* v. *Hannay* was on the construction of ord. 16, r. 1, of the Rules of the Supreme Court, which provides that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment." Ord. 3, r. 1, of the County Court Rules, 1889, is framed in precisely the same words. The House of Lords have determined that a rule so worded means that such plaintiffs as are now before the court cannot be joined in one writ, although the conduct of the defendants which is alleged to give rise to liability is the same in the case of each and all of the plaintiffs.

We are now asked to allow the joinder of these plaintiffs, and it is argued that ord. 3, r. 1, of the County Court Rules, when read with ord. 44, r. 18, provides for such joinder being made. We must construe ord. 44, r. 18. It says: "Where two or more persons are joined as plaintiffs under ord. 3, r. 1, and the negligence, act, or omission which is the cause of action shall be proved, the judgment shall be for all the plaintiffs, but the amount of the sum so awarded for damages and costs ordered to be paid to each such plaintiff shall be found and set forth in the judgment," &c. The introductory clause, "Where two or more persons are joined as plaintiffs under ord. 3, r. 1," is a condition to the applicability of the rule; and it must be construed to mean "where two or more persons are properly joined as plaintiffs under ord. 3, r. 1." If there are no plaintiffs so properly joined, the rest of the rule is not applicable. It is clear that according to the interpretation of the House of Lords these plaintiffs cannot properly be joined under ord. 3, r. 1, and therefore no subsequent part of rule 18 applies.

KAY, L.J.—This is an action brought under the Employers' Liability Act and Lord Campbell's Act. The plaintiffs are the personal representatives of fifty deceased persons, who were miners, and the question is whether their separate causes of action in respect of the death of each miner can be joined in one action. By section 6, sub-section 3, of the Employers' Liability Act, it was enacted that for the purpose of regulating the conditions and mode of appointment and remuneration of assessors under the Act, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under the Act in a county court, and otherwise preventing multiplicity of such actions, rules might be made in the same manner as rules for regulating the practice and procedure in other actions in county courts. That was in 1880, and in 1889 County Court Rules were made, one part of which —viz., order 44—is headed "The Employers' Liability Act, 1880." The rules contained in this order were made under the powers conferred by that Act. I think there is no doubt that these rules do contemplate that different causes of action may be joined in an action under the Employers' Liability Act; they do not say expressly that such a thing may be done, but they contemplate it. Rules 18 and 19 are under the heading "Judgment where several plaintiffs." Rule 18 says, "Where two or more persons are joined as plaintiffs under ord. 3, r. 1, and the negligence, act, or omission which is the cause of action shall be proved, the judgment shall be for all the plaintiffs, but the amount of the sum so awarded for damages and the costs ordered to be paid to each such plaintiff shall be found and set forth in the judgment, and the amount of costs awarded in the action shall be ordered to be paid to such person and in such manner as the court may think fit." It seems to me that this rule clearly contemplates that several causes of action may be joined together under ord. 3, r. 1. Rule 19, which provides for the payment of a dividend to each plaintiff in case of the proceeds of execution being insufficient, is pervaded with the same idea. It was argued that these rules are satisfied by the case where one person is killed, and he has no personal representative in the strict sense, and where by statute his widow or children may sue. I do not think that these words are satisfied by that case alone. I think these rules contemplate the death of more than one person being joined in one action under ord. 3, r. 1.

We must, however, turn to ord. 3, r. 1, and see whether it does permit such joinder. This rule is in the same terms as ord. 16, r. 1, of the Rules of the Supreme Court. In the case of *Smurthwaite* v. *Hannay* the House of Lords decided that such joinder could not be made under ord. 16, r. 1. They held that it only authorized the joinder of several plaintiffs where they had one cause of action. We are bound by that, and are obliged to say that these plaintiffs cannot be joined. I can see no reason why there should be a difference in this respect between a case of tort and a case of contract.

It was conceded in argument that this was so in every case except in an action under the Employers' Liability Act. The contention was that ord. 3, r. 1, must be read with rules 18 and 19 of order 44, as constituting a code of procedure as to parties in actions under the Employers' Liability Act; and it was said that when taken in that context it was capable of a different interpretation. In my opinion that is not a proper mode of using a context. It cannot properly be said that the rule has one meaning when applied to ordinary actions and another meaning when applied to actions under the Employers' Liability Act. I feel bound by the decision of the House of Lords, and I think that the judgment of the Divisional Court must be affirmed.

A. L. SMITH, L.J.—The plaintiffs have brought this action in the county court under the Employers' Liability Act for separate and distinct causes of action of tort. Under the Judicature Acts ord. 16, r. 1, was made, which allows all persons to be joined as plaintiffs in whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. In 1877 a decision was given on that rule in *Booth* v. *Briscoe*, in which it was held that several plaintiffs might join in an action brought in respect of one libel, although their causes of action were separate. In 1880 the Employers' Liability Act was passed, and power was given to frame rules for regulating the procedure in actions brought under that Act. In 1889 County Court Rules were made, among them being ord. 3, r. 1—which is a copy of ord. 16, r. 1, of the High Court Rules—and ord. 44, rr. 18 and 19. When the county court judges drew these rules they had before them the case of *Booth* v. *Briscoe*. But then came the case of *Smurthwaite* v. *Hannay* in the House of Lords, in which it was held that the words occurring in ord. 3, r. 1, do not permit the joinder of plaintiffs who have separate causes of action; and since then there has been the case of *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima* in the Privy Council. It is said that the county court judges having power to make rules allowing such a joinder of plaintiffs have done so in ord. 44, rr. 18 and 19. But "persons joined as plaintiffs under ord. 3, r. 1," means persons joined as ord. 3, r. 1, permits. Ord. 3, r. 1, does not permit the joinder of these plaintiffs, and therefore rules 18 and 19 do not fit this case. In my opinion the attempt to read the rule in different ways fails.

Appeal dismissed.

Solicitors for the plaintiffs, *Preston, Stow, & Preston*, for *Hollinshead & Moody*, Tunstall.

Solicitors for the defendants, *Watson, Sons, & Room*, for *Hawley & Jackson*, Longton.

From Chan. Div. (Lindley, Kay, & A. L. Smith, L.JJ.) March 11, 12.

MAYVILLE, LA COMPAGNIE DE (LIMITED) *v.* WHITLEY. (*a*.)

Company—Directors—Meeting—Notice of business to be transacted—"Extraordinary" business—Name of company, Authority to use.

In point of law directors of a company are not bound to give notice beforehand of extraordinary business which is to be transacted at a board meeting in order to render such business transactions valid.

S., a director of the M. Co., obtained the assent of five out of the seven subscribers to the memorandum of association of the company to the use of the name of the company as co-plaintiffs in an action brought by S. against his co-directors.

Held, that S. had no proper authority for the use of the name of the company. Such authority must be obtained either from the board of directors or from a meeting of the shareholders convened for that purpose.

Appeal from North, J.

The plaintiff company, which is an English one, was formed in May, 1895, for the purpose of developing a building estate and establishing a watering-place at Le Touquet, near Calais. The capital of the company was £400,000 in £1 shares. Seven persons signed the memorandum of association and subscribed for one share each. The articles of association provided that the first directors should be appointed by the subscribers of the memorandum of association, the total number not exceeding nine.

Article 94 provided: "The first directors shall have power to appoint any other persons to be directors at any time before the ordinary general meeting to be held in the year 1896, but so that the total number of directors shall not at any time exceed the maximum hereinbefore prescribed."

The directors had power to fill up casual vacancies in their number, and two were to form a quorum at their meetings. Seven directors were originally appointed by the subscribers, of whom H. S. Seal and Henri Tellier, a French gentleman, resident in France, accepted office. Whitley, the first defendant to the action, although originally appointed a director, did not know of his appointment for some considerable time, and on the 3rd of February, 1896, a resolution was entered in the minute-book appointing him a director in the place of F. C. Burnand, resigned.

Whitley at once commenced to act as a director, and under his instructions the books and papers of the company were removed from No. 7, Serjeant's-inn (Seal's office) to the Constitutional Club, of which Whitley was a member, and the registered office of the company was changed from No. 7, Serjeant's-inn to No. 14, Cockspur-street.

On the 14th of February, 1896, Whitley and Tellier held a meeting in the bedroom of the former at the Constitutional Club. Seal had not had notice of this meeting, and the directors purported to pass resolutions appointing Sir Terence O'Brien, K.C.M.G., a director, and appointing Messrs. Lee & Pembertons solicitors, and Messrs. Charles Hopkinson & Sons bankers of the company, and other business was transacted.

So far no shares had been allotted, the applications for them having been but few.

On the 22nd of February, Seal obtained the consent of five of the subscribers to the memorandum of association to the use of the name of the company as plaintiffs, and issued a writ by which he sought to restrain his co-directors from excluding him from meetings of the directors, from holding meetings without due notice, and asking for other consequential relief. On the same day, but before the writ had been served, Seal received notice of a meeting of directors called for the 24th of February. The proposed business for such meeting was not stated, but Whitley wrote to Seal saying that "the business will be brought up which was the subject of the meeting held on the 14th." Seal did not attend this meeting, at which the resolutions passed on the 14th were confirmed, and some additional business was transacted, including the allotment of 500 shares each to Whitley and Tellier and Sir Terence O'Brien and General Sir Richard Taylor, the necessary qualification for directors; and they were appointed additional directors. A resolution was also passed that the solicitors of the company, Messrs. Lee & Pembertons, be instructed to take all necessary steps to prevent the name of the company being used by Seal in his action against Whitley and Tellier.

Another board meeting was held on the 2nd of March; there were present Seal, Whitley, O'Brien, and Taylor. A further allotment of shares was made in spite of Seal's opposition, the total number of shareholders being brought up to forty-two, so that meetings of the company might be held. Seal, in the name of the company, added O'Brien and Taylor as defendants to the action, and moved for an injunction to restrain the defendants (*inter*

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

alia) from excluding Seal from acting as director, from holding meetings of directors without due notice, and from acting on the resolutions purporting to have been passed on the 14th and 24th of February, and to restrain O'Brien and Taylor from acting as directors. The solicitors of the company filed a cross-motion, in the name of the company, asking that the record might be amended by striking out the name of the company as plaintiffs, on the ground that the name had been used without proper authority, and also asking that Seal's solicitors might be ordered to pay the company's costs of the action and of the present application.

On the hearing of the two motions North, J., was of opinion that the meeting of the 14th of February was invalid, because no notice of it had been given to Mr. Seal, and that the meeting of the 24th of February was also invalid, because the notice did not state the business to be transacted at that meeting, such business being "unusual" and not "routine" business. In consequence Sir Terence O'Brien and Sir Richard Taylor had not been duly appointed directors, and the injunction asked against them must go. His lordship was also of opinion that there had been no attempt to exclude Mr. Seal, so that that part of the injunction failed. The injunction was granted to restrain the defendants from holding meetings of directors without due notice given. On the cross-motion his lordship declined to interfere, on the ground that even if the company's name had been used without authority, the motion to strike out was made equally without authority.

The defendants and the company appealed.

Vernon Smith, *Q.C.*, and *Gore-Browne*, for the defendants.—There is no rule of law which says that a notice convening a meeting of directors must state the business which is to be transacted at that meeting, and any such rule would be extremely embarrassing to companies. Lord Tenterden in *The King* v. *Pulsford*, 8 B. & C. 350, at p. 354, laid down an intelligent principle that where there are a select few whose duty it is to meet and consider the business to be brought before them no notice of such business is necessary. That principle has always been acted upon by companies. The cases relied upon by the plaintiffs in the court below, *In re Homer District Consolidated Gold Mines*, 39 Ch. D. 546, 37 W. R. Dig. 36, and *In re London & Southern Counties Freehold Land Co.*, 34 W. R. 163, 31 Ch. D. 223, may be distinguished. Seal should have protested against the holding of the meeting of the 24th of February at the time, and insisted on its being postponed; as he did not do so, but merely absented himself, he is now too late: *Browne* v. *La Trinidad*, 36 W. R. 289, 37 Ch. D. 1. *Wills* v. *Murray*, 4 Ex. 843, shows that notice of the business transacted is not usually necessary, unless there is an article expressly saying that notice must be given.

Younger, for the company.—I ask for an order in the same form as that in *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 28 W. R. 217, 13 Ch. D. 310. To authorize the use of the company's name the subscribers to the memorandum of association must all meet and give their consent: *In re Great Northern Salt and Chemical Works*, 44 Ch. D. 472, 38 W. R. Dig. 33. The authority given to Seal was only an authority to rescind the resolution come to on the 14th of February; it did not authorize the use of the name of the company for any other purpose.

He also referred to *John Morley Building Co.* v. *Barras*, 39 W. R. 619, [1891] 2 Ch. 386.

Swinfen Eady, *Q.C.*, and *Peterson*, for Seal.—Whitley was not a first director, and therefore under article 94 had no power to appoint additional directors. Moreover, the directors were not justified in issuing shares to their own nominees for the purpose of packing a meeting: *Fraser* v. *Whalley*, 2 H. & M. 10, 13 W. R. Ch. Dig. 42. We submit the allotment of shares was invalid, and the directors had no power to make use of their own improper resolutions. This action must be right in any event: *Pulbrook* v. *Richmond Consolidated Mining Co.*, 27 W. R. 377, 9 Ch. D. 610. Seal was justified in using the name of the company; it is not necessary to obtain the sanction of a general meeting: *Pender* v. *Lushington*, 6 Ch. D. 70, 25 W. R. Dig. 64. Moreover, he got the assent of an absolute majority of the company to the use of its name. A "casual vacancy" under the articles can only apply to a case where a director has accepted office and then resigned.

Vernon Smith, *Q.C.*, and *Younger* replied.

LINDLEY, L.J.—This case involves one question at least of immense importance to companies. The rest of the points are comparatively trifling. The great point is that raised in respect of the necessity of giving notice when a directors' meeting is held—not only a notice of the meeting, but a notice of the business to be transacted at the meeting. I am not prepared to say as a matter of law that it is necessary. As a matter of prudence it is very often done, and it is a very wise thing to do; but it strikes me, as it struck Lord Tenterden as long ago as the case referred to, *The King* v. *Pulsford*, that there is an immense difference between meetings of shareholders or corporators and meetings of those whose business it is to attend for the transaction of their affairs. Nothing is more common than for directors conducting a company's business to meet, say, once a week or once a month without giving notice at all either of the day or of what they are going to do. Being paid for their services, which they generally are—and they are in this company—it is the duty of the directors to go when there is any business to be done, and to attend to that business whatever it is; and I cannot say that, as a matter of law, now for the first time, the business conducted at a directors' meeting is invalid because the directors have had no notice of the kind of business which may happen to come before them. Such a law would be extremely embarrassing to the transaction of the business of companies. Now, Lord Tenterden had the very point before him in regard to municipal corporations in *The King* v. *Pulsford*. I need not refer to the facts, but the point was taken there that, a notice was not given of the business to be transacted at a meeting of the managing body. [His lordship read from Lord Tenterden's judgment, at p. 354, and continued:—] He decided that there was sufficient notice in that case. Then, so far as I know, the only other case in which this point has ever been brought forward or considered is the case of *The Homer District Consolidated Gold Mines, Ex parte Smith*. That case, no doubt, contains a passage in the judgment of North, J., which goes to show that he thought it was important, at all events, to observe that the purpose for which the directors' meeting which was in question there was called, was not stated; but when you come to look at the case you find, whatever may have been said about the necessity for the giving of any such notice, the decision itself is absolutely right. That case, except so far as it relates to the notice, is not in point here; but we are asked to say now, for the first time, as a matter of law that a notice must be given to the directors, of directors' meetings stating what the business is, if it is anything more than routine business. If we did so, I think we should be stating that which is not sound law. It is not

required for the honest transaction of business, and would be most disastrous. That is the only great point in this case. [His lordship then considered the facts and the evidence, and continued:—] The appeal of the directors against this injunction must therefore be allowed, on the ground that the appointment of Sir Richard Taylor and Sir Terence O'Brien was valid, and that there is nothing in point of law which invalidates the resolutions of the 24th of February, 1896.

Now, as regards the motion to strike out the name of the company, which had been used by Mr. Seal under the authority to which I have referred. As to that motion I think Mr. Younger is right. I think the evidence shows that Mr. Seal had no authority whatever to use the name of this company in these proceedings. A great deal, of course, turns upon what I have already said; because if what was done on the 24th of February, 1896, was valid, the appointment of the solicitor was valid, and Mr. Seal could not possibly have any authority at all. But he says: "I brought this action and served the writ before that, on the 22nd, when all I knew was the irregular proceeding and the irregular meeting of the 14th of February." What authority has he even to do that? He had not the authority of any meeting of the shareholders. He has the authority of five out of the seven subscribers it is true—got by him, I suppose, by sending round and asking them for their sanction. But I think that authority is not worth the paper it is written upon. If authority is wanted to use the name of the company, it must be authority got from the proper quarter—either from the directors or from the shareholders convened for the purpose. This is neither one nor the other. It follows that the name of the company ought to be struck out, and the costs ought to be paid by Mr. Seal, who has improperly used their name. Mr. Younger has put his view that the costs ought to be paid by the solicitor. I am against him as to that, I do not think any proper case has been made for any such extraordinary order as that. I know there are cases, and Mr. Younger has called attention to one, in which the solicitor putting the name of a company on a writ without authority had to pay costs; but it is to be borne in mind that the solicitor here is acting for the company and Mr. Seal too. Therefore upon that appeal the order will be made according to the notice of motion, and the costs will be paid by Seal, not by the solicitors. It appears to me that this is a litigation which ought never to have been brought. There is not the slightest ground or justification for it.

KAY, L.J.—In this case two questions have been argued, which are of considerable importance. The first question is this, Can the directors of a joint-stock trading company pass resolutions at their meetings as to matters not specified in the notice summoning the meeting or in an agenda paper added to the notice, saying what matters are to be discussed at the meeting? As I understand the learned judge's judgment he does not hold that notice to summon a directors' meeting must contain all, an agenda paper showing all business to be done at the meeting. But he says, if I have read the judgment rightly, that where the business is of an extraordinary or unusual character then notice must be given of it; or else at the meeting, if such business is transacted, any resolution passed as to such business will be invalid. One can see at once in what an enormous difficulty that would place directors. Who is to decide what is such extraordinary business that notice of it ought to be given? The learned judge feels that difficulty, because in the shorthand note of the judgment he is reported to have said: "Then it was said, 'Where are you to draw the line between what is important business of which notice should be given and what is not important business of which notice need not be given?' I have no intention of drawing any such line. It would be impossible to do so, and it would also be very inexpedient to attempt to do it. Nay, more, you may have matters going to be done with one company which may be very important business indeed, but with another company the transaction may be such as not to be a specially important matter for the company and it might be a matter of common occurrence. Therefore I do not intend to draw any line, except to say, and I do say, that wherever you draw the line the appointment of directors and the allotment of shares under such circumstances as the present, are both cases that come on the side of the line on which matters will be found with respect to which notice should be given. In my opinion, therefore, it was essential for the validity of the resolution passed at the meeting that Mr. Seal, an absent director, should have had notice that it was the intention to associate with him and the other two two new directors, and also that he should have had notice of the intention to proceed to allotment of shares of the company." If I understand rightly the meaning of his language, it is not necessary in every case to give notice of the business to be done at a directors' meeting, but such business as was transacted at the meeting of the 24th of February cannot be validly transacted unless—not notice of the meeting of directors—but notice of such business to be transacted at the meeting is given. I have never heard that laid down. As a matter of law I agree there is a great difference between a meeting of the directors of a joint-stock company and a meeting of the company itself. I am not going to say a word as to what is proper notice to be given in the case of a meeting of the shareholders. This is a meeting of directors who have to transact the ordinary business of the company, and I do not see how as a matter of business such a rule as this would be a workable rule at all. It would put directors in very great difficulty indeed as to the necessity of notice, and the only safe course for them to take would be to send an agenda paper to every director of the business to be transacted, in order that they might be sure that they did not omit to give him notice of such business as in the opinion of a judge before whom the matter might come would be such important business as that they ought to give notice of it.

Now, one knows very well that this is not the ordinary course. In many cases, as Lindley, L.J., has pointed out, the meetings of the directors are held at stated periods, and they are held on a particular day in every week or every month as the case may be, and no notice whatever is given of those meetings to any director at all. It is very often the case that, where some extraordinary business is going to be done, notice is sent of that meeting to the directors, and that such and such business will be transacted; and that is a very useful and proper and wise thing to do; but to say that it is absolutely imperative, and that without such a notice the business cannot be transacted is, I think, not according to the law; and as a rule it would be most inconvenient and would hamper the business of directors of a joint-stock company. I will not refer again to the authority (*The King* v. *Pulsford*) referred to by Lindley, L.J., but it seems to me to be completely against the view that there is any such law at all; and, with all respect to the learned judge in the court below, I think that his judgment on that point was not according to the law of this country, and I think there is nothing special in this case which would make it imperative to give the directors any such notice.

I see, looking at the articles of association, that there is an article which says that when any special business is to be transacted at a meeting of shareholders, of that special business notice shall be given. But there is nothing of that kind with respect to a meeting of the directors, and there is no article whatever that I can find that says anything about notice being given to convene meetings of directors. Now, besides that, there is another fact in this case which seems to me to be material with reference to this question. The directors are to be paid by a yearly salary, and unless they omit to attend for a considerable time they will receive that salary whether they are at the meetings or not. In many cases the directors are paid (and it seems to me a very much better way) only for the meetings at which they attend; but in this case, where they are paid by a regular annual salary, the temptation to attend by a proxy, if they can, is strong. But no honest man would draw the salary and keep away from the meeting if he could attend; therefore there is special reason in the present case why a director should be present at a directors' meeting, whether he knows what is the particular business to be transacted at that particular meeting or not. I therefore think that on that point—and it is a very important point—we must decide that in point of law, even when extraordinary business is to be transacted at a directors' meeting, it is not necessary to give notice beforehand of the intention to transact even that extraordinary business.

The other important question is—Is this a case in which a person in the position of Mr. Seal had a right to use the name of the company and to bring this action? [His lordship read the writ, and continued:—] Now, I must express my opinion that in the whole of that writ there is only one thing in respect of which Mr. Seal would be justified in bringing an action against the company, and that is to prevent himself being excluded from acting as director, supposing he could make a case on it; but all the rest of it seems to me to be an interference with the internal management of the company, about which this court does not allow members of a company or directors of a company to involve the company in litigation. The proper course, as is pointed out in *Foss* v. *Harbottle*, 2 Hare 461, is to call a meeting, and that is the remedy which any shareholder or director has in respect of all these irregularities, except alone the alleged exclusion of Mr. Seal from acting as a director. If there were irregularities in the transaction of the business of the company, those irregularities a meeting of the shareholders could condone and make perfectly right if they chose. Such meeting is practically the only remedy which this court allows a director or a shareholder of a company to take: otherwise we should have companies torn to pieces by litigation of this kind. The court has always set itself resolutely against such litigation.

In my opinion the whole of this action is entirely wrong, and no one knows better than a solicitor in Mr. Seal's position that an action of this kind ought not, under the circumstances of this case, to have been brought. I quite agree that the name of the company ought to be struck out, and I think the costs, as between solicitor and client, should be paid by Mr. Seal, and that the rest of the order should be discharged, with costs.

A. L. Smith, L.J.—As regards the first point—namely, that Mr. Seal had no notice of the object for which the meeting was called—not only do I agree with what has fallen from Lindley, L.J., but I think with the Lord Justice that Lord Tenterden's decision in *Rex* v. *Pulaford* covers this case. This was a selected board of directors, and without notice of the business to be transacted the directors were bound to attend if they performed their duty. Mr. Seal was bound to go to the meeting if he had notice when the meeting was going to take place, and therefore it is not right, it is not good law, to say that everything which was done by two properly appointed directors, who formed a *quorum*, was wrong because the other had not notice of what they were going to do. That point therefore fails.

Then comes the question, What right had he to use the company's name? None at all, in my opinion. He says that he had a right to use it because of the document he got of the 22nd of February, 1896, from the clerks and others. But that is not an authority from the shareholders. I do not find it is, and Mr. Younger has pointed out with considerable force that even if it were so that is only an authorization of those five gentlemen to deal with what had taken place at the bedroom meeting. For these reasons I think Mr. Seal is hopelessly in the wrong, and I think he should be mulcted in costs.

The appeal will be allowed, with costs.

Solicitors, *Burn & Berridge; Lee & Pembertons; Oldman, Clabburn, & Co.*

High Court of Justice.

Chan. Div. North, J. } Oct. 28, 29; March 31.

In re Watson.
Turner *v.* Watson. (*a.*)

Principal—Surety—Executor—Retainer.

A testator mortgaged a reversionary interest as surety for his son, and died bequeathing a share of the residue of his estate to this son. After the testator's death the son became a bankrupt (in 1859) *and never obtained his discharge. Neither the executors nor mortgagees proved in the bankruptcy. Certain payments were made by the executors and also by beneficiaries under the will to the mortgagees, who, however, ultimately sold the testator's reversionary interest in* 1869, *and out of the proceeds of sale retained the mortgage debt and handed over the balance to the executors. Upon the testator's residuary estate becoming divisible in* 1894,

Held, that the testator's executors were entitled to retain as against the son's share of the residue, the amount of the mortgage debt retained by the mortgagees, and the payments made by the executors to the mortgagees, with interest at 4 *per cent., but were not entitled to retain the amount contributed by other beneficiaries, nor to damages caused by the sale of the reversion instead of waiting for it to fall in.*

Originating summons.

By an indenture dated the 29th of August, 1854, Thomas James Watson assigned to J. E. Clowes and T. G. Kensit one-seventh part of a sum of £7,333 6s. 8d. Consols, to which he was entitled subject to the life interest of his mother, Susannah Watson, by way of further security for £500 advanced to his son, J. J. W. Watson, together with interest thereon. J. J. W. Watson assigned to the mortgagees a policy of insurance upon his life and covenanted to pay the £500 and interest, and both

(*a.*) Reported by G. B. Hamilton, Esq., Barrister-at-Law.

father and son covenanted to pay interest at 5 per cent. and the premiums on the policy. A power of sale was conferred upon the mortgagees.

Thomas James Watson, by his will, dated the 3rd of December, 1857, appointed his wife Caroline Watson, John Evans, and W. H. Turner executrix and executors, and gave his residuary estate to John Evans and W. H. Turner upon trust to pay the income to his wife during her life or widowhood, and upon her death or remarriage to divide the same between Mrs. White, James H. Watson, J. J. W. Watson, and Musgrave Watson, in the proportions of one-third to Mrs. White and two-thirds to be divided among the three sons.

The testator died on the 3rd of December, 1857.

J. J. W. Watson was adjudicated a bankrupt in June, 1859. The bankruptcy was never closed, nor did the bankrupt obtain either a certificate under the Bankruptcy Act of 1849 or an order of discharge under the Bankruptcy Act of 1861. Neither the executors nor the mortgagees proved in the bankruptcy.

In order to prevent the sale by the mortgagees of the testator's reversionary interest, the interest due under the mortgage was contributed by the beneficiaries and executors. £40 12s. 7d. was paid by his widow, £40 10s. 8d. by Mrs. White, £40 10s. 8d. by J. H. Watson, and £122 10s. 2d. by the executors.

In 1869 the mortgagees sold the reversionary interest for £690. After paying succession duty, £6 18s.; auctioneer's charges, £29 10s.; costs of sale, £23 14s. 10d.; and £525 4s. 8d. for principal, interest, and costs, they handed the balance, £104 12s. 6d., to the executors on the 9th of February, 1870.

Susannah Watson died in 1871. The bankrupt died on the 5th of February, 1886, and the testator's widow died on the 29th of August, 1894, when the testator's property became divisible.

W. C. Turner, the executor of the surviving executor of the testator's will, took out this summons to determine if, as trustee of the residuary estate of the testator, he was at liberty to retain out of the share of J. J. W. Watson all or any of the sums representing payments made and loss incurred by reason of the testator's liability as surety for J. J. W. Watson.

Swinfen Eady, Q.C., and *W. E. Mozley*, for the plaintiff.

Vernon Smith, Q.C., and *G. Cave*, for J. H. Watson and the representatives of Mrs. White.—The executors' right of retainer is not affected by the bankruptcy, which occurred after the death of the testator, and in that this case differs from *Cherry* v. *Boultbee*, 4 My. & Cr. 442. The bankrupt's assignees take subject to any equities there may be: *Jeffs* v. *Wood*, 2 P. Wms. 128. The bankrupt must account for the £122 10s. paid by the executors before becoming entitled to any share of the residue, and the payments made by the residuary legatees must be presumed to have been made at the request of the executors and stand on the same footing. There is the same right of indemnity as to the money retained by the mortgagees, which was in substance paid by the testator's estate: *In re Akerman*, 40 W. R. 12, [1891] 3 Ch. 212; *Petre* v. *Duncombe*, 20 L. J. Q. B. 242.

R. J. Parker, for Musgrave Watson.

C. James, for the assignees in bankruptcy of J. J. W. Watson, was stopped as to the payments made by the beneficiaries.—The executors had no right of retainer. At the time of the death of the testator the son was only under a contingent liability to the testator. The son's subsequent bankruptcy converted this into a right of proof, and until then there was not any subsisting debt: *Cherry* v. *Boultbee*, *Courtenay* v. *Williams*, 3 Hare 539; *In re Taylor*, 42 W. R. 373, [1894] 1 Ch. 674. Before the bankruptcy the executors never had a fund payable to the person liable to pay the debt. A debt cannot be retained out of a specific legacy, and a future debt cannot be retained or set off: *In re Rees*, 60 L. T. N. S. 260, 37 W. R. Dig. 80. There is no contract implied to pay interest, and certainly not at a higher rate than 4 per cent.

Vernon Smith, Q.C., replied.

Cur. adv. vult.

March 31.—NORTH, J., stated the facts and continued:—If the son were alive and not a bankrupt the case would be quite clear. *Willes* v. *Greenhill*, 9 W. R. 217, 29 Beav. 376, and *In re Akerman* show that the executor would be entitled to retain the son's debt, treating it as being so much in his hands on account of his share of the estate. *Courtenay* v. *Williams* and *In re Akerman* also show that the lapse of time since the son's bankruptcy in 1859, or since the realization of the security in 1869, would not affect the executors' right to retain. But there having been a bankruptcy, the question is as to the position of the assignees in bankruptcy of the son. I take it that they stand in no better position than the son himself would if he were alive and not bankrupt. [His lordship referred to *Bousfield* v. *Lawford*, 11 W. R. 842, 1 De G. J. & S. 459, and the judgment of Knight-Bruce, L.J., *ib.*, p. 463, and to *In re Batchelor*, L. R. 16 Eq. 481, 22 W. R. Dig. 141.] *Cherry* v. *Boultbee* and *In re Hodgson*, 27 W. R. 38, 9 Ch. D. 673, were cited as authorities to the contrary, but in both these cases the bankruptcy took place during the lifetime of the testator, and the ground of the decision was that the executors were never entitled to the debt, but only to a dividend.

In the present case no one ever proved against the bankrupt's estate in respect of this debt. The father's executors were not, at the date of the son's bankruptcy, in a position to prove. The only persons who could prove were the mortgagees, who never did prove. The executors could not have proved until 1869, when the mortgagees realized their security. If they had proved, their right of retainer would have been gone altogether. *Stammers* v. *Elliott*, 16 W. R. 489, L. R. 3 Ch. App. 195, and *Armstrong* v. *Armstrong*, 19 W. R. 971, L. R. 12 Eq. 614, are clear authorities for this. The same result would have followed if the bankrupt had obtained his discharge without the executors proving. *In re Orpen*, 29 W. R. 467, 16 Ch. D. 202, shows this. The case of *In re Rees*, which was cited in support of the contention that there is no right of retainer, is distinguishable, for there there had been proof.

It is contended that the executors have a right of proof only; but I can see no reason why they should hand over what they have belonging to the testator in order that they may get it back from the bankrupt's estate. *In re Whitehouse*, 36 W. R. 181, 37 Ch. D. 683 (p. 694, *per* Stirling, J.), is a clear authority against this contention. Lord Chelmsford, in *Stammers* v. *Elliott*, L. R. 3 Ch. 195, at p. 200, also lays this down clearly. The result is that the surviving executor has a right of retainer.

It was suggested that he might retain, on behalf of the estate of the deceased mother, the brother, and the sister, the sums contributed by them to keep down the interest and premiums; but there can be no right of retainer in respect of those sums. They did not come out of the testator's estate, and no debt is due to the testator's estate in respect of them. There is no equity by virtue of which executors can retain a debt due, not to the testator's estate, but to

some other person, in order that they may hand over the amount retained to that person.

As to the £122 paid by the executors there is a clear right of retainer, as there is of the £578 deducted by the mortgagees from the proceeds of sale in satisfaction of their claim. I think this right of retainer carries with it the right to retain interest at 4 per cent. Although the interest reserved by the mortgage deed was 5 per cent., it does not follow that the surety ought to receive that rate in the absence of any contract as to interest. In *Petre* v. *Duncombe* a jury gave 5 per cent. interest to a surety by way of damages, but there the principal debtor had stated an account allowing interest at 5 per cent. on some previous payments. I think I ought to allow only 4 per cent. That is the rate of interest the court generally gives in such cases.

A claim has also been made to retain something in respect of consequential damage. That means, I assume, that the reversion when sold by the mortgagees did not realize its full value, and certainly not so much as it would have realized if they had waited till it fell into possession. No proof has been given of any consequential damage, and there can be no retainer in respect of it.

Solicitors, *Lowe & Co.*; *Whites & Co.*

Chan. Div. }
Kekewich, J. } April 16.

Re HILL.
HILL *v.* PILCHER. (*a.*)

Settlement—Limited power to purchase land—Money "liable to be laid out in the purchase of land"—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 33.

Under the trusts of a settlement by which the moiety of certain freehold lands and also certain personalty were settled, the trustees were authorized, at the request of the tenant for life, to invest the personalty in the purchase of the unsettled moiety of the freehold lands.

Held, that money in the hands of the trustees forming part of the personalty might be applied by the trustees under section 33 *of the Settled Land Act*, 1882, *as capital moneys in the purchase, jointly with the owner of the other moiety, of adjoining convenient freeholds.*

Adjourned summons.

Under the trusts of a marriage settlement the moiety of certain freehold premises was held by the trustees on trust for sale at the request of the tenant for life during her life, and afterwards, at their discretion and subject thereto, the said moiety, together with certain personal estate, was held by the trustees upon the usual trusts for the husband and wife and children.

The settlement also contained a provision that at the request in writing of the husband and wife, or the survivor of them, the trustees might sell any part of the securities vested in them upon the trusts of the settlement, and invest the same in the purchase of the other moiety of the freehold premises.

This was a summons to determine the question (amongst others) whether any portion of the trust funds was applicable under the Settled Land Act or otherwise for the purpose of purchasing, jointly with the owner of the other moiety of the property, a piece of land adjoining the freehold property settled which it appeared from the evidence was a most desirable addition to it.

Austen Cartmell, for the tenant for life.—Section 33 of the Settled Land Act, 1882, applies where there is money in the hands of trustees of a settlement liable to be laid out in land. Here the trustees are authorized to apply the money in hand in the purchase of the unsettled moiety of the freeholds. It is therefore within the section.

Badcock, for the trustees.

KEKEWICH, J.—The question for decision in this case is whether money which trustees of a settlement have power to invest in the purchase of particular land at the request of the tenant for life is or is not money which is "liable to be laid out in the purchase of land" within section 33 of the Settled Land Act, 1882. On this, the first question which arises is whether the power to purchase the unsettled moiety of the property settled is discretionary or obligatory. Where there is a direction or power to trustees to sell or purchase at the request of the tenant for life, the trustees must do so if required by the tenant for life, and consequently in this case upon the request being made a "liability" would arise to make the purchase. As to the further question, whether the power being to purchase particular land is this money within the meaning of the 33rd section of the Settled Land Act, I think that where a settlement contains provision for the investment of money in land so as to convert that money from personalty to realty the Act intends that such money should be capable of being applied as capital money for all the purposes of the Act, and accordingly the trustees may apply the money as desired in this case.

Solicitors, *S. W. Johnson & Son.*

Chan. Div. }
Romer, J. } March 16, 23; April 17.

Re PANTHER LEAD CO. (*a.*)

Company—Winding up—Lease—Proof by lessor—Creditor—Insolvency of company.

Since the decision in Hardy *v.* Fothergill, 37 *W. R.* 177, 13 *App. Cas.* 351, *the earlier cases as to proof by a lessor in the case of a company in liquidation have to be reconsidered, and it is the duty of the court to assist a lessor in proving in respect of the obligations of a company as lessee under its lease in all cases where the lessor is desirous of proving at once for his loss on the footing of the lease being determined or treated as determined.*

A company which was lessee under an onerous lease went into voluntary liquidation, and the liquidator gave up possession to the lessors, but not so as to surrender the term; the lessors were ready to come to an arrangement by accepting a surrender or determining the lease on being allowed to prove for the loss thereby sustained.

Held, that liberty ought to be given to the liquidator to carry out such arrangement.

Summons.

This was a summons for directions which came before Romer, J., sitting as additional judge of the Chancery Division for Vaughan Williams, J.

The company was lessee under a lease, which contained onerous covenants, for a term of twenty-one years, commencing in 1883, and determinable at the end of seven and fourteen years.

The company, which was formed in 1857, went into voluntary liquidation in 1895, and the liquidator gave up possession to the lessors.

A question was raised on the present summons whether the lease had been surrendered, but his lord-

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

(*a*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

ship held, on the facts, that there had been no surrender.

The lessors had offered to arrange with the liquidator to take a surrender of the lease or to determine it, on their being allowed to prove for the loss thereby sustained by them.

This summons was taken out by the liquidator in the voluntary winding up to determine the question whether the lessors were entitled to prove in the winding up for the future and contingent liability of the company as regarded future rent and breaches of covenant, and whether the lessors were entitled to have the assets of the company impounded to answer their claims.

The main questions raised on the summons were (1) whether *Hardy* v. *Fothergill*, 37 W. R. 177, 13 App. Cas. 351, overrules the earlier cases on the same subject matter, such as *Re Haytor Granite Co.*, 14 W. R. 186, L. R. 1 Ch. App. 77, and *Horsey's claim*, 16 W. R. 577, L. R. 5 Eq. 561; and (2) whether or not the present case was or was not distinguishable from *The New Oriental Bank Corporation* (*No.* 2), 43 W. R. 525, [1895] 1 Ch. 753.

The following is a statement of the previous law on the subject, taken from the cases cited in the argument:—

In the earlier cases—as, *e.g.*, in *Horsey's claim*—it was decided that, as it was impossible to put a just estimate on the claim of a landlord for future rent and possible breaches of covenant, he was not entitled to prove against a limited company being wound up, and to receive a dividend on his proof.

This view would seem to have prevailed until *Hardy* v. *Fothergill*, which decided that a lessor's claim under a covenant for indemnity would be barred by an ordinary discharge in bankruptcy obtained by the assignee, even though the lessor have tendered no proof respecting it, for the contingent liability on the covenant is a debt provable in the bankruptcy, unless the court declares it to be a liability incapable of being fairly estimated. But the effect of *Hardy* v. *Fothergill* on the right of a lessor to have the assets of a limited company which is being wound up impounded remained undetermined till the case of *The New Oriental Bank Corporation* (2), though the point was mentioned in *Craig's claim*, 43 W. R. 245, [1895] 1 Ch. 267, before the Court of Appeal.

In *The New Oriental Bank Corporation* (2) Vaughan Williams, J., held that the rule in *Hardy* v. *Fothergill* does not apply where a lessor is proving in respect of the liability of his lessee under a subsisting lease, whether the lessee is an insolvent company which is being wound up or is a bankrupt, and that in the case of an insolvent company *Re Haytor Granite Co.* and *Horsey's claim* are still applicable.

Eve, Q.C., and *J. G. Wood*, for the application.

Buckley, Q.C., and *P. S. Stokes*, for the lessors.

Wood replied.

In addition to the cases mentioned above, the following cases and authorities were referred to: *Gooch* v. *London Banking Association*, 32 Ch. D. 41, 34 W. R. Dig. 38; *Re Westbourne Grove Drapery Co.*, 25 W. R. 509, 5 Ch. D. 248; *Northern Counties of England Fire Insurance Co., Macfarlane's claim*, 17 Ch. D. 337, 29 W. R. Dig. 47; Companies Act, 1862, s. 158; Judicature Act, 1875, s. 10.

ROMER, J.—In this case I have already held that the lease to the company has not been surrendered by operation of law, and now the question arises as to what ought to be done in the winding up with regard to the claim of the lessors in respect of the lease. The lease is an onerous one. The premises are not occupied or used or required by the liquidator or by the company. If the liquidator can make a proper arrangement with the lessors whereby the lease may be determined, he certainly ought to do so. On the other hand, it is equally obvious that the terms of the lease are beneficial to the lessors, and that if the lease were put an end to without due compensation to the lessors they would suffer damage. Now, if this is the case, as in *The New Oriental Bank Corporation* (*No.* 2), before Vaughan Williams, J., and the lessors had refused to let the lease be given up and prove for the loss thereby sustained by them, I should have felt great difficulty in doing more than was done by the learned judge in that case, for a lessor cannot be compelled to come in and prove. But here the lessors offer to arrange with the liquidator to take a surrender of the lease or to determine it, on terms of their being allowed to prove for the loss thereby sustained by them. This is clearly an arrangement which ought to be made by the liquidator on his side, and after the expression of my opinion I have no doubt that he will enter into it, and so all difficulty will be avoided. All I need do, therefore, on this summons is to give liberty to the liquidator to carry out the arrangement I have indicated. Should, for any unforeseen reason, any difficulty arise, then a further application to the court can be made. The costs of both parties to this application will be paid by the liquidator out of the assets.

I desire to add that, in my opinion, since the decision in *Hardy* v. *Fothergill* the old cases as to proof by a lessor in the case of a company in liquidation have to be reconsidered, as was pointed out by Lindley, L.J., in *Craig's claim*, and certainly it will be the duty of the court to assist a lessor in proving in respect of the obligations of a company as lessee under its lease in all cases like the present, where the lessor is desirous of proving at once for his loss on the footing of the lease being determined or treated as determined. In such cases I see no difficulty in allowing the proof or estimating its amount. And I need not point out the injustice that would ensue if a liquidator in the case of an insolvent company like the present was to be at liberty to refuse to allow any proof except for rent actually accrued due. He might apply all the assets in paying the other creditors large dividends on their debts, and leave the unfortunate lessor with a mere claim for his future rent and in the position of there being no assets available for the payment of any part of such rent as and when it accrued due and became provable.

Solicitors, *Coode, Kingdon, & Cotton*, for *Coode, Shilson, & Co.*, St. Austell; *Emmet & Co.*, for *Kettle & Landor*, Wolverhampton.

Q. B. Div.
(Cave and Wills, JJ.) June 15.

SMITH *v.* GILL. (*a.*)

County court—Appeal—Claim not exceeding £20, but counter-claim exceeding £20—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), s. 120.

Where in an action brought in a county court there is a counter-claim for a sum exceeding £20, there is a right of appeal in respect of the counter-claim, notwithstanding the claim itself was for a sum not exceeding £20.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Appeal from a county court.

The action was to recover £3 11s. 6d., the cost of removing certain gas brackets put up by the defendant in the plaintiff's billiard-room, which were not suitable for the purpose for which they were required.

The defendant counter-claimed for £21 7s. 6d., the price of the aforesaid brackets.

Judgment was given in favour of the plaintiff on the claim and counter-claim.

Section 120 of the County Courts Act, 1888, provides that "if any party in any action or matter shall be dissatisfied with the determination or direction of the judge . . . the party aggrieved . . . may appeal from the same to the High Court . . .; provided always that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damages does not exceed twenty pounds. . . ."

The defendant appealed.

J. E. Bankes, for the appellant.

Buckmaster, for the respondent, took a preliminary objection. There is no right of appeal. Parties to a counter-claim are not "parties in any action or matter"; for "action" is defined, in section 186, to mean "every proceeding in the court which may be commenced as prescribed by plaint," and counter-claims are commenced, not by plaint, but by a notice. Therefore the circumstance that there is a counter-claim for a greater amount than £20 does not affect the rule that there is no appeal where the claim is for a less amount than £20. "Matter" refers only to the equitable jurisdiction of the court.

CAVE, J.—We do not think that there is anything in this preliminary point.

The case then proceeded.

Solicitors for the appellant, *Hamlin, Grammer, & Co.*, for *J. Vosper Curry*, Bradford.

Solicitors for the respondent, *Prior, Church, & Adams*, for *W. H. Forster*, Leeds.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills, J.)

May 21.

OSBORNE *v.* CHOCQUEEL. (*a*.)

Animals—Negligence—Negligently keeping a ferocious dog—Scienter—*Disposition to bite mankind.*

Where a claim is made for injuries caused by a dog to a human being, the evidence of scienter *must show not only that the dog had a ferocious disposition, but that it had a ferocious disposition against mankind. Proof, therefore, that the dog had worried a goat was not sufficient evidence of* scienter *to make the defendant liable.*

Appeal from the decision of the judge at the Brompton County Court.

The plaintiff was bitten by the defendant's dog. The evidence of *scienter* was that while in the possession of a former owner the dog had, in company with another dog, chased and bitten a goat.

The learned judge gave judgment for the plaintiff with £22 damages.

Brook Little, for the defendant.—The evidence of *scienter* was insufficient. It was unreasonable to suggest that a dog that would bite a goat might not be perfectly docile with regard to men. The authorities showed that it was necessary to prove not only a ferocious disposition but a ferocious disposition against mankind: Bullen & Leake, Precedents of Pleadings, 3rd ed., p. 366; *Applebee* v. *Percy*, 22 W. R. 704, L. R. 9 C. P. 647; *Worth* v. *Gilling*, L. R. 2 C. P. 1, 15 W. R. C. L. Dig. 75.

Hawtin, for the plaintiff.—The question of the ferocious disposition of the dog is a question of fact. All that is required to be shown is a ferocious disposition, from which ferocity towards men may be inferred: *Smith* v. *Great Eastern Railway Co.*, 15 W. R. 131, L. R. 2 C. P. 4.

Lord RUSSELL OF KILLOWEN, C.J.—The appeal must be allowed. The facts of the case are these. The dog was a bull-dog, and was formerly owned by a Dr. Roberts. Its only misdeed was that while in Dr. Roberts' possession it worried a goat at Wormwood Scrubs. In September, 1895, Dr. Roberts made it over to the defendant. In November the defendant was leading the dog by a leash, and the plaintiff with other boys began teasing it. When upon reaching home the dog was released it went back to the plaintiff and bit him. There was no evidence that the dog had manifested any disposition to bite mankind. It had a creditable record with the exception of the unhappy incident in connection with the goat. The question is, What is the test of the defendant's liability?

I think the law is in an unsatisfactory condition. It would be much more intelligible if a man were to be responsible for whatever damage his dog did. The law has so dealt with the matter in a particular class of case. That is to say, that if a dog kills or injures sheep or cattle the owner is liable, notwithstanding the dog had never to his knowledge shown a disposition to injure sheep or cattle before. Attempts have been made to abolish the necessity for proving *scienter*, but they have failed. A Bill on the subject which was introduced into Parliament did not receive support.

But looking at the law as it stands it is impossible to arrive at any other conclusion than that where a dog has injured a human being, in order to establish liability on the part of the owner it is necessary to prove *scienter*, that the dog was accustomed either to bite or bite at mankind.

The learned judge has not found that the dog had any ferocious disposition against mankind or that it ever attempted to bite mankind. All that he has found is that the dog was of a ferocious disposition. The learned judge was therefore wrong.

WILLS, J.—I am of the same opinion. For a great number of years it was always the practice in pleadings to describe the dog as not merely of a ferocious disposition, but that it was accustomed to bite mankind. In *Worth* v. *Gilling* an amendment to that effect was added at *nisi prius*. When pleading was more strict there could be no better definition of the law than could be found in the necessary allegations to support a claim.

In *Hartley* v. *Harriman*, 1 B. & Ald. 620, it was held that a declaration that the defendant's dogs had a disposition to attack sheep was not supported by proof that the dogs frequently attacked men.

Neither is it to be taken as a necessary inference that because a dog is accustomed to attack sheep that it is *ipso facto* shown to be liable to attack men. It is well known that a dog may have a disposition to attack any sort of animal, and yet be perfectly good as regards mankind. Therefore the fact that this dog worried a goat is no evidence of a ferocious disposition as regards mankind.

Solicitor for the defendant, *A. H. D. Nonweiler*.

Solicitors for the plaintiff, *Thomson & Co.*

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.)

May 4.

BASSANO *v.* BRADLEY. (*a.*)

Practice -- County Court — Jurisdiction — Proceeding under Charitable Trusts Act, 1853—*Title—Rent-charge issuing out of lands—Annual value—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 139), *s.* 41—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 60.

An action by trustees of a charity to recover arrears of a rent-charge is not a "proceeding" within section 41 *of the Charitable Trusts Act*, 1853.

The plaintiffs sought to recover in the county court arrears of a rent-charge of £10 *a year issuing out of lands of an annual value of more than* £50.

Held, that there was no dispute as to the title of the lands, but only as to the rent-charge, and that the jurisdiction of the county court was not ousted.

Rule *nisi* for a prohibition to the county court of Worcester.

The action was brought by the plaintiffs, who were the trustees of a charity, to recover the arrears of a rent-charge of £10 issuing out of lands of the defendants which were admittedly of more value than £50 a year. The summons referred to the Charitable Trusts Act, 1853, and leave to proceed under that Act had been obtained.

The defendants obtained a rule *nisi* for a prohibition on the grounds that the jurisdiction of the county court was excluded (1) by section 41 of the Charitable Trusts Act, 1853; (2) by section 60 of the County Courts Act, 1888. Section 41 of the Charitable Trusts Act, 1853, provides that "no judge of the Court of Chancery nor any district court of bankruptcy or county court shall upon any proceedings under this Act have jurisdiction to try or determine the title at law or in equity to any real or personal property or any term or interest therein as between any charity or the trustee thereof and any person holding or claiming such real or personal property, term, or interest adversely to such charity, or to try or determine any question as to the existence or extent of any charge or trust."

The County Courts Act, 1888, s. 60, enacts that "a judge shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditament shall come in question where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of £50 by the year. . . ."

Bosanquet, Q.C., and *Hickey*, for the plaintiffs, showed cause against the rule.—This is not a "proceeding" under the Charitable Trusts Act; although the leave of the Charity Commissioners has been obtained, it was not really necessary. Secondly, there is no question here in which the title to lands of a greater annual value than £50 is in dispute. The rent-charge of £10 is the hereditament as to the title of which there is a question. There is nothing in section 60 of the County Courts Act, 1888, to prevent a county court judge trying an action as to a rent-charge of less than £50 a year, even though the lands out of which it issues exceed £50 in annual value: *Stolworthy* v. *Powell*, 55 L. J. Q. B. 228, 34 W. R. Dig. 51.

A. T. Lawrence, for the defendants.—The plaintiffs intended to proceed under the Charitable Trusts Act, as is shown by their obtaining the leave of the Charity Commissioners. Section 41 of that Act therefore acts as a bar to the action. But, even if that is not so, the jurisdiction of the county court judge is ousted by section 60 of the County Courts Act. The defendants deny that their land, which is of a greater annual value than £50, is subject to this rent-charge. The question is one relating to the title not only of the rent-charge but also of the land out of which it issues. The decision of this case must affect the title of the defendant's land.

LORD RUSSELL OF KILLOWEN, C.J.—With regard to the first point we are clearly of opinion that the Charitable Trusts Act, 1853, has no application to this case, although no doubt some warrant is given to the defendants' contention by the fact that the plaint refers to the Act, and also because the plaintiffs took the trouble to get the consent of the Charity Commissioners, which was not necessary if the action was not within the Act. The application therefore fails on that ground.

The second point turns on the construction of section 60 of the County Courts Act, 1888. I am not satisfied in my own mind that we have arrived at the true construction of that section. On the other hand, the onus lies on the defendants to satisfy us that the county court has no jurisdiction, and I am not able to arrive at the conclusion that they have done so. The words of the section are: "A judge shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditament shall come in question." Up to that point the case is clearly within the words, for this is a case of an incorporeal hereditament. The section proceeds: "where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of £50 by the year." It is to be observed that the words "rent payable in respect thereof" cannot be read in connection with the words "incorporeal hereditaments," for it is not possible to conceive a case of rent of an incorporeal hereditament. We are therefore thrown back on the earlier words, "where neither the value of the lands, tenements, or hereditaments in dispute" shall exceed £50 a year. I am unable to accept Mr. Lawrence's view as to the construction of the section. The dispute in this case is as to the plaintiffs' right to an incorporeal hereditament of the yearly value of £10 issuing out of certain lands. There is no dispute as to the defendants' title to those lands; the dispute is as to the title to the incorporeal hereditament issuing out of the lands. Under these circumstances I think that the prohibition ought not to go. With regard to the case which was referred to in the argument, *Stolworthy* v. *Powell*, I will only say that if a case similar to that comes before me I should like to further consider the point there decided.

WRIGHT, J.—I am of the same opinion, subject to the same doubt.

Rule discharged.

Solicitors for the plaintiffs, *Field, Roscoe, & Co.*, for *Watts & Jobson*, Dudley.

Solicitors for the defendants, *Tucker, Lake, & Lyon*, for *Docker & Tarleton*, Birmingham.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 6, 8, 9.

Re MONNIER (VEUVE) ET SES FILS (LIMITED). *Ex parte* BLOOMENTHAL. (*a*.)

Company — Winding up — Contributory — Certificate — "Fully paid" shares — Estoppel — Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A holder of shares in a company cannot relieve himself of his liability under section 25 *of the Companies Act*, 1867, *by alleging estoppel on the ground that the company gave him a certificate representing that the shares were fully paid up, if the circumstances were such that he must have known that no cash had been paid for the shares.*

The appellant was the registered holder of 16,000 *shares, in respect of which he had received certificates that they were fully paid up. He had paid no cash for the shares, and knew that the shares belonged to the company; no contract under section* 25 *of the Companies Act*, 1867, *had been registered before the issue of the shares.*

Held, that, as under the circumstances of the case he must have known that nothing had been paid for the shares, he was liable to be put on the list of contributories for the full amount.

This was an appeal by F. Bloomenthal from an order of Vaughan Williams, J., treating him as a registered shareholder of the company. The facts were as follow.

Bloomenthal, who did the company's printing, was asked in February, 1894, to lend them £1,000. The company gave an acceptance for the amount, and deposited with him 10,000 £1 fully paid-up preference shares as an additional security for the loan. Subsequently, in April, 1894, a further advance of £600 was made by him to the company on similar terms, and similarly secured by an additional 6,000 £1 shares. Bloomenthal was registered as the holder of the whole 16,000 shares, and received certificates in respect of them from the company in the following form: "This is to certify that Frederic Bloomenthal is the registered proprietor of 1,000 7 per cent. cumulative preference shares of £1 each, numbered —— to ——, both inclusive, in Veuve Monnier et ses Fils, Limited, subject to the articles of association, and that on each of such shares the full amount has been paid." It was also part of the arrangement that, if the company should wish at any time to pay off any part of the loan, the shares were to be returned at the same rate at which they were taken; and as a matter of fact, in December, 1894, the company sold 200 shares by auction, Bloomenthal executing a transfer of the shares and receiving £20 in part payment of the loan. No cash had ever been paid for the shares, nor had any contract been registered under section 25 of the Companies Act, 1867. It was also proved that Bloomenthal knew that the 16,000 shares which formed part of his security were portion of an issue of 40,000 shares which had not been well subscribed for by the public. The company went into liquidation in December, 1895.

In January, 1896, Bloomenthal took proceedings to have his name removed from the register. An order was, however, made for the compulsory winding up of the company before his motion could be heard, and he was placed on the list of contributories for the full amount of the shares standing in his name. He thereupon took out a summons in the winding up to have his name removed from the list of contributories.

Vaughan Williams, J., refused the application, on the ground that Bloomenthal had agreed to become a member of the company to secure his loan, and though he doubtless believed he was incurring no liability, yet, according to his lordship's view of the evidence, he knew that the £16,000 was not actually paid, and that he was an allottee of the shares. Bloomenthal appealed.

Astbury, Q.C., and *Mark Romer*, for the appellant.—The appellant got a certificate representing that the shares were fully paid up, and acted on the faith of that representation. The liquidator is equivalent to the company, and is therefore estopped from denying now that these shares were fully paid up: *Burkinshaw* v. *Nicolls*, 26 W. R. 819, 3 App. Cas. 1004. There was no contract that the appellant should be a shareholding member of this company, and the appellant never had any beneficial dominion over these shares. 200 were actually sold while he held them. The position of the appellant is that the shares were placed in his name for security, and he supposed that section 25 of the Companies Act, 1867, had been complied with long before he took these shares. *Sandy's case*, 37 W. R. 531,, 42 Ch. D. 98, turned on knowledge and representation. The evidence shows that the appellant repudiated before the petition to wind up was presented.

They also referred to *Waterhouse* v. *Jamieson*, L. R. 2 H. L. Sc. 29, 18 W. R. H. L. Dig. 8; *Beck's case*, 22 W. R. 348, L. R. 9 Ch. App. 392; *Western of Canada Oil, Lands, and Works Co.* v. *Walker*, 24 W. R. 165, 1 Ch. D. 115; *British Farmers' Pure Linseed Co.*, 26 W. R. 334, 7 Ch. D. 533; *Ooregum Gold Mining Co.* v. *Roper*, 41 W. R. 90, [1892] A. C. 125; *Parbury's case, ante*, p. 107, [1896] 1 Ch. 100.

Eve, Q.C., and *Martelli, contra*.—The appellant knew that he was the registered propietor of these shares. Therefore, apart from any question of contract, he became liable for the statutory liability. Our proposition is that he was put on inquiry. He knew that the company had failed to get these shares subscribed for. He was on the register and holding shares, and if he says now that the shares were fully paid up; he must show grounds for that belief. He admits that he knew that the shares belonged to the company. It is impossible, therefore, that he could have believed that they had been paid for by anybody. There was no repudiation till the winding-up petition had been presented. All that the appellant meant by saying that he believed the shares to have been fully paid up, was that he believed there was no further laibility on them.

Astbury, Q.C., in reply.—The appellant must have had actual knowledge that nothing had been paid for the shares, not merely constructive knowledge, if he is to be made a contributory. [RIGBY, L.J., referred to *Addison's case*, 18 W. R. 365, L. R. 5 Ch. App. 294.]

LINDLEY, L.J., after stating the facts, said:—Whether it was contemplated at the time of the loan that these shares should be registered in Mr. Bloomenthal's name or not does not seem to be clear. I see no evidence to show that it was part of the bargain that they should be registered in his name; but they were registered in his name, both as to the original 10,000 and the subsequent 6,000, and he received certificates from the secretary of the company which are very important. I will read one of them. [His lordship read the certificate, and continued:—] Now, that informs him of two things.

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

It informs him, first, that he has been registered in respect of those shares; and secondly, that on each of such shares the full amount has been paid. The first statement was true, the second statement was not true. Well, what was done was this. Knowing that he had been so registered, he did not in any way object to it. When the 6,000 shares are pledged to him as security for the further advance of £600, he receives further certificates in the same form, again informing him that he is on the register with respect to those shares; and what is very important with reference to one part of this case, is this: When the company require him, as they afterwards did in November, to transfer some of these shares to them to enable them to borrow money and repay him some of his advances, he executes transfers of these shares as a shareholder.

Pausing there for a moment, that last fact satisfies me that this case cannot be brought within the principle of *Beck's case*, on which Mr. Astbury relied. In *Beck's case* the man had been put on the register without any authority at all, and the only question, as James, L.J., said, was whether there was anything to prevent him from denying that he was a shareholder. There was absolutely nothing there, positively nothing. But here there is. There is the assertion by him, or the exercise by him, of his rights as a registered shareholder, by transferring some of the shares which were put into his name, and which were standing in his name with his knowledge and without any disapproval on his part. It appears to me, therefore, that it is impossible for him to say, as Beck said, "I am not a shareholder in this company." Such cases as *Sandy's case* and others are conclusive to my mind to show that he is a registered shareholder in respect of these shares, and he cannot get out of that position. Neither would he care to get out of it if the shares were what they are represented to be—namely, fully paid up.

But I pass from the first step, which I think is absolutely clear, to the second step, which is the really important and difficult one—whether he can say to the company, "You are estopped from requiring me to pay upon these shares because of your statement, on the faith of which I acted, that on each of the shares put into my name the full amount had been paid." Now, if this gentleman were in a position to avail himself of the equitable doctrine that he is a *bonâ fide* purchaser for value of these shares without notice of the truth—if that were really his position—I should be of opinion that he could say to the company, "You are estopped from denying that statement, and, although I am a shareholder, I am not liable to pay calls on those shares, because you have admitted yourself that they were fully paid up." That brings us to the question, which is the really difficult question in this case—the question of fact. That a *bonâ fide* holder for value of shares which purport to be paid up, without knowing that they are not paid up, is not liable to calls was settled in the Scotch case of *Waterhouse* v. *Jamieson*, and again in *Burkinshaw* v. *Nicolls*; and, although those were cases of transfers, I am of opinion that the doctrine is not necessarily confined to transfers, but may be extended to the case of an allottee. *Parbury's case* is an instance in point. In *Parbury's case* Parbury was an allottee from the company. He had paid a person the full amount of those shares in order that that person might pay the same to the company and procure for Parbury a proper certificate. The person (Wright) who received the money, and who was connected with the company, misapplied the money; but the company gave Parbury a certificate that they had received his money and that his shares were paid up in full, although, in truth, that was not the case. It appears to me that the doctrine sanctioned by the House of Lords twice over, in *Waterhouse* v. *Jamieson* and in *Burkinshaw* v. *Nicolls*, was properly applied to *Parbury's case*, although he was an allottee and not a transferee. He had every reason to suppose that the statement made by the company to him was true, and he had no reason to doubt that they had received his money, although in fact they had not.

Now, can Mr. Bloomenthal bring his case within that principle? Mr. Astbury has struggled very hard to satisfy us that he can. The case is put in the shortest possible way thus. Mr. Astbury says: "These certificates, which told me that I was the registered shareholder, told me in so many words that on each of such shares the full amount had been paid, and I had no suspicion that that was not true." That is the strongest way of putting it. Now, we have to investigate that. What did Mr. Bloomenthal know? It appears to me that he knew so much that if he had taken the trouble to investigate what he knew he would have realized the fact that these shares could not have been fully paid up; in other words, he knew facts which showed that that statement was untrue, although I believe him perfectly when he said that he did not think about the matter and did not see the consequences of what he was doing. Now, what he knew, unfortunately for him, was this. He knew, first of all, that the shares were the company's shares. It was part of the bargain that they should be the company's shares and should be pledged to him by the company for the debt of the company, and that he should hold them for the company, subject, of course, to the repayment of his debt. He knew that he did not pay for them. Now, it appears to me that, knowing these two things, he had all the facts necessary to show anybody who put them together and thought about the matter at all, that this statement could not have been true. It was suggested that, for anything he knew to the contrary, these shares might have been Mr. Austin's, the company's secretary, or somebody else's, and that he might be the nominee of Austin, or whoever the other person was. It appears to me that the nature of the transaction excludes the possibility of any such suggestion as that, and I think, although at first I doubted it, that Williams, J., was right when he came to the conclusion he did, as a matter of fact, that "Mr. Bloomenthal did not think for one moment that the £10,000 had been actually paid. That was not his notion. He knew perfectly well that the £10,000 was not actually paid. He knew perfectly well that he was allottee of the shares." I believe that is true, though it must be qualified with this, though I am afraid the qualification cannot assist Mr. Bloomenthal, he did not think it out. It is not that he did not know, but that he did not think it out, and he has unwarily fallen into a pit from which the ingenuity of his counsel, backed as it is by the desire of the court, cannot extricate him. I think the appeal must be dismissed, and dismissed with costs.

LOPES, L.J.—In this case Mr. Bloomenthal is on the register for 16,000 shares, and he desires to be relieved from the liability attaching to his position as a registered shareholder. Now, I do not hesitate to say that this is a very hard case, and, speaking for myself, I have struggled, so far as I have been able, to exonerate him from the terrible liability which he has brought on himself. There can be no doubt of this, that he is a registered shareholder; and I can have no doubt that he perfectly well knew that he was. But then what he relies on and what is urged by counsel on his behalf is this, he relies on estoppel. How far he can rely on that, in

my judgment, depends on a question of fact, that question being what he really did know. If he did not know and had no reason to know that these shares were not fully paid up, the certificates to which reference has been made, which state in the clearest language that the shares were fully paid up, would estop the liquidator and would prevent his setting up the truth; but if, on the other hand, he knew or ought to have known that those shares were not fully paid up, the estoppel would be unavailing. Now, I cannot doubt that he knew as a fact that these shares were not fully paid up shares. He knew and must have known that he had not paid for them. He knew and must have known that there had been no transfer to him of those shares, and he knew that the public, to whom those shares had been offered, had not taken them up. Moreover, and that I think is more important than anything else, he said he knew the shares belonged to the company. Now, how is that consistent with his believing the shares to be fully paid up? I cannot but come to the conclusion that he knew or had reason to know, or ought to have known, that they were not fully paid up. In my judgment he knew, as a fact, that they were not fully paid up, but he did not know the effect of that knowledge on his liability. I think the appeal must be dismissed.

RIGBY, L.J.—I regret to feel myself constrained to agree with the judgment that has been already pronounced by the Lords Justices. I say so because I think this was a case in which none of the parties concerned, for a moment thought that so serious a responsibility was being put upon Mr. Astbury's client. But we have to deal with a code contained in Acts of Parliament, and, although there are many advantages in a code, there are some disadvantages. There are cases in which it might be advantageous to introduce modifications which we cannot find in the code itself; but, if such cases do occur, our duty is to obey the directions given by the Legislature; we have no other duty at all. Now, I assume without hesitation in favour of Mr. Astbury's client that he never understood or believed for a moment that he was incurring this liability; but he had the great indiscretion to deal to a large amount in matters about which he knew very little, in matters in which his own opinion as to the legal effect of what he was doing was of no importance; but the question is what he did and what was in his mind. Now, assuming that, although he was an allottee and not a transferee, he would be entitled to the benefit of the doctrine that a *bonâ fide* purchaser without notice (and I include a mortgagee in that description) is entitled to rely on a positive statement made to him by the company, which he had not the means of knowing to be inaccurate in the important sense in which it was supposed to have been made; he is entitled to that, if he can show that he was in truth a purchaser for value without notice. I assume also in his favour he was not put upon inquiry. It was not a question of constructive notice, but of direct and positive notice, which to a reasonable man ought to have been sufficient to bring him to the conclusion that the statement made in the certificates, that the shares were fully paid up, was not made in the sense that cash had passed from any person to the company to the extent of £1 per share; but that it was made only in the sense that the company were content to treat them as I believe they did intend to treat them. I have no reason to believe to the contrary, and therefore I do not assume any proposition such as that there was a deliberate attempt at cheating, because I think he could only believe it in the sense that they were content to treat them as fully paid-up shares.

Now, it clear when we put together the facts—which, unfortunately for this gentleman, he was incapable of putting together for the purpose of deriving a correct legal conclusion from them—that he knew the position, for he had conversed with the secretary of the company on the question, and I cannot suppose that this conversation had passed from his mind at the time. He knew that the 40,000 preference shares, of which the 16,000 in question here formed part, had been offered to the public and to a great extent offered in vain. He knew therefore that of that 40,000 a considerable portion remained with the company. They had not been issued and therefore were not in a proper sense shares, but they formed part of the capital of the company capable of being issued, and he knew that they remained with the company in that sense. He bargained with the company, in plain language, that he would have a portion of that capital placed at his disposal, as security for the promissory notes or bills of exchange that they gave for the moneys advanced; and that the company, and the company alone, subject to his security, were to have the disposal of those shares, and be in fact the owners of those shares. All that he knew, and, as has been pointed out by Lindley, L.J., there can be no doubt that he also knew, and knew as a matter of substantial knowledge, that he was the registered owner. He was told so by the very certificate on which he relies, as containing the statement which he seeks now to make, through his counsel, an estoppel. But not only that. There were two stages of the transaction and a third final dealing when he was called on to retransfer, and did retransfer, in pursuance of his agreement to do so, some of these shares. Now, all that he knew. He knew also that not a farthing of cash had passed from himself to the company in the way of payment of the capital that could be called up on those shares. He knew also—I say he knew, and he must have known it, all the circumstances of the case pointed it out to him—that no one had paid it. The theory that someone else might possibly have paid and so become the owner of the shares is met by the unfortunate fact that he knew there was no owner other than the company, and therefore no one could have paid them. I say therefore, unhappily for him, he did know that the shares were not fully paid up in the only sense that could have availed him; that is to say, he knew there was no person in existence who could have paid the company £1 per share, or, indeed, any sum whatever per share, so as to make them fully paid-up shares; and I can only reconcile, as I most willingly do, his evidence on the point by assuming, as the learned judge appears to have done, that when he said, "I had not a suspicion they were not fully paid up," he was speaking quite honestly. He had not a suspicion that they were not at law so fully paid up as to entitle him to be registered as the owner without any demand being made upon him. I do not think there is any sign at all that this gentleman tried to say anything that was not quite right. I fully accept that view. I think he is most unfortunately situated. It is a pity that a man should have undertaken so serious a matter as allowing himself to be registered, as undoubtedly he did, as the owner of 16,000 shares which he must have known were not certainly worth the full amount of £1 per share, and that he should have undertaken to do so without seeking advice which would at once have told him, "The very facts you put before us prove that these are not fully paid-up shares"; and the facts which Mr. Astbury himself has told us prove that he cannot rely on an estoppel.

Appeal dismissed.

Solicitors, *Romer & Haslam; Cush, Phillips, Waters, & Williams.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) May 8, 11.

KNIGHT *v.* SIMMONDS. (*a.*)

Building estate—Building scheme—Restrictive covenants—Right to enforce covenants—Acquiescence in breach—Change in character of property.

A person who, by virtue of a building scheme, has a right to enforce a covenant prohibiting the carrying on of a trade or business upon certain land may lose that right by acquiescing in systematic breaches of the covenant, or by a total change in the character of the building estate. But the fact that on a part of the building estate remote from the plaintiff's property businesses have been carried on in breach of the covenant is not, unless it appears that the plaintiff knew of what was being done, proof of acquiescence by him; and a change in the character of the property must, to deprive the plaintiff of his right, be so complete as to make the object for which the covenant was imposed impossible of attainment.

Held, upon the facts of the particular case, that the plaintiff had not lost his right.

Duke of Bedford *v.* Trustees of the British Museum, 2 *My. & K.* 552; Sayers *v.* Collyer, 33 *W. R.* 91, 28 *Ch. D.* 103; *and* German *v.* Chapman, 26 *W. R.* 149, 7 *Ch. D.* 271, *considered.*

Appeal from Romer, J.

In May, 1852, the Cottenham Park Estate, a freehold estate of over two hundred acres, at Wimbledon, was bought by one Finch, who laid it out in accordance with a building scheme for the erection of dwelling-houses of a superior class, and put it up in lots for sale by public auction. The particulars and conditions of sale required each purchaser to enter into a covenant with the vendor, his heirs, appointees, and assigns, not to permit or suffer any trade or business whatsoever to be set up or carried on in or upon any of the lots, or any taverns, hotels, tea-gardens, lunatic asylums, beershops, or shops of any kind to be opened, or goods or wares to be exposed for sale, on any part of the land sold to him (with an exception as to certain lots about which no question arose).

At the auction, in November, 1852, one W. G. Smith bought the lots numbered 47 and 48, which were duly conveyed to him in December, 1852. The deed of conveyance recited that the purchase was subject to the conditions of sale, and that these provided for the purchaser entering into such covenant with the vendor as was after expressed in the said deed. The covenant actually entered into, however, only bound the purchaser not to permit any trade, &c., "without the consent in writing" of the vendor, his heirs, appointees, or assigns. The plaintiff Knight afterwards, with notice of the original conditions and particulars of sale, and of the conveyance to Smith, purchased part of lot 49 from one Trist, to whom Smith had sold it.

The other purchasers at the auction, and Messrs. Buckle & Philps, the purchasers by private contract of the part of the estate not sold at the auction, entered into absolute covenants in accordance with the original conditions. Buckle & Philps then laid out their purchase according to a new building scheme, dividing it into smaller lots. The covenant required of each purchaser under this sub-scheme was contained in a deed of covenant dated the 14th of June, 1853, and provided that he should not, on the land bought by him, carry on, or permit or suffer to be carried on, a tavern, hotel, tea-garden, lunatic asylum, or beer-shop, or any other shop, nor expose or permit to be exposed for sale any goods or wares, and should not carry on, or make or permit or suffer to be carried on, any trade or business which should be noisy, noxious, dangerous, or offensive to the neighbourhood or to the neighbouring owners or occupiers, or which should be in any wise injurious to the land subject to the sub-scheme.

The defendant, in 1893, bought his land, which was part of the land comprised in the sub-scheme, with notice both of Buckle & Philps's covenant and of the deed of covenant of June, 1853. His predecessor in title had bought of Buckle & Philps in 1853, with notice of their covenant, and had executed the deed of June, 1853.

The defendant shortly after his purchase began to erect on his land a building which he intended to use as a laundry. Notwithstanding notice from the plaintiffs that they should object to the building as a breach of the covenant, he completed it, and he was now carrying on there the business of a laundryman. He had not obtained such consent to the carrying on of any trade or business as was required by the covenant in the conveyance to Smith of December, 1852; and it was admitted at the trial that he had bought with notice of that covenant, and also of the original conditions of sale.

The plaintiffs commenced this action to restrain the defendant from carrying on any business on the land purchased by him, and from committing other alleged breaches of covenant.

On the 22nd of February, 1896, Romer, J., decided that the plaintiff Knight was, but the other plaintiffs were not, entitled to an injunction against the carrying on of any business on the premises, and refused the other relief sought.

The defendant appealed.

Eve, Q.C., and *E. C. Macnaghten*, for the appellant, cited *Sayers* v. *Collyer*, 33 W. R. 91, 28 Ch. D. 103; *German* v. *Chapman*, 26 W. R. 149, 7 Ch. D. 271; and *Duke of Bedford* v. *Trustees of the British Museum*, 2 My. & K. 552. They contended that the plaintiff Knight had acquiesced in the carrying on upon the property of various trades, particularly laundry businesses; and, further, that the whole character of the property had been changed, so that the estate had ceased to be residential, and that the covenant against carrying on business, &c., was no longer binding.

Astbury, Q.C., and *R. M. Bray*, for the respondent, were not called upon.

LINDLEY, L.J.—I think the judgment of the learned judge is quite correct. [His lordship stated the facts, and proceeded:—] The defendant has begun to carry on business as a laundryman, and his defence is that this is not a proper case of restrictive covenant, because the nature and character of the property has been altered. The facts appear to be these. Romer, J., has found that it is not true to say that the character of this property has been changed. All the houses are and have been used for residential purposes, but at some corner of the property bought from Buckle & Philps people who have bought places which look like residences have more or less carried on business therein. Romer, J., has found some facts as to that which I think of importance, and therefore I will refer to that part of his judgment; for, having attended carefully to the argument, I cannot see the slightest reason for disagreeing with the learned judge, and therefore I shall read part of his judgment (as reported [1896] 1 Ch. 653, 662): "The defendant contends that the estate has so changed from its original residential character,

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law

and that the original scheme has been so departed from on this part of the estate, that it would be inequitable now to enforce the scheme and original covenants as against the defendant. And further, he contends that, in any case, so many businesses (especially laundry businesses) have been carried on upon this part of the estate, and for so long a time, that the plaintiff ought to be now held precluded by acquiescence or otherwise from any right he might otherwise have had to restrain him. In my opinion, on the evidence, the defendant fails to establish any such case as would enable the court to uphold either of these contentions. Notwithstanding the evidence of several of the defendant's witnesses, I am satisfied that this part of the estate, like the rest of it, has continued to be and is still practically a residential one. Nor has the original scheme been so departed from as to render it inequitable that it should now be enforced at the instance of the plaintiff Knight. All the houses have been built as private houses. Looking at them from the exterior they all appear to be, and to be used as, private residences only. In no case before this action was brought was there any outward or visible sign on or about the premises to call the attention of any passer-by, or of the plaintiff Knight, to the fact that any of them were used except as private houses." Then he goes on (p. 664): "Such breaches of the scheme and covenants as there were by reason of these laundry businesses were done secretly as far as concerns the general landowners and residents entitled to enforce the covenants, including the plaintiff Knight. Not only did these landowners and residents not acquiesce in any breach of the scheme and covenants; but there is abundant evidence before me of their care in enforcing them whenever a breach was threatened or committed to their knowledge." He also says: "I am satisfied that the general landowners and residents, including Knight, were not aware that any breach was being committed which could be proved or stopped."

In these circumstances I should have thought that the case was a tolerably plain one; but the argument on behalf of the appellant has induced me to look into the authorities on this subject, which I had not for some time had opportunity or occasion to consider. I will state the result of those authorities as I understand them. These covenants do not at law run with the land. Here the breaches were undisputed, but the defence to the action was change in the character of the neighbourhood and acquiescence. When a court of equity is asked to enforce a covenant by decreeing specific performance or granting an injunction—in other words, when equitable as distinguished from legal relief is sought—equitable as distinguished from legal defences have to be considered. The conduct of the plaintiff may disentitle him from relief; his acquiescence in what he complains of, or his delay in seeking relief, may of itself be sufficient to preclude him from obtaining it. *Sayers* v. *Collyer* and *Roper* v. *Williams*, T. & Russ. 18, illustrate this. In both of those cases the court refused to enforce restrictive covenants at the instance of the particular plaintiffs. But, further, before granting equitable relief, courts of equity look not only to the words of a covenant, but to the object to attain which it was entered into; and if, owing to circumstances which have occurred since it was entered into, such object cannot be attained, equitable relief will be refused. This doctrine was laid down and acted upon by Lord Eldon and Sir Thomas Plumer in *Duke of Bedford* v. *Trustees of the British Museum*, by Woods, V.C., in *Peek* v. *Matthews*, 15 W. R. 689, L. R. 3 Eq. 515, and was recognized in *German* v. *Chapman*. It is upon this ground that restrictive covenants intended to preserve the character of land to be laid out and used in a particular way will not be enforced if such land has already been so laid out or used that its preservation as intended is no longer possible. Such state of things can seldom (if ever) have arisen except from a departure from the scheme by the vendor and purchasers from him or from the acquiescence or laches of those entitled to enforce the observance of the covenants in question; but, whatever the explanation of the altered state of things may be, if the object to be attained by the covenant cannot be attained, equitable relief to enforce it will be refused. Nor do I understand the observations of Bowen and Fry, L.JJ., to be opposed to this view of the law. Their object evidently was not to discredit the cases I have referred to, but rather to guard against a loose application of the principle on which they proceed. Some expressions of Lord Eldon in *Roper* v. *Williams* and *Duke of Bedford* v. *Trustees of the British Museum* led to the notion that if a restrictive covenant for the preservation of building estate was not enforced in all cases, it could not be enforced in equity in any. But this notion was emphatically protested against by the Court of Appeal in *German* v. *Chapman*, and its error had been previously pointed out by Wood, V.C., in *Mitchell* v. *Steward*, 14 W. R. 453, L. R. 1 Eq. 541, 547. The evidence in the present case shows that, except in a few instances of no real importance, the restrictive covenants entered into with the vendor when the property was sold in lots for building purposes have always been observed. There has been no departure worth mentioning from the scheme originally adopted. The case, therefore, falls within *German* v. *Chapman*, and not within *Duke of Bedford* v. *Trustees of the British Museum* and *Peek* v. *Matthews*. The facts as found by Romer, J., are clearly warranted by the evidence, and no grounds have been shown to disentitle the plaintiff from the relief which he sought, and which he has obtained. The appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. It appears to me that the law is correctly laid down in *German* v. *Chapman*. The learned judge has found, and I think rightly, that the defendant is bound to establish that the nature of the property has been so substantially changed that the object of the covenant was to be considered at an end. The learned judge has found, on the contrary, that it was not so changed. In those circumstances this case must be governed by *German* v. *Chapman*, and therefore the appeal fails. I would only add that, looking at the evidence, I entirely agree with the learned judge's view, and on that evidence I should find the same way as he has done.

KAY, L.J.—I am of the same opinion, and shall add one or two observations, because the case is one of some importance. [His lordship stated the facts, and proceeded:—] Those covenants having been imposed for the purpose of keeping the whole of this property as a residential property, they were covenants to carry out a building scheme, and therefore in equity were to be considered as covenants entered into for the benefit of each of the several purchasers of lots in this building estate. Accordingly each of the purchasers has a right in equity, though not at law, to enforce those covenants against the purchaser of any other lot, and it is just the same thing in equity as though the defendant, or rather his predecessor in title, had entered into that covenant with the predecessors in title of the plaintiffs directly. Two answers are made to the action. First, it is said that the plaintiffs have disentitled themselves from bringing it, because they have acquiesced in a laundry business being carried on, not indeed on this particular plot of land, but somewhere on the estate; and, secondly,

that even if they had a title to bring the action, still the character of the whole property has been so changed that it is no longer a residential property, but is a property on which one may carry on such a business as this. I am not going into the facts, but I agree entirely with the findings of the learned judge. In the first place, I think the plaintiff never had acquiesced; and in the second, the property had not been so far altered in character that it had ceased to be a residential estate and that the plaintiffs had lost their right to enforce this covenant. The defendant is in the same position in equity as if his predecessor in title had entered into a direct covenant with the plaintiffs not to carry on any trade or business. The alteration in the character of the property must be a very considerable one indeed if it prevents the plaintiffs from enforcing in equity that covenant to the benefit of which they are entitled. It is obvious that a trade might be carried on in some remote part of the estate without doing these plaintiffs any injury whatever; and if it be said that they are to lose their right to sue unless they at once put a stop to that trade, although the infringement did them no kind of damage, the benefit of the covenant would be lost entirely. I should hesitate very much indeed before I came to the conclusion that one such instance of infringement was enough to disentitle the plaintiffs to maintain this action. In a building estate of this size a man in the position of one of the plaintiffs might very well know nothing of such an incident as I have mentioned; and I cannot think the fact that he did nothing to stop that would prevent him from taking proceedings against a man who should carry on the same trade in such proximity to his house as to do him probably a great amount of damage.

I think the appeal entirely fails, and must be dismissed with costs.

Appeal dismissed.

Solicitors, *John Bartlett; Jenkins, Baker, & Co.*

High Court of Justice.

Chan. Div.
Chitty, J.

June 3.

In re THOMPSON.
GRIFFITH *v.* THOMPSON. (*a.*)

Will — Absolute gift — Condition subsequent — Repugnancy.

A testator gave all his property, real and personal, to trustees for division among his children, their shares to be paid when they respectively attained twenty-eight. The will further contained a clause cutting down the children's shares to £1,000 each in the case of sons, and to £500 in the case of daughters, if any of them should embrace a religious life.

Held, following Saunders *v.* Vautier, *Cr. & Ph.* 240, *that there was an absolute gift to the children vesting on the testator's death, and the provision as to payment at twenty-eight was nugatory; and that the clause as to embracing a religious life was a condition repugnant to the former gift, and must be disregarded.*

Adjourned summons.

Edward Thompson, by his will, dated the 10th of November, 1868, after directing certain annuities to be paid, gave all his property, real and personal, to his trustees upon trust "to divide and distribute the same between my three sons—Arthur Thompson, Edward Thompson, and James Thompson—and my five daughters — Catherine Thompson, Elizabeth Thompson, Mary Anne Thompson, Annie Thompson, and Cecilia Thompson—share and share alike, the respective shares of my said sons to be paid to each of them on their severally attaining the age of twenty-eight years; but as to the shares of my said daughters who shall have attained or shall attain the age of twenty-eight years, or shall marry under that age with the consent and approbation of the trustees or trustee for the time being of this my will, it is my will that the interest, income, and dividends of each of their presumptive shares shall be paid to them respectively until they shall be married, and upon the marriage of each and every of my said daughters my said trustees are to settle upon her her presumptive share of my property, with remainder to her issue, with cross remainder between and among each and all my said daughters."

The will further contained the following clause: "Provided always, and I hereby direct the trustees or trustee for the time being of this my will, that in the event of any child or children embracing a religious life—that is to say, becoming a Roman Catholic priest, monk, nun, sister of mercy, or a member of any other religious community bound by a monastic vow or vows, then and in that case the provision for each such child as shall be a son to be £1,000, to be paid to him if he shall attain the age of twenty-eight years, but not otherwise; and for each child as shall be a daughter to be £500, to be paid to her if she shall attain the age of twenty-eight years, but not otherwise, on her attaining that age."

By a codicil dated the 22nd of February, 1884, the testator extended the provisions of his will to three younger children—Henry, Hilda, and Mary Irene Thompson.

Hilda married A. C. Thomas.

There was no gift over of any of the children's shares.

Henry Thompson, one of the sons aged twenty-five, and who had been for over a year a novice in a monastery at Ramsgate, claimed to be paid his share of the testator's estate; and the question raised by summons for the decision of the court was as to the effect of the condition in the will against any child embracing a religious life.

Macswinney, for the trustees of Edward Thompson's will.—The clause as to the religious life is a valid condition subsequent, and equivalent to a revocation of the prior gift: *Re Dickson*, 1 Sim. N. S. 37; *Re Catt's Trusts*, 12 W. R. 739, 2 H. & M. 46. The condition may operate any time during the life of any child as to his or her share, and no share of the capital above £1,000 can be given to any child until his or her death.

E. C. Macnaghten, for Mr. and Mrs. Thomas.

Byrne, Q.C., and *Stokes*, for Henry Thompson.—The testator has tried to cut down a prior absolute gift by the condition as to embracing a religious life. This is a condition repugnant to the former gift, and therefore void, on the principle of *In re Machu*, 30 W. R. 887, 21 Ch. D. 838, and *In re Dugdale*, 36 W. R. 462, 38 Ch. D. 176.

Medd, for Mary Irene Thompson.

CHITTY, J.—If a testator gives a share so that it vests in possession on his death, and afterwards directs that it should be paid at some future period, that direction is void, within the principle of *Saunders v. Vautier*, Cr. & Ph. 240. The direction, therefore, here for payment at twenty-eight is nugatory and

(*a.*) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

void, so that the sons became entitled on the death of the testator, and in the case of the daughters their shares were settled.

Then as to the clause cutting down the former gift if any of the children embrace a religious life. By this clause the testator thought that as he had given so he could take away. But it appears to me that the testator has tried to cut down a prior absolute gift by a direct condition subsequent, which in my opinion is repugnant to the former gift, and therefore void.

Solicitors, *Simpson & Co.*, for *Kelly & Keene*, Mold; *Fooks, Chadwick, Arnold, & Chadwick.*

Chan. Div. }
Kekewich, J. } Jan. 16.

In re MONTAGU.
FABER *v.* MONTAGU. (*a.*)

Trustee—Infant—Infant tenant in tail in possession—Vesting order—Form of order—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 31, 32, 50.

The effect of an order under the Trustee Act, 1893, *appointing a person to convey the estate of an infant tenant in tail in possession for all such estate as the infant could if of full age convey, is to bar the estate tail and the remainders over; and no reference is needed to a disentailing deed or the Fines and Recoveries Act (as set out in Seton on Judgments, 5th ed., vol.* 2, *p.* 1067, *Form No.* 21).

Under an indenture of resettlement, dated the 26th of August, 1843, hereditaments known as "the Melton Estate" were limited to the use of Andrew Montagu for life, with remainder to James Montagu for life, with remainder to the first and other sons of James Montagu in tail male, with remainder to the daughters of James Montagu in tail, with remainder to Andrew Montagu in fee simple.

James Montagu died on the 11th of January, 1891, leaving male and female issue, the eldest of whom, Frederick James Osbaldeston Montagu, on the death of Andrew Montagu on the 8th of October, 1895, was aged seventeen years, and became tenant in tail male in possession. Andrew Montagu by his will, dated the 16th of September, 1895, devised real estate to which he was absolutely entitled (referred to in the will as the "secondly devised premises") to the use of trustees so long as Frederick J. O. Montagu should be living and under the age of twenty-five years, with certain powers of management, with remainder to the use of Frederick J. O. Montagu for life without impeachment of waste, with remainder to uses in favour of the sons and daughters of Frederick J. O. Montagu in tail male and in tail, with remainder to uses and upon trusts in favour of the brothers and sisters of Frederick J. O. Montagu and other persons.

The testator then devised the Melton Estate to the uses and upon the trusts and subject to the powers in his will declared concerning the "secondly devised premises," declaring that the last mentioned devise should take effect under the doctrine of election, and should thereby bind Frederick J. O. Montagu and every person who should become tenant in tail male or in tail in possession of the Melton Estate under the indenture of resettlement, and that Frederick J. O. Montagu and every other such person should accordingly, at the request and to the satisfaction of the trustees, at the expense of the Melton Estate execute, enrol, perfect, and do all such assurances and things, deeds, instruments, and acts as might be necessary for evidencing such election and giving effect to the devise of "the Melton Estate." And the testator declared that if Frederick J. O. Montagu or any of such other persons should refuse or neglect to comply with the request of his trustees, or should fail to execute, enrol, perfect, and do such assurances, &c., his will should be construed and the rights of all persons claiming thereunder should be determined in all respects as if the person so refusing, neglecting, or failing had died immediately before the testator, without having been married.

Upon an application in the matter of the infants his lordship, being of opinion that it would be for the infants' benefit to elect to take in accordance with the provisions of the will, on the 13th of December, 1895, appointed C. H. Morton guardian of the infants' estate.

The writ in this action was issued on the 16th of December, 1895, on behalf of the trustees of the will as plaintiffs, against Frederick J. O. Montagu and his brothers and sisters as defendants, to determine whether the infant defendants, or any of them, were bound forthwith to elect to take in accordance with the will; and that, if so, such election should be declared for them or him by the court, and directions given for complying with the will and vesting "the Melton Estate" in accordance therewith.

Renshaw, Q.C., and *Brabant*, for the plaintiffs.—The right course is to obtain an order appointing a person to convey the estate of the infant tenant in tail in possession: *Powell* v. *Mathews*, 1 Jur. N. S. 973; *Hargreaves* v. *Wright*, 1 W. R. 408. The court having by the order of the 13th of December, 1895, declared that it would be for the benefit of Frederich J. O. Montagu to take in accordance with the provisions of the will, no further election on his behalf is necessary: Seton, 5th ed., vol. ii., p. 1339, form 3; *Lamb* v. *Lamb*, 5 W. R. 772; *Blunt* v *Lack*, 3 Jur. N. S. 195, 5 W. R. Dig. 18. [KEKEWICH, J., referred to *Bankes* v. *Small*, 35 W. R. 765, 36 Ch. D. 716.] By the Trustee Act of 1893, ss. 31 and 33, the court is empowered where any judgment is given for the conveyance of land to declare that the parties to the action are trustees within the meaning of the Act, and to make an order appointing a person to convey. A form of order for the conveyance of freeholds by an infant is given in Seton, 5th ed., vol. ii., p. 1067, form 21, but no enrolment or reference to the Fines and Recoveries Act is now necessary: *Mason* v. *Mason*, 26 W. R. 565, 7 Ch. D. 707. The Trustee Act, 1893, s. 50, defines "convey" and "conveyance" as including the acts to be performed by the tenant in tail in accordance with the Fines and Recoveries Act.

P. O. Lawrence and *A. F. Morton*, for the defendants.—The giving of effect to the election should be postponed until the infants are of age: *Boughton* v. *Boughton*, 2 Ves. Sen. 12.

KEKEWICH, J.—When once the court finds that it can enforce the execution of a disentailing assurance, it can do so as against an infant, and declare him a trustee, and I direct an order to be drawn up accordingly.

The order was finally settled as follows:—Declare that it is for the benefit of the infant defendant, Frederick James Osbaldeston Montagu, to take in accordance with the will of the above-named Andrew Montagu; and declare that the manors, lands, and hereditaments in the county of York comprised in and now subject to the uses of the

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

indenture of resettlement dated the 26th day of August, 1843, in the statement of claim in this action mentioned, and which manors, lands, and hereditaments are hereinafter referred to as "the Melton Estate," ought, in pursuance of the provision in that behalf in the said will of the said Andrew Montagu, to be conveyed to the uses, upon the trusts, and subject to the powers and provisions in such will contained concerning the manors and hereditaments thereby devised which are therein referred to as "the secondly devised premises," and that the said manors, lands, and hereditaments be conveyed accordingly. And it appearing that the said defendant F. J. O. Montagu is tenant in tail male in possession under the said indenture of resettlement of the said Melton Estate, and that he is an infant, declare that the said defendant F. J. O. Montagu is a trustee of the Melton Estate within the meaning of the Trustee Act, 1893; and let Charles Henry Morton be appointed to convey the said Melton Estate for all such estate as the infant defendant F. J. O. Montagu could, if of full age, convey unto the plaintiffs as the general trustees of the will of the said A. Montagu and their heirs discharged from the estate in tail male of the said defendant F. J. O. Montagu under the said indenture of resettlement, and from all estates, rights, interests, and powers to take effect after the determination or in defeasance of such estate in tail male, to the uses, upon the trusts, and subject to the powers and provisions in the said will declared, contained, or referred to, concerning the said secondly devised premises; and let the said C. H. Morton convey the same accordingly, such conveyance to be settled by the judge.

Solicitors, *Avison & Co.*, Liverpool, for *Greenfield & Cracknall.*

Q. B. Div.
Commercial Court.
(Collins, J.) June 19.

NICOL *v.* HENNESSEY. (*a.*)

Sale—Trover—Wrongful sale by co-owner of shares in a ship—Implied contract of sale.

The plaintiff was the owner of certain shares in a ship. The defendant, who was the managing owner of the ship, being desirous of selling the ship, in a letter addressed to the plaintiff asked her for a bill of sale of her shares. This she refused to give, but subsequently she offered to sell her shares for £100. *The defendant, without further communication with her, sold the ship with the consent of all the other co-owners at a price which would have yielded to the plaintiff in respect of her shares a less sum than* £100.

Held, that there was an implied contract on the part of the defendant to pay for the shares as upon a contract of sale, and that, though there was no presumption of law that the defendant agreed to pay any price asked, yet, it being found that the price asked was a reasonable one, a presumption arose from the facts of the case that the defendant agreed to pay that price.

Action.

The plaintiff was the owner of two 64th shares in the sailing ship *Woodhall*, for which she had paid in 1891 £180.

The defendant, who was the plaintiff's brother, was the managing owner of the ship.

On the 3rd of January, 1896, the defendant, with the consent of owners representing thirty-eight 64th shares, entered into a contract to sell the ship for £1,875, less £50 for commission.

On the 29th of January he wrote to the plaintiff, telling her of the intended sale, and asking her to send him the bill of sale of her two shares.

The plaintiff refused to consent to the sale, and asked the defendant to furnish her with the accounts of the ship's voyages.

Further correspondence ensued, and the accounts were eventually delivered; whereupon the plaintiff wrote on the 17th of February:—

"Thanks for statement re *Woodhall* extending over a period of two years, from January, 1894, to January, 1896, showing a net loss of £469. This is, of course, very much to be regretted, but does not, I think, by any means justify sacrificing the property for less than a third of its original value, having regard to what she has done in past times and may be reasonably expected to do with a renewal of trade. However, I do not wish to cause unnecessary trouble, and therefore I am willing to sell my two shares for £100."

The defendant did not send any reply to that letter, but on the 19th of February, having obtained the consent of all the owners except the plaintiff, he transferred the ship and cancelled the register, at the same time giving the purchaser a bill of sale of the plaintiff's two shares, together with an indemnity against any action being brought in respect of them.

On the 21st of February the defendant's solicitor wrote to the plaintiff offering to send her a cheque for £57 0s. 6d., respresenting the proportion of the purchase money due to her in respect of her two shares, in exchange for a bill of sale of the shares.

This offer the plaintiff refused to accept, and she brought the present action to recover £100, the price of the shares, and alternatively to recover damages for conversion.

The defendant paid £57 0s. 6d. into court.

H. T. Boyd, for the plaintiff.—The defendant has dealt improperly with the plaintiff's goods. The plaintiff is entitled to waive the tort, and the law will imply a contract on the part of the defendant to buy the plaintiff's shares for £100, the price she asked for them: *Hill* v. *Perrott*, 3 Taunt. 274, and *Abbotts* v. *Barry*, 2 Brod. & B. 369. [COLLINS, J., referred to *Lee* v. *Shore*, 1 B. & C. 94.] The majority owners have no right to sell. The managing owner should have commenced a co-ownership action in Admiralty to compel his co-owners to sell. The defendant has paid £57 0s 6d. into court. That amounts to an admission that there was a contract of sale: *Bennett* v. *Francis*, 2 Bos. & P. 550.

For the defendant evidence was called to show that the ship was not worth more than £1,500 or £1,600.

H. Holman, for the defendant.—The true measure of damages is the market price of the plaintiff's shares at the time of the sale; £57 0s. 6d. was the full value.

COLLINS, J.—There is no defence to this action. The only question is what sum ought the defendant to pay. [His lordship, after reciting the facts, proceeded:—] The defendant had received from his sister a refusal to consent to the sale, and he had told her that her holding out would prevent the sale taking place. She therefore offered to sell her shares for £100, and he, without saying more, gave a bill of sale of her two shares to the purchaser of the ship. I do not think it would be a very violent inference to draw, that he consented to the terms on which she was willing to sell.

The authorities cited establish the proposition

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

that if a person deals with and exercises acts of ownership over the property of another then there is an implied contract to pay for the property as on a contract of sale. Therefore a presumption arises that plaintiff's interest was sold to the defendant, and there was an implied contract that the defendant should pay for it. I do not think that there was an implied contract for the price named by the plaintiff; for the plaintiff might have mentioned an unreasonable amount, say £500. The legal presumption is limited to a reasonable price. But the legal presumption is quite distinct from the presumption arising from the facts of the case. So that here I do not think it is a violent presumption to say that £100 is to be taken as the amount which he agreed to pay in order that he might deal with the shares.

I am not bound to accept the evidence for the defendant as to the value of the ship. Where the owner of the chattel sold is not under any obligation to sell the price got is no evidence of the value of the chattel to the owner, who may not be willing to sell at all. No sale against the wish of the plaintiff could have been made without the intervention of the court. She has been deprived of the benefit of such an inquiry; so that here I say that £100 is not only the agreed value, but I am not sure whether it is not also the true value of the shares.

Judgment for the plaintiff for £100 with costs.

Solicitor for the plaintiff, *Robert Greening.*

Solicitors for the defendant, *Downing, Holman, & Co.*

C. C. R.
(Lord Russell of Killowen, C.J., Pollock, B., Hawkins, Cave, and Wills, JJ.) April 25.

REG. *v.* HOPKINS AND FERGUSON. (*a.*)

Criminal law—Charge on property to defraud creditors —Bill of sale executed by defendant in pending action —Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13.

The plaintiff in an action to recover unliquidated damages is not a creditor of the defendant within section 13, *sub-section* (2), *of the Debtors Act*, 1869, *until he has signed judgment. Therefore the defendant in such an action who before judgment has granted a bill of sale over his property with intent to defeat any judgment which the plaintiff may obtain cannot be convicted under that sub-section of having made a charge on his property with intent to defraud the plaintiff.*

Case stated by the Recorder of Manchester.

The defendants were jointly indicted at the Manchester Quarter Sessions, Hopkins for having, on the 8th of October, 1894, unlawfully and with intent to defraud one Annie Copeland, a creditor of Hopkins, made a charge on the property of Hopkins, to wit, a bill of sale of all the household furniture and other effects of Hopkins in and upon certain premises, and Ferguson for having aided and abetted Hopkins.

Section 13 of the Debtors Act, 1869, enacts that a person shall be guilty of a misdemeanour (sub-section (2)) "if he has, with intent to defraud his creditors or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property."

It was proved that on the 8th of October, 1894, an action to recover damages for breach of promise of marriage was pending between Annie Copeland as plaintiff and Hopkins as defendant; that on that day Hopkins granted in favour of Ferguson a bill of sale of all his furniture and effects upon certain premises, and that at the time the bill of sale was granted both the defendants had the intention to defeat any judgment and execution which Annie Copeland might obtain in her action; and that on the 2nd of November, 1894, judgment in the action was given for the plaintiff for £25 and costs.

At the close of the case for the prosecution it was objected on behalf of the defendants that, inasmuch as at the time of the granting of the bill of sale Annie Copeland had not recovered judgment against Hopkins, she was not then a creditor within the meaning of sub-section (2) of section 13 of the Debtors Act, 1869.

The recorder overruled the objection, and the jury found both the defendants guilty.

The question for the opinion of the court was whether the recorder was right in holding that Annie Copeland was, on the 8th of October, 1894, a creditor of Hopkins within the above sub-section.

C. Rose-Innes, for Hopkins, was stopped by the court.

C. A. Russell, for Ferguson, was not called upon to argue.

M'Keand, for the prosecution.—Section 13, sub-section (2), of the Debtors Act, 1869, applies to an intention to defraud future as well as present creditors. In *Barling* v. *Bishopp*, 8 W. R. 631, 29 Beav. 417, it was held that a voluntary conveyance made by a defendant in an action of trespass after notice of trial with the object of defrauding future creditors was void under 13 Eliz. c. 5.

LORD RUSSELL OF KILLOWEN, C.J.—I have no doubt as to what our decision ought to be in this case. The simple point for our consideration is whether the prosecutrix was at the time this bill of sale was granted a creditor of Hopkins within the meaning of section 13, sub-section (2), of the Debtors Act, 1869. In my judgment it is perfectly clear that she was not. She had brought an action for breach of promise of marriage against him, in which she might or might not succeed; in other words, she had a cause of action against him at that date which might, and in the event did, mature into a judgment. Indeed, if she had already obtained a verdict in her favour, but had not signed judgment, she would not have been a creditor of Hopkins. *Jones* v. *Thompson*, 6 W. R. 443, E. B. & E. 63, is an authority for that proposition. This disposes of the case against both defendants, for if Hopkins could not be convicted Ferguson could not be convicted of aiding and abetting him.

The convictions must be quashed.

POLLOCK, B., and HAWKINS and CAVE, JJ., concurred.

WILLS, J.—I am of the same opinion, and I only wish to add that even in cases arising under 13 Eliz. c. 5, which has been referred to, a narrower construction has been placed upon those portions of the Act which deal with criminal matters than upon those which deal with civil rights and remedies.

Convictions quashed.

Solicitor for the defendant Hopkins, *Millar*, Manchester.

Solicitor for the defendant Ferguson, *Kirkman*, for *W. Thompson*, Manchester.

Solicitor for the prosecution, *Solicitor to the Treasury.*

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

IN BANKRUPTCY.

Q. B. Div.
(Vaughan Williams and Kennedy, JJ.) April 30; May 2.

In re BARR.
Ex parte WOLFE. (*a.*)

Bankruptcy — Petition — Inequitable proceeding — Debt payable at future time — Amount of debt for which petition should be presented — Rebate of interest — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-section* 1 (*b*); *s.* 7, *sub-section* 3.

A debt due on a promissory note at three months which are unexpired is a good petitioning creditor's debt, although the lender has given the borrower the option of renewing the note at the expiration of every three months on payment of forehand interest.

On presenting a petition for a debt payable in future the creditor must allow a rebate of interest.

It is not inequitable to take proceedings in bankruptcy upon a note not yet due, and given with such option of renewal, in a case where the creditor has notice of an act of bankruptcy committed by the debtor.

Appeal from the dismissal of a bankruptcy petition by the registrar of the county court at Bradford.

Upon the 16th of August, 1895, Wolfe, the petitioning creditor, lent Barr, the debtor, £100, taking a bill at three months for £115, and giving the debtor the following written undertaking:—

"August 16, 1895.

"This is to certify that in the event of Robert Barr, who has this day borrowed the sum of £100, being unable to pay the same, with interest (namely, the sum of £15 as per promissory note), at the end of three months, the same shall be renewed, provided the sum of £15 is paid from time to time as interest."

In November the debtor paid £15, and the note was renewed until February, 1896. In December he committed an act of bankruptcy by having his goods seized and sold. Wolfe presented a petition founded on this act of bankruptcy in January. It was dismissed by the registrar on the ground that under the circumstances of the case proceedings in bankruptcy were inequitable.

Wolfe appealed.

A. H. Carrington, for the appellant.—Although the creditor here had renewed the bill until February, there was nothing inequitable in his presenting a petition in January, because he had notice of the act of bankruptcy in December and could not safely take any money in payment off of the loan from the debtor: *Re Lowe, Ex parte Lowe*, 38 W. R. 560, 7 Morr. 25. His only chance of recovering any of the money he had lent was to make the debtor a bankrupt.

C. E. Jones, for the respondent.—The debt was not one upon which a petition could be presented, because it was not payable at a certain future time. The debtor had the option of renewing the bill indefinitely, therefore the date of its payment was uncertain. There are no cases showing that a current bill is a good petitioning creditor's debt. [VAUGHAN WILLIAMS, J., referred to *Ex parte Douthat*, 4 B. & Ald. 67.] [KENNEDY, J., referred to *Hill* v. *Harris*, 1 Moo. & M. 448.] I also say that the proceedings were inequitable, because the creditor's undertaking of the 16th of August amount to an implied covenant not to sue upon the bill.

A. H. Carrington, in reply.—The effect of the prepayment of interest was only to renew the bill for three months certain. [VAUGHAN WILLIAMS, J.—Then in one way or another there was a promise to forbear taking proceedings for three months.] No, the creditor reserves his rights in bankruptcy. The effect of taking the forehand interest depends on the terms of the undertaking of August 16. By renewing the bill the creditor only means that he will make the debt payable at a future date. [VAUGHAN WILLIAMS, J.—Does not the acceptance of forehand interest always imply a covenant not to sue?] I say it only puts the debt off, makes it payable in future instead of *in præsenti*. I contend that the consideration for which it was given has not failed because the debt was put off. [VAUGHAN WILLIAMS, J.—Will you offer to return the forehand interest?] Yes, I will give it up.

Cur. adv. vult.

May 2.—VAUGHAN WILLIAMS, J., delivered the judgment of the court.—This is an appeal against the registrar of the County Court of Bradford refusing a receiving order, and, as far as I understand his refusal, it was based on the ground that in his opinion it would have been inequitable to make a receiving order. So far as that ground goes we think he was wrong. The supposed equity was based on an agreement of the 16th of August, 1895, whereby the petitioning creditor undertook constantly to renew an acceptance for money lent upon the terms of forehand interest being paid, and the registrar seems to have thought it inequitable that the petitioning creditor should base a petition on such an acceptance, but we think that, the debtor having committed an act of bankruptcy, there was nothing inequitable in the petitioning creditor acting as he did.

It remains that we should see if there is any other ground upon which the refusal can be supported. Under the Bankruptcy Acts prior to 1869 a debt presently due, payable in future, was a good petitioning creditor's debt. It was not so under the Act of 1869, but became so again in 1883 by virtue of section 6 (1) (*b*), of the Bankruptcy Act, 1883: "6 (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (*b*) the debt is a liquidated sum payable either immediately or at some certain future time."

The only question therefore is whether the effect of the letter of the 16th of August, 1895, is to prevent the debt being payable at some certain future time. [His lordship here read the letter.] Notwithstanding this letter giving, apparently for an indefinite time, to the debtor the right to have the note renewed, nevertheless there is a debt payable at some certain future time, and we think the petition cannot be dismissed. We arrived at this conclusion upon the hearing of the argument, but I was anxious, as the judge in bankruptcy, that there should be no precedent which would enable a creditor under these circumstances to support a petition for a larger debt than he is really entitled to. Here is a debt payable in future, the three months not having run out. The question arises as to what is the amount of debt for which the creditor may prove. In this case there was only a short time to run, but I take it that in any case a creditor should not rely on more than remains after rebate of interest. Further, in this case the consideration has partly failed, and there is a bonus within section 23 of the Bankruptcy Act, 1890; but Mr. Carrington is willing to claim only £100, without prejudice to the right of the creditor to amend his proof by adding what he may think is due to him for interest by virtue of the terms of his bargain.

Appeal allowed.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Solicitor for the appellant, *J. Golman*, agent for *Albert V. Hammond*, Bradford.

Solicitors for the respondent, *Jaques & Co.*, agents for *Johnson Richardson*, Bradford.

Q. B. Div.
(Vaughan Williams and Kennedy, JJ.)

April 30.

In re ALICE SCOTT.
Ex parte ALICE SCOTT. (*a*.)

Bankruptcy—Act of bankruptcy—Oral notice of suspension of payment by non-trader — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (h).

A statement by a debtor who is not a trader that he is unable to pay his debts should not be construed as a notice of intention to suspend payment unless accompanied by a statement tending to show that the debtor proposes to deal with his creditors collectively.

Appeal by the debtor from a receiving order made against her by the registrar of the county court at Canterbury.

One of Miss Scott's creditors called upon her upon the 16th of January, 1896, to collect his own debt and that of the petitioning creditor, and she asked him to call again upon the 18th. When he called upon the 18th the servant opened the door upon the chain, and said that Miss Scott would see no one. Miss Scott also called out from within. "I will not see anyone." The creditor said, "Will you not pay my debt or Mr. X.'s?" (the petitioning creditor's); to which Miss Scott replied, "No, I won't pay anybody now. It is too late now, I am acting under advice. I refuse to see anybody at all."

The registrar found that these words constituted a notice of suspension of payment, and made a receiving order against Miss Scott, from which she appealed.

J. W. Weigall, for the appellant.—Miss Scott did not intend any notice of suspension by her words. She meant that it was too late in the evening to deal with the creditor, and that she would pay him shortly. If this is held to be a notice of suspension, it will be dangerous to tell a man that you cannot pay him now, but will pay him at the end of the week when your dividends come in.

He cited *Ex parte Oastler, Re Friedlander*, 33 W. R. 126, 13 Q. B. D. 471; *Crook* v. *Morley*, [1891] A. C. 316, 40 W. R. Dig. 14; *In re North, Ex parte Hasluck*, [1895] 2 Q. B. 264, 43 W. R. Dig. 10; *In re Morgan, Ex parte Turner*, *ante*, p. 96.

Muir Mackenzie, for the respondent.—Miss Scott must have intended to give notice of suspension, or to imply that she could not pay her debts in full, for as a matter of fact she owed on the 18th of January far more than she could pay. At the lowest it was a notice of "temporary suspension" within Lord Watson's judgment in *Crook* v. *Morley*.

J. W. Weigall replied.

VAUGHAN WILLIAMS, J.—This case raises a new point. The old cases are cases where the debtor is a trader and sends out a circular. Here the debtor is not a trader, and there is no circular; and what we have to determine is whether her words uttered on the 18th of January, "No, I won't pay anybody now. It is too late now, I am acting under advice. I refuse to see anybody at all," amount to a notice of suspension or intention to suspend payment within section 4, sub-section 1 (*h*) of the Bankruptcy Act, 1883.

Speaking for myself, I have considerable doubt as to whether the Legislature intended to apply this sub-section to non-traders. In ordinary parlance the term "suspension of payment" only applies to people in business. However, the Legislature has not qualified this sub-section so as to limit it to traders, so I am not prepared to say that it does not apply to non-traders.

When one has to consider the point the fact must be taken into consideration that the person who spoke these words was not a trader.

If one held every refusal by a debtor to an individual creditor to pay a debt at the moment when it is demanded to be an act of bankruptcy, one would be giving to the sub-section a much wider meaning than it was ever intended to have. The true limit is to be found in this way: it must be a notice of suspension of payment in ordinary course. In the case of a trader payment in ordinary course is payment of commercial debts as they come due. If a creditor calls and demands payment, and receives not only a refusal to pay but a refusal to pay based on inability to pay, it may well be held that that amounts to a notice of suspension or notice of intention to suspend in the case of a trader, because it is a notice of suspension or a notice of intention to suspend payment of debts in ordinary course; but with a private person ordinary course is not the same thing as with a trader.

With private persons the times when calls for money may be expected are obviously different from what they are with traders whose commercial creditors look to be paid at specified times. Creditors of private persons sometimes send their bills in at once, sometimes quarterly, sometimes half-yearly, or at more distant intervals; and if a debtor who is not a trader says to his creditor, "I can't pay you now, I can't pay anybody till my rents come in," that cannot be held to amount to a notice of intention to suspend payment. If the debtor in this case had merely said, "I can't pay you or anyone at present, but hope to pay all soon," she would not have brought herself within the sub-section.

I am convinced myself that what the sub-section points at is the case of a debtor dealing with his creditors as a body; if a debtor proposes to deal collectively with his creditors, that brings him within it, but neither in the case of a trader nor of a private person is there a notice of intention to suspend payment unless there is a notice of what involves dealing with the creditors in a body. If the debtor here had merely given the creditor notice that she was unable to pay him, that would not have been enough. I therefore have to look and see if I can find anything more, and I do find it. "I am advised not to see anybody. It is too late, I am acting under advice." That showed a state of things had arisen which necessitated her dealing with her creditors collectively. What she was saying was: "I have taken advice, I am advised that I must deal with my creditors collectively, I am to see nobody." The advice obviously is not to deal with any creditor separately; and therefore I think her words amounted to a notice of intention to suspend payment.

I do not find that this notice falls within the sub-section because this lady refused to pay or see her creditor; but I base my finding purely on this, that it was notice that she had taken advice, and intended to deal with her creditors collectively.

KENNEDY, J., concurred.

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Solicitors for the appellant, *Kingsford & Dorman*, for *Burrows & Weigall*, Margate.

Solicitors for the respondent, *Prior, Church, & Adams*, for *Sparkes & Emery*, Broadstairs.

Q. B. Div.
Vaughan Williams, J. } April 20.

In re SASS.

Ex parte THE NATIONAL PROVINCIAL BANK OF ENGLAND (LIMITED). (*a.*)

Bankruptcy—Proof—Guarantee to bankers for whole account with limited liability—Proof by creditor after payment by surety—Admission of proof in full.

A surety guaranteed the whole of the indebtedness of S. to a bank, but the total amount recoverable from him was not to exceed £300. Subsequently a receiving order was made against S. when his indebtedness to the bank amounted to over £700. The surety paid the £300 to the bank, after which they presented a proof for the whole debt.

Held, that they were entitled to prove for the whole of their debt, for, the guarantee being for the whole amount, the surety could not prove against the estate unless he paid the bank in full.

Appeal by the National Provincial Bank of England, Limited, against the partial rejection of their proof by the official receiver, trustee in the bankruptcy of Sass.

Edwin Sass, the bankrupt, had an account with the bank, which was overdrawn to the extent of about £800 at the date of his being made bankrupt. As security against his overdrafts the bank held a guarantee from a Mr. Stourton, of which the following were the material parts:—

"I, the undersigned, Henry Stourton, hereby guarantee to you the payment of any sum or sums of money which may be now or may hereafter from time to time become due or owing to your bank anywhere from or by Edwin Etty Sass, his executors or administrators (who are all hereinafter referred to as "the said debtor"), either solely or jointly with any other person or persons in partnership or otherwise, upon banking account or upon any discount or other account, or for any other matter or thing whatsoever, including the usual banking charges. This guarantee is to be a security for the whole amount now due or owing to you, or which may hereafter from time to time, until the expiration of the notice hereinafter mentioned, become due or owing to you by the said debtor, but nevertheless the total amount recoverable hereon shall not exceed Three hundred pounds, in addition to such further sum for interest and other banking charges and for costs as shall accrue after the date of demand by you for payment. . . . And in case of bankruptcy, liquidation by arrangement, or composition with creditors, any dividends you may receive from the estates of the said debtor or others shall not prejudice your right to recover from me, my executors or administrators, to the full extent of this guarantee any sum which after the receipt of such dividends may remain owing to you from the debtor."

In 1894 the bank called upon the guarantor to pay the sum guaranteed, and he paid them the £300 and £3 11s. 9d. interest from the date of their demand. The bank placed this amount to the credit of their "Realized Securities Account," and did not treat it as a payment received from the debtor. Upon February 14th, 1895, they proved against the estate of the debtor for the full amount owing to them. The trustee rejected their proof to the extent of £303 11s. 9d., the amount received by them from the guarantor.

The bank appealed.

Herbert Reed, Q.C., (*Yate Lee* with him), for the bank.—A creditor with a guarantee in this form is entitled to prove for the whole amount due from the debtor. The debtor's estate should not get the benefit of payments made by a surety whom the debtor was bound to indemnify. The trustee cannot set up that there might be two proofs presented, for the guarantee is for the whole amount owing to the bank, and the surety could not prove unless he paid the bank the whole amount owing to them: *The Midland Banking Co.* v. *Chambers*, 17 W. R. 598, L. R. 4 Ch. App. 398; *Ex parte The National Provincial Bank, In re Reese*, 29 W. R. 796, 17 Ch. D. 98; *The Yorkshire Bank* v. *Thomas* (unreported, Collins, J., March 20, 1895). The rule which the trustee seeks to apply is only applicable to cases of negotiable securities: *In re Blakeley, Ex parte Aachener Disconto Gesellschaft*, 9 Morrell, 173; *The Commercial Bank of Australia* v. *Wilson*, 41 W. R. 603, [1893] A. C. 181.

Muir Mackenzie, for the official receiver (trustee).—The terms of this guarantee are unlike those in the cases cited against me. It only provides that the bank may sue the guarantor after receiving a dividend from the estate. If they are paid by the guarantor before proving, they cannot prove in full against the estate. This guarantee should be construed as applicable to part only of the debt; *Ellis* v. *Emmanuel*, 24 W. R. 832, 1 Ex. D. 157. The surety could prove upon this guarantee for the amount he has paid, *Wolmershausen* v. *Gullick*, [1893] 2 Ch 514, 41 W. R. Dig. 16, 193.

VAUGHAN WILLIAMS, J.—In this case I think the official receiver was wrong in rejecting part of the proof. In my opinion the common law right of the bank here was to sue the debtor for the whole amount due from him, irrespective of the amount paid by the surety, unless that came to twenty shillings in the pound. In bankruptcy the principal creditor has a right to prove for the whole of his debt, unless the surety is a surety for part of the debt only, and has paid that part; then the right of proof *pro tanto* goes to the surety, who is entitled to stand in the shoes of the principal creditor to the extent of the amount which he has paid.

Here all that I have to do is to examine this guarantee, and see whether, as between the bank and the surety, the surety was for the whole or part of the debt, and it is clear that he was surety for the whole, notwithstanding the fact that his liability was limited; and he, having paid part only of the debt, could not be allowed to prove in the bankruptcy. I should have said that this was quite clear upon the first part of this guarantee; but if there were any doubt, the last clause amply suffices, either by itself or read with the first part, to show that, as between the bank and the surety the bargain was that the bank should have the benefit of all sums paid as dividends or otherwise; and it would be wrong to hold that the surety, as against the bank, could have any rights by reason of his guarantee, unless he paid them the full amount owing by the debtor. The proof must be admitted for the full amount.

Appeal allowed, with costs.

Solicitors for the bank, *Wilde, Berger, & Moore.*

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). March 26.

PLEDGE *v.* WHITE. (*a.*)

Mortgage—Consolidation—Redemption—Assignment of mortgages to one person.

In 1863, *Banks mortgaged Nos.* 1 *and* 2 *to J.; later on, in* 1863, *No.* 3 *to H.; and in* 1865-1866, *Nos.* 4, 5, 6, *and* 7 *to other mortgagees. Afterwards, in* 1866, *Banks made a second mortgage to Brockman of* 4, 5, 6, *and* 7; *and in* 1868 *he made a second mortgage of* 1, 2, *and* 3, *and a third mortgage of* 4, 5, 6, *and* 7 *to Brockman and Harrison. The appellant became the transferee from Brockman and Harrison of their equity of redemption of all the seven properties in* 1885. *The respondents (the executors of Brockman) held the first mortgage on Nos.* 1, 2, 4, *and* 5, *by transfers to their testator* (1871 *to* 1873), *and by transfer in* 1890 *they also held the first mortgage on No.* 3.

Held, in an action by the appellant seeking to redeem No. 2 *alone, that the respondents were entitled to consolidate their mortgages on all the seven properties.*

Decision of the Court of Appeal, 43 *W. R.* 50, [1895] 1 *Ch.* 51, *affirmed.*

Vint *v.* Padgett, 6 *W. R.* 641, 2 *De G. & J.* 611, *approved.*

Per Lord Davey.—*The doctrine of consolidation is applicable where, at the date when redemption is sought, all the mortgages are united in one hand and redeemable by the same person; or where, after that state of things has once existed, the equities of redemption have become separated.*

This was an appeal from an order of the Court of Appeal (Lord Herschell, C., Lindley and A. L. Smith, L.JJ.) reported as *Pledge* v. *Carr*, 43 W. R. 50, [1895] 1 Ch. 51, affirming that of Romer, J., 42 W. R. 620.

The facts are given in Lord Davey's judgment, where the cases are discussed.

Levett, Q.C., and *Bramwell Davis, Q.C.* (*Cater* with them), for the appellant.

Cozens-Hardy, Q.C., and *Edwin Ward*, for the respondents, were not heard.

The House took time for consideration.

Lord HALSBURY, C.—I have had an opportunity of considering the judgment prepared by my noble and learned friend (Lord Davey), and I am not prepared to dissent from it. I use that form of expression because I confess I lament the conclusion to which it has been found necessary to come, although I believe the strict principle upon which it rests is founded in our law at present, and in dealing with a technical system it is better to adhere to a principle when once established than to create greater confusion by dissenting from it. I think the principle laid down in *Vint* v. *Padgett*, 6 W. R. 641, 2 De G. & J. 611, has been so firmly established now by authority in our technical system that I feel that more mischief would be done by dissenting from it than by acquiescing in it. For these reasons I am content with the judgment which my noble and learned friend has prepared, and shall assent to the motion that he will make.

Lord WATSON.—I also have had an opportunity of carefully considering the judgment about to be delivered by my noble and learned friend opposite. For my own part, I should have desired if possible to decide otherwise; but I am compelled to say that I concur with the reasonings and the conclusion of my noble and learned friend.

Lord DAVEY.—The facts of this case are complicated, but they may be stated in a narrow compass sufficiently for elucidating the point of law which is raised. There are seven different properties which are involved in this appeal. There were originally eight, but one of the properties, known as 1 and 2, Shakespeare-terrace, has been dealt with in a separate suit, and the rights of the appellant and respondents in respect of that property are not now in question. One James Banks was the original owner and mortgagor of all these seven properties. James Banks mortgaged 34, Bouverie-square, and 5 and 6, Shakespeare-terrace (which I will refer to as Nos. 1 and 2) to John Banks, by deeds dated respectively the 11th of May and 26th of August, 1863. He mortgaged Pembury Villa (which I will refer to as No. 3) on the 12th of October, 1863, to S. Hobday, and the other four properties (which I will refer to as Nos. 4, 5, 6, and 7) to other mortgagees by deeds dated from the 18th of October, 1865, to the 24th of November, 1866. He then made a second mortgage to Brockman of 4, 5, 6, and 7 by a deed or deeds dated the 27th of November, 1866. He then made a second mortgage of Nos. 1, 2, and 3, and a third mortgage of 4, 5, 6, and 7 to Brockman and Harrison by one deed, dated the 20th of August, 1868. Or, in other words, on that date Banks assigned the equity of redemption on all seven properties to Brockman and Harrison. At that date, therefore, Brockman and Harrison might have redeemed 1, 2, or 3, without redeeming the other properties, but they could not have redeemed either 4, 5, 6, or 7 without redeeming all those four properties. Pledge, the present plaintiff and appellant, became the transferee from Brockman and Harrison of their equity of redemption of all the seven properties on the 1st of April, 1885. In the meantime Brockman, by deeds dated from 1871 to 1873, became the transferee of the first mortgages on Nos. 1, 2, 4, and 5. The defendants and respondents are the surviving executors of Brockman, who died in 1877, and on the 27th of December, 1890, they became the transferees of the first mortgage on No. 3. From that date, therefore, the equity of redemption on all seven properties was vested in the appellant, subject to mortgages on the several properties all vested in the respondents.

In these circumstances, on the 30th of March, 1893, the appellant issued his writ in this action, by which he claims to redeem No. 2 alone on payment of what is due on the first mortgage of that property only. The defendants claim to consolidate their mortgages on all the seven properties, and say that the appellant cannot redeem No. 2 alone without redeeming the other six properties also. It was admitted at the bar that the respondents had the right to consolidate their mortgages on Nos. 1 and 2, because the mortgages on those properties were vested in one mortgagee, John Banks, before the assignment of the equity of redemption in both to Brockman and Harrison, the appellant's predecessors in title; but the appellant contends that they are not entitled to consolidate their mortgages on 3, 4, 5, 6, and 7 with their mortgage on No. 2, because these mortgages did not become united in title with the mortgage which he desires to redeem on No. 2 until after the date on which the equity of redemption was assigned to his predecessors in title—viz., the 20th of August, 1868, and his counsel argues that the rights of the appellant and respondents must be determined by the state of circumstances at that date. The question for your

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

lordships' decision is whether the respondents have the right of consolidation which they claim, notwithstanding that the mortgages which it is sought to consolidate were not united in title with the mortgage sought to be redeemed until after the assignment of the equity of redemption to the present appellant's predecessors in title.

Romer, J., by whom the action was tried, and the Court of Appeal held that the case was covered by the decision of Knight-Bruce and Turner, L.JJ., in the year 1858, in *Vint* v. *Padgett*, which it was not competent for them to question, and accordingly decided in favour of the respondents. The appellant's counsel admit that they cannot distinguish the present case from that decision, but contend that it is wrong and ought to be reversed by your lordships.

The equitable rule as to the consolidation of mortgages is not one of those doctrines of the Court of Chancery which has met with general approbation, at any rate as regards its later development. Originally it may have been a right of a mortgagee holding two separate mortgages on estates of the same mortgagor, which have become absolute estates at law against the mortgagor and debtor personally, to refuse to be redeemed as regards one estate without having his other debt also paid. But it has long been settled that the right of consolidation may be exercised by the transferee of the mortgages as well as by the original mortgagee, and may be exercised in respect of equitable mortgages as well as by a mortgagee holding the legal estate absolute at law; and, on the other hand, it may be asserted against the assignee of an equity of redemption from the mortgagor as well as against the mortgagor himself.

If *Vint* v. *Padgett* had been an isolated decision on a new point, then, notwithstanding the eminence of the learned judges who were parties to the decision, it may be that your lordships would have felt disposed to review it; and if it did not appear to your lordships a necessary or legitimate development of the doctrine, your lordships would probably be disposed to express your dissent from it, as was done with regard to another decision of the same learned judges by this House in the case of *Jennings* v. *Jordan*, 30 W. R. 369, 6 App. Cas. 698. But it is obvious that the learned judges did not conceive themselves to be laying down new law. Knight-Bruce, L.J., said that a long course and series of authorities binding on the court precluded the possibility of their thinking that there was in the case more that one arguable question, if any—viz., as to the materiality of notice of a second mortgage to a transferee of prior mortgages; and Turner, L.J., said it was impossible to distinguish the case from *Bovey* v. *Skipwith* (a case decided in the reign of Charles II., to which I will presently refer) on any other ground than as to notice being material.

In *Tweedale* v. *Tweedale*, 23 Beav. 341, 6 W. R. Ch. Dig. 44 (decided in 1857, the year before *Vint* v. *Padgett*), the union of two mortgages made to different mortagees took place after the assignment of the equity of redemption of both mortgaged properties. Lord Romilly held that the assignee could only stand in the position of the mortgagor, and be entitled to his rights only; and if the mortgagor could not have redeemed one property without the other, the assignee stood in no better or more favourable position, and was not entitled to redeem one without redeeming the other. Indeed, the contrary seems from the report to have been scarcely argued in that case.

The case of *Vint* v. *Padgett* came before Stuart, V.C., in the first instance, whose judgment, reported in 6 W. R. 321, 1 Giff. 446, may be referred to as showing how entirely that experienced judge considered the point to be settled. "In accepting," he says, "by way of security the equity of redemption of two separate estates, Mr. Lee deliberately incurred the risk of their uniting in one hand; and when that union has taken place there is only one single debt, and in order to redeem he must pay off both mortgages, each of which affects the entirety of both estates."

The old case of *Bovey* v. *Skipwith*, 1 Ch. Ca. 201, referred to by Turner, L.J., was a combined case of tacking (in the strict technical sense) and consolidation. There was (1) a mortgage with conveyance of the legal estate in two properties; (2) an assignment of the equity of redemption in the two properties to a second mortgagee; (3) a third mortgage of one of the properties only, without notice of the second mortgage. The third mortgagee bought and took a transfer of the first legal mortgage. It was held, first, that he might tack his equitable third mortgage to the first mortgage; so as to gain priority over the second mortgagee; and, secondly, that having done so he might consolidate his third mortgage (which was was on one estate only) with the first mortgage on both estates, and hold the two estates as against the second mortgagee until all that was due to him on both securities should be satisfied.

The case of *Titley* v. *Davies*, before Lord Hardwicke, reported in 2 Y. & C. C. C. 399, may be distinguished on the ground that Titley, the second equitable mortgagee of one of the estates, had before the assignment of the equity of redemption in another estate to Peyton acquired a right to redeem Shepheard, the first mortgagee on both estates, and thereby consolidate the two mortgages. It is not therefore, in my opinion, a direct authority on the present case, in which the consolidation has taken place by purchase and transfer, and not by the exercise of an existing right to redeem.

In *Selby* v. *Pomfret* (1861), reported before Wood, V.C. (9 W. R. 398, 1 J. & H. 336), and before Lord Campbell, C. (9 W. R. 583, 3 De G. F. & J. 595), the facts, so far as material for the present purpose, were (1) mortgage to defendants of leasehold premises in Mark-lane on the 26th of June, 1858; (2) mortgage to Stileman and Neale of leasehold premises in Herne Hill on the 1st of February, 1859; (3) mortgagor became bankrupt on the 9th of February, 1859; (4) transfer of the Herne Hill mortgage to defendants on the 16th of February, 1859, and therefore after the bankruptcy of the mortgagor. The Vice-Chancellor held that the defendants were entitled to consolidate the two mortgages against the assignees in bankruptcy of the mortgagor, and to retain the balance due on the Mark-lane mortgage, which was deficient, out of the surplus proceeds of sale of the Herne Hill mortgage. Lord Campbell, in affirming the Vice-Chancellor's decree, said: "It does seem strange that mortgagees, after the bankruptcy of the mortgagor, should be allowed by their own act to vary the rights of themselves and the other creditors of the mortgagor, so as to obtain payment in full of a debt in respect of which, at the time of the bankruptcy, they were only entitled to a dividend along with the body of unsecured creditors. But it is settled that a mortgage executed by a bankrupt before his bankruptcy, where the value of the land mortgaged exceeds the sum secured, is upon the bankruptcy of the mortgagor to be considered *tabula in naufragio*; and if the assignees do not immediately redeem, any mortgagee of the bankrupt whose security is insufficient may take an assignment of the mortgage and tack to it the debt due under the mortgage to himself. Therefore, the Vice-Chancellor truly observes, 'the fact of the bankruptcy before the defendants took the transfer

made no difference. Anyone might seize the plank. The assignees might have got the benefit of it if they had been quick enough; but the defendants were more alert.'" And see *Neve* v. *Pennell*, 11 W. R. 986, 2 H. & M. 170.

Although the Lord Chancellor uses the word "tack" it is apparent from the facts of the case which he was dealing with that he meant tacking in the sense of consolidation. The case of *Selby* v. *Pomfret* may, no doubt, be distinguished from the present one on the ground that the assignment of the equity of redemption was by operation of law; but if there was no existing right of consolidation at the date of the bankruptcy, the distinction seems to me unsubstantial, because the assignees of the bankrupt take his property subject only to existing equities. The statutory *jus tertii* of the creditors may be considered as entitled to more consideration, and not less than the right of a particular assignee.

In *Beevor* v. *Luck* (1867), 15 W. R. 1221, L. R. 4 Eq. 537, Lord Hatherley held that a mortgagee of one propertymight, as against the assignee of the equity of redemption of another property, consolidate with his mortgage a mortgage from the same mortgagor on that other property of which he had taken a transfer after the date of the assignment of the equity of redemption, of the second property only, overruling the case of *White* v. *Hillacre*, 3 Y. & C. Ex. 597.

The extent to which the right of consolidation was carried in this case was criticized by Lord Selborne in this House in *Jennings* v. *Jordan*, and so far as it held that mortgages on two properties could be consolidated against the assignee of the equity of redemption of one property only where the union of the two mortgages did not take place until after the separation of the equities of redemption, the case of *Beevor* v. *Luck* must be held to be overruled. It was so considered by Fry, J., in *Harter* v. *Colman*, 30 W. R. 484, 19 Ch. D. 630.

This case is free from any such difficulty. At the time when redemption is sought all the mortgages are presently redeemable by the same person. Pledge, the plaintiff in the action, became by one transaction the assignee of the entire equity of redemption of all the mortgages. An attentive consideration of Lord Selborne's judgment has satisfied me that the noble and learned lord did not intend to throw any doubt upon the application of the doctrine in such circumstances.

The actual point decided in *Jennings* v. *Jordan* was that a mortgagee could not, as against the assignee of an equity of redemption of one property, consolidate with his original mortgage a mortgage on another property created by the same mortgagor after the assignment of the equity of redemption. The contrary had been maintained by the plaintiff on what was probably a misunderstanding of the case of *Tassell* v. *Smith*, 6 W. R. 803, 2 De. G. & J. 713. "I take it," said Lord Blackburn, "that the only question before this House is whether where the mortgage on one property is not created till after the equity of redemption on the other property has been parted with there is as against the purchaser an equity to consolidate the two." Their lordships also discussed the question whether in a case where the equities of redemption have become separated, consolidation could take place against the assignee of one equity of redemption only by subsequent union of two mortgages, and they preferred the decision in *White* v. *Hillacre* to that of Lord Hatherley in *Beevor* v. *Luck*.

Lord Selborne expressed himself in the following words: "A mortgagee who holds several distinct mortgages under the same mortgagor, redeemable not by express contract, but only by virtue of the right which (in English jurisprudence) is called "equity of redemption," may, within certain limits and against certain persons (entitled to redeem all or some of them), consolidate them, that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all. This doctrine of consolidation is well established and cannot now be altered, except by the Legislature, whether it originally rested on a sound equitable foundation or not. The present question is as to its limits. There is no difficulty in its application when all the mortgages, whether originally made to the same mortgagee or having come into a single hand by subsequent assignments, are redeemable at the same time by the same person. Its extension to a case in which, after that state of things has once existed, the equities of redemption have become separated by the act of the person in whom they had been combined, though it may perhaps be open to some objection on practical grounds, rests upon an intelligent principle."

After discussing the principle on which such an extension can be defended, Lord Selborne continues: "In the present case the rights of redemption existing at the date of the settlement of 1838," which was the assignment of the equity of redemption in that case, "could not, in my opinion, have been properly worked out (unless by some voluntary arrangement between the parties interested) otherwise than by consolidating all the mortgages now vested in the appellant Jennings which were prior in their creation to the 3rd of December, 1838, as they have been, in fact, consolidated by the decree of the Court of Appeal." (The date mentioned by Lord Selborne, I may observe, was the date on which the assignment of the equity of redemption was made to the appellant's predecessor in that case.) "I have much more difficulty in following or satisfactorily explaining the principle of some other authorities, such as *Beevor* v. *Luck*, which have held, contrary to the decision of Baron Alderson in *White* v. *Hillacre*, that a mortgagee's right to consolidate, as against the purchaser of the equity of redemption of property mortgaged to him, is capable of being enlarged after the date of that purchase by a transfer to the mortgagee of other mortgages which were then in other hands, and with the equity of redemption of which, if there were no consolidation, the purchaser would have nothing to do."

I understand Lord Selborne to be here speaking only of the case in which the equities of redemption have become separated, and his observations have no reference to a case such as that now before the House, in which all the equities of redemption have been assigned to and are now vested in one person. I do not think that anything was said in this House in *Jennings* v. *Jordan* which throws any doubt or discredit on the decision in *Vint* v. *Padgett* and the other cases to the same effect. At the time when this action was commenced the exact position contemplated by Lord Selborne had taken place—of all the mortgages being united in a single hand and redeemable by the same person.

It appears to me that an assignee of two or more equities of redemption from one mortgagor stands in a widely different position from the assignee of one equity only. He knows, or has the opportunity of knowing, what are the mortgages subject to which he has purchased the property, and he knows that they may become united by transfer in one hand. If the doctrine of consolidation be once admitted, it appears to me not unreasonable to hold that a person in such a position occupies the place of the mortgagor or assignor to him towards the holders of the mortgages subject to which he has purchased, although it may be unreasonable to hold that he can be affected

by the transfer to such holders of mortgages to other persons by the same mortgagor on property which he he has not purchased, and with the equity of redemption of which he has no concern. He does not investigate the title to such other property, and cannot know in the latter case to what mortgages the property is subject. If your lordships affirm the decree now under appeal, the doctrine of consolidation will be confined within at least intelligible limits. It will be applicable where at the date when redemption is sought all the mortgages are united in one hand and redeemable by the same person or where after that state of things has once existed the equities of redemption have become separated. If the purchaser of two or more equities of redemption desires to prevent consolidation, he has it in his power to redeem any one mortgage before consolidation takes place; but if for his own convenience he delays doing so, he runs the same risk as his assignor ran of the mortgages becoming united by transfer in one hand.

I am of opinion that the application of the doctrine of consolidation to a case like the present has been too long considered part of the equitable jurisprudence of this country to be altered at the present time, and it is not so unreasonable as to demand a reversal of it by this House.

I think, therefore, that this appeal should be dismissed, with costs.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellant, *A. R. & H. Steele*, for *John Minter*, Folkestone.

Solicitors for the respondents, *Talbot & Tasker*.

Privy Council.

(*From the Supreme Court of Queensland.*)

March 20.

KING *v.* VICTORIA INSURANCE CO. (*a*.)

Insurance—Assignment of rights to insurer—Settlement of claim—Judicature Act (*Queensland*) (40 *Vict. c.* 86).

B. insured the safe delivery of certain wool in the V. Insurance Co. The wool was lost owing to the negligence of K., and the insurance company honestly paid the claim made upon them for such loss by B., and took from him a formal assignment of his causes of action against K., B. stipulating that the assignment should not authorize the use of his name in legal proceedings.

Held, that the insurance company were entitled to the remedies available to B. against K., and although the subrogation by act of law would not give the insurance company a right to sue in their own name, the Judicature Act (corresponding with the English Judicature Act of 1873) *and the above assignment together would.*

This was an appeal from the Supreme Court of Queensland. The facts and proceedings are given in their lordships' judgment.

Cohen, Q.C., and *Gye*, for the appellants.

Asquith, Q.C., *C. E. Jones*, and *Roskell*, for the respondents.

The judgment of their lordships, Lords WATSON, HOBHOUSE, DAVEY, and Sir RICHARD COUCH, was delivered by

Lord HOBHOUSE.—The appellant is a nominal defendant representing the Government of Queensland in a suit instituted by the respondents to recover damages under the following circumstances. The Bank of Australasia effected an insurance with the plaintiffs "at and from Townsville to London viâ Torres Strait, including risk of fire and flood from sheep's back until waterborne at Townsville." The insurance was to be upon goods to be loaded in a vessel not named. In point of fact the goods were wool, and the vessel was called *The Dorunda*. The adventure was stated to begin from the loading of the goods on board the vessel. Some of the wool was on arrival at Townsville put on board a lighter belonging to a firm of wharfingers for the purpose of being conveyed to *The Dorunda*. While the lighter was moored to the wharf a storm arose, which broke away from their anchorage certain punts belonging to the Government which had not been properly secured. The punts fell foul of the lighter, broke her away from her moorings, capsized her, carried her down stream, and so destroyed or damaged the wool. The bank claimed against the plaintiffs under the policy for a loss of £920. The plaintiffs paid that amount, and took a formal assignment from the bank of all their rights and causes of action against the Government, the bank stipulating that the assignment should not authorize the use of their name in legal proceedings.

By way of defence the Government denied negligence and liability altogether. That question was fully tried at Townsville before Cooper, J., and a special jury, who found to the effect above stated, with the result that judgment was entered for the plaintiffs for £1,007 and costs.

The Government have not further contested the question of negligence, but on a motion to set aside the judgment they raised two objections. One related only to the amount of damages, and in that they partially succeeded. The other was to the effect that the plaintiffs had no right of action, or at any rate none in their own name; because the loss was not within the risks covered by the policy, and because the assignment of a mere right to recover damages was illegal.

The view taken by the Supreme Court was that the plaintiffs were not, by the mere fact of paying the claim, subrogated to the rights of the bank. They thought that the damage done to the wool was not within the terms of the policy. The wool was not loaded on board ship, and therefore was not within the clause which makes the risks, or one of the risks, begin from that event. Whether the learned judge thought that the placing of the wool on board a wharfinger's lighter in the general course of trade at Townsville satisfied the term "waterborne," and so ended one risk or part of the risk, is not clear. At any rate the Chief Justice thought that the risk "from sheep's back until waterborne" which is expressed to be included in the risk from Townsville to London, did not attach because the jury had found that the loss was caused by collision, and not through fire or flood. Assuming that the plaintiffs were bound to pay, the court held, on the authority of *Simpson v. Thomson*, 3 App. Cas. 279, 26 W. R. Dig. 219, that they could not by mere force of subrogation sue in their own names. But they held that this right was conferred by the bank's express assignment, aided by the terms of section 5, sub-section 6, of the Judicature Act, 40 Vict. c. 86. That Act follows exactly the English Judicature Act of 1873. The learned judges below consider that the term "legal chose in action" includes all rights the assignment of which a court of law or equity would before the Act have considered lawful, and that the right in question is a right of

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

that kind. On those grounds they sustained the judgment, except as to the amount of damages.

The Government have now appealed to her Majesty in Council claiming that the suit shall be dismissed. They argue that the loss sued on was not within the terms of the insurance; that the plaintiffs stand in the position of mere strangers making a voluntary payment to the bank, and bringing a lawsuit; and that they have no title which a court either of law or of equity would recognize. They make the subordinate objection that the plaintiffs cannot sue in their own name; but Mr. Cohen's arguments go the whole length of denying that the plaintiffs acquired any right at all; and, indeed, in the face of the Judicature Act, they must go that length in order to sustain the subordinate objection.

To their lordships it seems a very startling proposition to say that when insurers and insured have settled a claim of loss between themselves, a third party who caused the loss may insist on ripping up the settlement, and on putting in a plea for the insurers which they did not think it right to put in for themselves; and all for the purpose of availing himself of a highly technical rule of law which has no bearing upon his own wrongful act. It is not alleged that there was anything but perfect good faith in the claim made by the bank and satisfied by the insurance company. It is not alleged that the question of negligence has not been as fully and fairly tried in this action as it could have been in an action by the bank; or that the Government has been in any way prejudiced by the form of the action. But it is claimed as a matter of positive law that, in order to sue for damage done to insured goods, insurers must show that if they had disputed their liability the claim of the insured must have been made good against them. If that be good law, the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute they have tried to avoid, by persons who have no interest in that dispute, but who are sued as being the authors of the loss. The proposition is, as their lordships believe, as novel as it is startling; at least Mr. Cohen was unable to furnish any authority for it, and they know of none. Yet it is difficult to suppose that such cases have not frequently occurred.

As regards the question whether the loss was or was not within the terms of the policy, their lordships will make no observation but this, that whatever might have been the result of a dispute between the parties to it, there is nothing to suggest that the claim was not one which the insured might not honestly and reasonably make, or to which the insurers might not honestly and reasonably accede. They will assume, as the court below has assumed, that the bank could not by the terms of the policy have compelled the insurers to indemnify them. Still if, on a claim being made, the insurers treat it as within the contract, by what right can a stranger say that it is not so? The payment would not be made if no policy existed; and it seems to their lordships an extravagant thing to say that a payment made under such circumstances is a voluntary payment made by a stranger, and that it would be at least an excess of refinement to hold that it is not a payment on the policy, carrying with it the legal incidents of such a payment. Such settlements of claims between the parties concerned ought not to be reopened for a by-purpose at the instance of parties not concerned. To hold otherwise would convert rules of law framed for the purpose of checking speculations in lawsuits into instruments for promoting lawsuits which the parties interested are wise enough to avoid by agreement. Their lordships have no doubt that if, after receiving payment from the plaintiffs, the bank had got damages from the Government, a court of equity would have treated them as trustees for the plaintiffs to the extent of the payment, nor that if it had been necessary to use the name of the bank a court of equity would have compelled the bank to permit it on the usual terms. Mr. Cohen says that no instance is to be found in the reports where the Court of Chancery has bound a defendant to give his name to be used in an action of tort. Nevertheless it cannot be doubted that insurers often have used the names of the insured to recover damages in tort, and have not heeded whether the payment made on their contracts of indemnity did or did not fall within their strict terms. If the reports are silent, the more probable explanation is that the kind of defence raised in the present case has not commended itself to lawyers.

It is true that subrogation by act of law would not give the insurer a right to sue in a court of law in his own name. But that difficulty is got over by force of the express assignment of the bank's claim, and of the Judicature Act, as the parties must have intended that it should be when they stipulated that nothing in the assignment should authorize the use of the bank's name.

Their lordships do not express any dissent from the views taken in the court below of the construction of the Judicature Act with reference to the term "legal chose in action." They prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of that term. They rest their judgment on the broader and simpler ground that a payment honestly made by insurers in consequence of a policy granted by them, and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured. On this view the highly artificial defence of the Queensland Government fails, and the appeal must be dismissed, with costs.

Their lordships will humbly advise her Majesty in accordance with this opinion.

Solicitors for the appellants, *Freshfield & Williams.*

Solicitors for the respondents, *Phelps, Sidgwick, & Biddle.*

Court of Appeal.

From Prob. Div. & Adm. Div. (Lindley, Lopes, and Kay, L.JJ.) May 14.

MORAN *v.* PLACE. (*a*.)

Practice — Probate — Caveat — *Action brought against* caveator—*Married woman—Restraint on anticipation* — "*Instituting*" *an action or proceeding* — *Married Women's Property Act*, 1893 (56 & 57 *Vict.* c. 63), *s.* 2.

A married woman who enters a caveat *in the Probate Registry, and afterwards so insists on her objection to the proving of a will that an action has to be brought against her to have it proved in solemn form, does not "institute" an action or proceeding within the meaning of section* 2 *of the Married Women's Property Act*, 1893; *and therefore an order cannot be made for payment out of property of the married woman subject to a restraint*

(*a*.) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

on anticipation of costs of the action which she may have been ordered to pay.

Appeal from Barnes, J.

Mrs. Place, the defendant, had entered a *caveat* in respect of a will of William Moran, her father.

The plaintiff, the executrix named in the will, was ultimately obliged to bring an action against the defendant to have the will proved in solemn form. The plaintiff succeeded in the action, and Barnes, J., ordered the defendant to pay her costs, but refused to make an order, under section 2 of the Married Women's Property Act, 1893, for payment out of property of the defendant subject to a restraint on anticipation, holding that the defendant had not, within the meaning of that section, "instituted" any action or proceeding.

The plaintiff appealed.

Warrington, Q.C., and *C. T. Giles*, for the appellant, referred to section 2 of the Married Women's Property Act, 1893; Probate Rules, 1862, r. 12 (in Tristram and Coote's Practice, 11th ed., p. 828); *In the Goods of Chamberlayne*, 15 W. R. 680, L. R. 1 P. & D. 316; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100; *Coplestone* v. *Nicholes*, 33 L. J. Prob. 57, 12 W. R. Prob. Dig. 9; and *Peacock* v. *Lowe*, 15 W. R. 717, L. R. 1 P. & D. 311.

Bayford, Q.C., and *Durley-Grazebrook*, for the respondents, were not called upon.

LINDLEY, L.J., stated the facts, and proceeded:—The question here turns on what is the effect of that *caveat*. It is not notice to the plaintiff or to anybody in particular, but a notice to the registrar, an officer of the court, not to allow anything to be done by anyone in the matter of the goods of the deceased without notice to the person who lodged the *caveat*. That certainly does not commence anything; it is impossible to look at that as, in ordinary language, commencing any proceeding. It merely obliges the registrar to tell the party if anybody takes any step in relation to the matter. The next thing is a warning to the *caveat;* and that warning having been entered the next thing is that somebody begins to stir, that is, in this case, the present plaintiff, and wants to prove a will. That notice being there, the plaintiff has to warn the person who gave it, and then if the *caveator* intends making a real objection she enters an appearance. If the litigation goes on, the person who wants to prove the will issues a writ and serves it on the *caveator*. Here there was a litigation between the plaintiff and the defendant, and if we look at that quite apart from all technicalities who is the person who "institutes" those proceedings? I think it is the person who is the *actor* from the beginning in the litigation, that is, the plaintiff. He is so treated when appearance is entered, and he is so treated when those proceedings are followed up by a writ. Though the person who enters the *caveat* causes the litigation, she does not institute the proceedings. She causes somebody else to institute proceedings against her, that being the real fact of the case.

Let us go now to the Act of Parliament which we have to apply, that is the 2nd section of the Married Women's Property Act, 1893. [The lord justice read the section, and continued:] Now then, can it be said that Mrs. Place, who entered this *caveat*, and has had these proceedings instituted against her in consequence, has instituted these proceedings? I say no, quite apart from all technicalities. Reliance was placed on expressions in *Coplestone* v. *Nicholes* and *Peacock* v. *Lowe*. Now I have read the judgment in *Peacock* v. *Lowe* I think I see what Sir J. P. Wilde meant when he used those expressions. But when we come to look at the modern practice, I do not think it would now be correct to say, as he there indicates, that there are two ways of commencing a probate action. Ord. 1, r. 1, of the R.S.C., 1883, directs that all suits which formerly were commenced by citation shall be instituted by an action in the High Court, and therefore (ord. 2, r. 1) by writ.

It appears to me therefore that, though it is true Mrs. Place caused these proceedings to be instituted, she did not herself institute them. Personally I am rather sorry for it, but I think that is the result of the settled practice. The appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. [The lord justice stated the facts, and continued:] It is said that Mrs. Place has instituted this action or proceeding. I am unable to take that view. I think the action or proceeding is instituted by writ, and Mrs. Place never could by any possibility be anything but a defendant. It seems to me a contradiction in terms, as it were, to say that a person who can by no possibility be a plaintiff can be the person instituting an action or proceeding. No doubt Mrs. Place had, previously to the writ, taken preliminary steps which led up to the writ; but all that time there was nothing of the nature of a *lis pendens*. The moment the writ was issued the action or proceeding was commenced, and therefore I think the order appealed from is right.

As to the three cases which were cited to us, all of them were before 1873, the date of the Judicature Act. I do not think those cases are now of any value, because of the provisions of ord. 1, r. 1, of the R.S.C., 1883. When we look at section 100 of the Judicature Act of 1873 we find these words: "Action shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court."

Therefore the conclusion I come to is this, that Mrs. Place by entering a *caveat* cannot be said to be a person instituting an action or proceeding within the meaning of this section. If that is so, the plaintiff is not entitled to the order for costs which she asks.

KAY, L.J., stated the facts, and proceeded:—It is rather odd to say that a defendant who has lost the suit and been ordered to pay the costs "instituted" the proceedings; but the way in which that is attempted to be made out is this. That lady entered a *caveat* in the Probate Court. The effect of that is simply that, if any proceedings whatever are taken to propound any will, or otherwise in relation to this estate, she is to have notice. But it does not necessarily mean that she intends to fight. She merely wants information. The next step is that somebody who wants to propound a will warns off the *caveat*. Even then no litigation has really been begun, because even the *caveator's* name is not known. She might have used any name—possibly a fictitious name. When the *caveat* is warned then the person who warns gives his name, I suppose, and intimates, and notice is then given to the person who entered the *caveat* that there is an intimation, that the person who has warned the *caveat* means to propound a will, or something of that kind. Still the person who entered the *caveat* need not fight unless she likes. She need not enter an appearance, but if she enters an appearance she has to give her name. When she has given her name then you have got an intimation that A. B. means to propound a will, and that C. D., who entered the *caveat*, means to resist probate. But even then, since the Judicature Act, another step must be taken. The person who gave the warning must, as plaintiff, issue a writ against the person

who entered the *caveat*. Then undoubtedly—then, at least—there is a *lis pendens*, a regular litigation, begun by writ, of A. B. against C. D. It is said that though it is true this married woman was a defendant in the action which was commenced, nevertheless she instituted the proceedings because she entered the *caveat*, and that the proceedings were commenced by the *caveat*. We have asked, Does a *caveat* constitute a *lis*? It cannot be said that it necessarily does, for when the *caveat* is entered there is no defendant, no opponent. It is impossible, I think, to say that any *lis* was commenced by entering a *caveat*. There might be more reason in saying that when the *caveat* was warned and an appearance was entered to the warning a *lis* was commenced. I am not sure that before the Judicature Act that might not have been so. But it is very difficult to say that it was so after the Judicature Act. Since that Act I think the litigation ought to be considered to be commenced by the writ. Certain language of Sir J. P. Wilde in two cases, *Coplestone* v. *Nicholes* and *Peacock* v. *Lowe*, has been referred to. Both of those cases were before the Judicature Act. No doubt he does say that the ordinary way of taking proceedings in the ecclesiastical courts was by citation; but he adds, "it is plain that it was not the only way." Even in the very judgment in which he used that expression he uses these words: "The executors have propounded a will in a declaration, but no plea has been filed, and it is obvious that until a plea is filed it is impossible to say whether or not the validity of the will is in dispute. The mere entering of a *caveat* does not show that there is any dispute as to the validity of a will, for it is often entered in order that the person entering it may have notice of the will being proved, without any intention of disputing it, and there is nothing to preclude him from withdrawing his opposition, and allowing the executors to take probate in common form. The validity of the will is not in dispute until the plea is filed." That is absolutely inconsistent with any notion that the learned judge meant that for all purposes a litigation of this kind is begun by a citation. I go farther. The application was to allow the heir at law to be cited, and the learned judge says this: "By the 61st section of the Probate Act (20 & 21 Vict. c. 77) there are two states of things in which the heir at law may be cited, the first being where proceedings are taken to prove a will in solemn form, and the second where, in any contentious cause or matter, the validity of a will is disputed." Now, if a *caveat* was a "proceeding," or the first step in a proceeding, it would have been the duty of the learned judge to allow the citation to issue on that ground. But he says, in effect: "It is premature to issue this citation to the heir-at-law. I can only do it when the validity of the will is in dispute." He therefore refused to allow it to issue.

On the whole I am clearly of opinion that, since the Judicature Act at any rate, the proceedings do not commence by the citation. That is not the institution of proceedings in any true sense of those words; and I do not think there is any ground for saying that any proceedings are "instituted," within the meaning of the Act, by the mere entry of a *caveat* in the case. I think the learned judge was quite right, and that the appeal must be dismissed.

Appeal dismissed with costs; costs to be set off against the costs of the action payable by defendant to plaintiff.

Solicitors, *T. C. Summerhays; Stibbard, Gibson, & Co.*

High Court of Justice.

Chan. Div. }
Chitty, J. } June 18, 19.

DIBBINS *v.* DIBBINS. (*a.*)

Contract—Option to purchase within limited time—Exercise within time by unauthorized agent—Exercise after time by authorized person—Owner of unsound mind—Ratification.

A. and B. agreed by articles of partnership that if either partner should die the other might purchase the deceased partner's share on certain terms upon giving to his legal representative notice within three months from the death. A. died during the partnership. B. had meanwhile become of unsound mind. Just before the time for the exercise of the option expired C., purporting, but without authority, to act for B., gave notice to purchase A.'s share. Shortly after the time expired B.'s committees, pursuant to an order in lunacy, gave a similar notice.

Held, that neither of the above notices was effectual, and that the doctrine of ratification had no application to such a case.

Bolton *v.* Lambert, 37 *W. R.* 434, 41 *Ch. D.* 295, *distinguished.*

Action.

By an indenture dated in 1892 the defendant and the plaintiffs' testator agreed to be partners in the trade of dairymen, under articles which provided that if either partner should die the other might purchase the deceased partner's share in the partnership without paying anything for goodwill, upon giving to his legal representative notice in writing within three calendar months from the death. The articles provided for the realization of the assets of the partnership if no arrangement was made under the foregoing provision.

The testator died during the partnership on the 5th of April, 1895, having appointed the plaintiffs his executors. The defendant was then and now a person of unsound mind not so found by inquisition.

On the 4th of July, 1895, notice in writing of the defendant's intention to purchase the testator's share of the said business, signed by the solicitor for the defendant, was served on the plaintiffs. It did not appear that the solicitor was authorized to give this notice.

Under an order in lunacy of the 23rd of July, 1895, and upon a certificate of the 2nd of August, 1895, another notice for the same purpose was on the 8th of August, 1895, served on the plaintiffs.

This was an action for a declaration that neither of the above notices was valid, and for realization of the partnership assets, an account, and a receiver. The defendant counterclaimed for specific performance of the option. The question was whether under these circumstances either of the said notices was valid.

Farwell, Q.C., and *T. L. Wilkinson*, for the plaintiffs.—Neither of the two notices was effectual. There was no authority to give the first, and the second being after the time for the exercise of the option cannot be supported as a ratification of the first: *Holland* v. *King*, 6 C. B. 727; *Doe* v. *Goldwin*, 2 Q. B. 143. *Bolton* v. *Lambert*, 37 W. R. 434, 41 Ch. D. 295, is distinguishable, and *Bird* v. *Brown*, 4 Ex. 786, is in favour of the plaintiffs.

Eustace Smith (*Byrne, Q.C.*, with him), for the

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

defendant.—The second notice related back to the first, and is valid: *Hagedorn* v. *Oliverson*, 2 Man. & S. 485; *Ancona* v. *Marks*, 10 W. R. 251, 7 H. & N. 686; *Bolton* v. *Lambert*; *In re Portuguese Consolidated Copper Mines, Bosanquet's and Badman's Cases*, 39 W. R. 25, 45 Ch. D. 16; *Lord Audley's Case*, Cro. Eliz. 561.

Farwell replied.

CHITTY, J., after stating the facts, continued:—It is settled that there is no difference between the rule in equity and at law as to an option of this nature, the option must be exercised before the expiration of the time for which it is expressed to be given both at law and in equity.

It was admitted at the bar, and it is plain, that the notice first given was of no validity when given. But the parties interested on behalf of the surviving partner took proceedings in lunacy, and obtained an order authorizing his committees to give notice on his behalf. Pursuant thereto the committees gave what would have been a sufficient notice if it had been in time, which it was not. It is now said that this amounted to ratification of the notice without authority, and had relation back to the time of the invalid notice. If that were so, the result would be that an option which must be finally exercised within a limited time would be well exercised after that time. *Bolton* v. *Lambert* was cited in support of that contention. That was a case of an offer accepted by an agent without authority, and the acceptance was afterwards ratified. In the meantime there had been an attempt to withdraw the offer, and the Court of Appeal held that the ratification related back to the acceptance. That was not a case like this, of an option which must be finally exercised within a certain time. There was no time limited for ratification there, and the doctrine as to relating back was properly applicable. The Court of Appeal did not purport to overrule common law decisions of great weight which have been referred to in the argument before me, and Cotton, L.J., mentioned one (*Bird* v. *Brown*) in his judgment for the purpose of distinction. Of those cases *Holland* v. *King* comes first. An option was there conferred on the executor or administrator of a deceased partner of succeeding to his share in the business on giving notice within a time named to the surviving partners. The widow of one of the partners gave notice within the time; but she was not then his legal representative, and did not become so until after the time had expired. The court certified to the Vice-Chancellor that the notice was not given within the time limited in the option. The court proceeded on the ground that the notice must be effectual within the time, and that no subsequent ratification was valid. Maule, J., said during the argument: "The right of option is given . . . upon the express condition that it shall be exercised within three calendar months after the death. If the notice here given be held to be an effective notice, the consequence will be that the widow might have given a notice that would have bound the surviving partners, and then might have waited for a longer period than three months to see if it was worth while to avail herself of it" (6 C. B., p. 740).

Doe v. *Goldwin* related to notice to quit which would operate at common law to terminate a tenancy, and it was held that the notice to quit must be one which the tenant might safely act on, and consequently that a notice by an unauthorized agent cannot be made good by an adoption of it by the principal after the proper time for giving it.

These two cases have an immediate bearing on this, because the time was held to be of essential value, and the doctrine of relation back did not apply.

Bird v. *Brown*, which was distinguished, as I have said, by Cotton, L.J., in *Bolton* v. *Lambert*, and was referred to as an ordinary case by Bowen, L.J., in *In re Portuguese Consolidated Copper Mines, Ex parte Badman*, was a case of stoppage *in transitu*. Rolfe, B., said: " . . . . . the real question . . . . is whether the ratification by Illins after a conversion by the defendants can have the effect of altering retrospectively the ownership of the goods, so as to prevent the plaintiffs from saying that the goods were theirs at the time of the conversion which, if no subsequent ratification had occurred, certainly were theirs at that time, and would have so continued. We are of opinion that the ratification by Illins had no such effect" (4 Ex., at p. 798). To allow the exercise of the option here would not alter the whole contract, but would make a material alteration in it, so as to bring the case within *Bird* v. *Brown*. The ratification did not relate back there, as Rolfe, B., said, and he explained under what circumstances ratification did relate back. That applies to the case before me. Then he mentioned *Lord Audley's case*. *Bird* v. *Brown* is in favour of the plaintiffs.

I must hold that the option has not been validly exercised, and it makes no difference that the person to exercise it was of unsound mind. It is impossible to hold that an unauthorized agent could exercise such an option as this so as to bind a person incompetent to exercise the option himself.

Solicitors for the plaintiffs, *Greenop & Sons*.

Solicitor for the defendant, *Thomas Lovell*.

Chan. Div. / Romer, J. — March 31.

GRAHAM v. DRUMMOND. (*a*.)

Executor—Executor and residuary legatee—Equitable charge of assets by executor or legatee—Creditor of testator—Notice—Priority—Right to follow assets.

Where an executor, who is also residuary legatee, by a legal or equitable assignment and for valuable consideration transfers assets to a person who has no notice of the existence of unsatisfied debts of the testator, or of circumstances rendering such conduct on the part of such executor improper, and such transferee has given proper notice of his charge, such assignment will hold good against the unsatisfied creditors of the testator.

Trial of action.

This was an action for a declaration that the plaintiff, Henry Arthur Graham, was entitled under a certain memorandum of charge to a charge upon all the securities of Catherine Mary Champagné, which at the date of such memorandum had been legally transferred to the defendants George J. Drummond and Edgar A. Drummond, and (the securities having now been realized), that he was entitled to a charge on the proceeds of sale thereof. The facts of the case were as follow.

Under a marriage settlement, dated the 13th of November, 1878, made on the marriage of Mary Dorcas Champagné, daughter of Mr. Arthur Henry Champagné, since deceased, to a Mr. George Philips, the said A. H. Champagné covenanted with the trustees thereof that he, his heirs, executors, or administrators, would during the lives of himself and his wife, the said Catherine M. Champagné, and the life of the survivor of them, in case the said G. Philips and Mary Dorcas, his wife, or either of them, or any

(*a*.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

issue of their then intended marriage should so long live, pay to the trustees or trustee of the said settlement the sum of £300 a year, clear of all deductions, to be held by them on the trusts therein declared. A similar settlement, dated the 31st of August, 1882, was made on the marriage of Blanche Jane Champagné (another daughter of the said A. H. Champagné) to a Mr. H. A. Weatherall, which contained a covenant for the payment of an annuity of £300 a year on the same terms and on trusts similar to those in the former settlement. At the date of the action the said George Philips and certain issue of the marriage were living. Captain and Mrs. Weatherall were also alive.

By his will, dated the 6th of April, 1864, the said A. H. Champagné gave all his estate and effects whatsoever and wheresoever to his wife, the said C. M. Champagné, for her absolute use and benefit, and appointed her sole executrix of his will. The said A. H. Champagné died on the 9th of December, 1882, and his will was duly proved by the said C. M. Champagné on the 31st of January, 1883.

By a series of indentures, of which the first was dated the 20th of December, 1892, the said C. M. Champagné charged certain stocks, shares, and securities to which she was beneficially entitled under the said will with the payment of certain sums of money secured by the said indentures to Mr. G. J. and Mr. E. A. Drummond, bankers, Charing Cross, London.

In December, 1892, Mrs. Champagné applied to the plaintiff to discount certain bills, and executed in his favour the following memorandum of charge:

"27, Chancery-lane, W.C., London,
Dec. 28, 1892.

"To H. A. Graham, Esq.

"Dear Sir,—In consideration of your discounting four joint and several promissory notes of myself, Captain and Mrs. Weatherall, all dated this day, for £1,000, £1,000, £700, and £297 respectively, I hereby charge to secure the repayment thereof all my securities now in the hands of Messrs. Drummond, bankers, Charing Cross, and now charged by them to secure an aggregate sum of about £53,000 advanced by them to me. I hereby agree on demand to execute to you a legal mortgage upon the said securities in the same form (so far as is practicable) as the charge I have given as aforesaid to Messrs. Drummond to secure to you the repayment of the said promissory notes; and in the meantime and until such legal charge is executed, this letter is to be considered as such legal charge, and to be taken, read, and construed as if such legal charge had been given in the form aforesaid, and this letter is to confer all rights, powers, and remedies as such legal charge would give when executed.

"Yours faithfully,

"(Signed) CATHERINE M. CHAMPAGNE."

The plaintiff discounted the notes, and also gave notice of the memorandum of charge to Messrs. Drummond.

Mr. E. A. Drummond died on the 10th of May, 1893. On the 31st of July, 1893, Mrs. Champagné was adjudicated a bankrupt, and Mr. G. J. Drummond, as surviving mortgagee of the above-mentioned securities, sold the same. After the liabilities to the Messrs. Drummond had been satisfied there remained in the hands of the said defendant, Mr. G. J. Drummond, the sum of £3,022 10s. 10d. To this sum the trustees of the marriage settlement of Captain and Mrs. Weatherall laid claim, as also did the plaintiff and other persons. Mr. G. J. Drummond accordingly refused to pay over the money to the plaintiff, who accordingly brought this action, in which Mr. G. J. Drummond and the various claimants were defendants. Mr. G. J. Drummond thereupon paid the money into court to the credit of the action.

The said trustees submitted that the securities in question were held by Mrs. Champagné as executrix of her husband, and were subject to his debts. They further submitted that she had no power to charge them as she had purported to do by the memorandum in question, as she had made no provision for the payment of the debt due to the trustees of the marriage settlement. They further submitted that if the memorandum in any way constituted a valid charge it was only valid as a charge on the beneficial interest remaining after provision had been made out of the assets of the testator for the payment of his debts. They counter-claimed for a declaration that they were entitled as creditors of the testator to payment of their debts from the sum, and that the sum might be carried to the account of another action in the Chancery Division in which the testator's estate was being administered. The plaintiff denied that he had had any notice of the defendants' claim.

Neville, Q.C., *A. à B. Terrell*, and *B. A. Hull*, for the plaintiff.—If an executor disposes of the assets of the creditor for valuable consideration, they cannot be followed by a creditor, whether they were legal or equitable: *Nugent* v. *Giffard*, 1 Atk. 463. In that case, as in the present, the executor was a residuary legatee, although that does not appear on the report: see *McLeod* v. *Drummond*, 17 Ves. 152. They also referred to *Mead* v. *Lord Orrery*, 3 Atk. 235. If a man buys from an executor he is not affected by the mere fact that the executor is misapplying the money, unless there is some evidence to show him that the executor intends to misapply such money: *Taner* v. *Ivie*, 2 Ves. Sen., 466; *McLeod* v. *Drummond*. By giving notice to the Messrs Drummond, the legal mortgagees, the plaintiff did all that was necessary to perfect his title.

Eve, Q.C., and *R. J. Parker*, for the trustee defendants.—The plaintiff is not entitled to any priority because he gave notice before the trustees gave it. *Dearle* v. *Hall*, 3 Russ. 1, does not apply to the case. Even if it did, it would not help the plaintiff, as the trustees gave notice at the proper time. As soon as a notice is given it attaches to the funds, and cannot be affected by any fresh dealings therewith, as by the appointment of new trustees: *Ward* v. *Duncombe*, 42 W. R. 59, [1893] A. C. 369. As creditors we have at law an equity to the testator's assets, and it is not an equity that can be affected by a notice to a prior incumbrancer: *Feltham* v. *Clark*, 1 De G. & Sm. 307. In *Re Morgan*, *Pilligrem* v. *Pilligrem*, 30 W. R. 223, it was held that although the mortgagee did not know that the executor mortgagor was an executor, it would not protect him as against the creditors of the estate. They also referred to *Dilkes* v. *Broadmead*, 9 W. R. 238, 2 De G. F. & J. 566; *Ricketts* v. *Lewis*, 30 W. R. 609, 20 Ch. D. 745; *Noble* v. *Brett*, 6 W. R. 219, 24 Beav. 499; *Hooper* v. *Smart*, 24 W. R. 152, 1 Ch. D. 90. There is no authority for the proposition that an equitable purchaser or incumbrancer can set up a purchase for value without notice.

E. N. Bullen, for another defendant, Owles.

Neville, Q.C., in reply.—There is no foundation for the distinction that is here attempted to be made between legal and equitable assets. In *McLeod* v. *Drummond* the Master of the Rolls says, 14 Ves., p. 360: "I do not find that any difference has been made between the power of an executor to dispose in any manner of equitable assets and his power to dispose of legal assets."

ROMER, J.—The point of law which I have to consider arises under the following circumstances.

Mrs. Champagné was sole executrix and legatee under her husband's will. Several years after his death, in order to secure a debt of her own to Messrs. Drummond, she transferred certain railway stocks forming part of his estate into their names. Subsequently, in order to secure a liability of her own, she gave a charge on the stocks in favour of the plaintiff. Messrs. Drummond and the plaintiff respectively, when they obtained their charges on the stocks, had no knowledge or notice that any debt of the husband remained unpaid, or that Mrs. Champagné was not in every respect entitled to deal with the stocks as she did. The plaintiff gave notice of his charge to Messrs. Drummond long before they or he had any notice that any debt of the husband remained unpaid. This is an action by the plaintiff to enforce his security. Messrs. Drummond have sold the stocks, and, after paying out of the proceeds their own secured debt, have paid the balance into court in this action. It now appears that the defendants Philips, Close, and Lowe, as trustees of a certain marriage settlement, are unsatisfied creditors of the husband, and they claim as such creditors to have a right to the fund in court superior to the plaintiff's claim, and to have that fund transferred to the credit of another action in this division, in which the estate of the husband is being administered by the court.

The question before me is whether under the circumstances above stated this claim of the trustees is well founded. In my opinion it is not, and for the following reasons. I think it is settled law that if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator. The cases showing this are numerous and of long standing. In the first place, there are two decisions of Lord Hardwicke. The first of these is *Nugent* v. *Giffard*. To understand that case a fact must be borne in mind which does not appear in the report—viz., that the executor was also sole legatee. This fact appears in a statement in 4 Bro. Ch. Cas. 136, and is mentioned by Lord Eldon in *McLeod* v. *Drummond*. The second case is *Mead* v. *Lord Orrery*, and the real ground on which it was decided and is to be supported was that one of the three executors there dealing with the asset was one of the residuary legatees, and that the person dealing in good faith with them was entitled to assume that the executors assented to that asset being treated as part of the residuary share of the legatee. These cases were followed by Sir William Grant, M.R.'s, decision in *Taylor* v. *Hawkins* (8 Ves. 209) where he pointed out the necessity that the assignee or mortgagee of the asset should have no express notice of the existence of unsatisfied debts of the testator. And the principle has been recognized and followed in *Whale* v. *Booth*, 4 Term Rep. 625, note *a*, and *Storry* v. *Walsh*, 2 W. R. 300, 18 Beav. 559, and has been stated for a considerable time as established law in leading textbooks dealing with the subject.

But it is now said on behalf of the creditors here that the principle of law I have stated is limited to cases where the assignee or mortgagee of the asset obtains the legal estate in or legal control over that asset. It is said that where the assignment or mortgage only confers an equitable interest in the asset, then that equitable interest is subject to the prior equitable right of the unsatisfied creditors, and, of course, if this contention were correct, then the principle could never apply to an equitable asset. Now, I cannot find that up to the present time it has ever been contended or suggested that the principle is so limited, and I do not think it ought to be. In the reported cases the question whether the asset was equitable or whether the purchaser or mortgagee had acquired a legal estate, or its equivalent in case of chattels personal, has never been treated or referred to as being important; and so far as authority goes it is against the limitation contended for, inasmuch as *Nugent* v. *Giffard* was a case where the asset was an equitable, and not a legal term of years. And in *McLeod* v. *Drummond*, 14 Ves., at p. 360, Sir William Grant, M.R., though he was there dealing with the ordinary case of executors borrowing money on security of their testator's assets, makes the following general remarks: "I do not find that any difference has been made between the power of an executor to dispose in any manner of equitable assets and his power to dispose of legal assets. In the case of *Nugent* v. *Giffard* it was only the equitable, and not the legal, term that the executor had assigned in payment of a debt of his own, and in *Scott* v. *Tyler*, 2 Bro. Ch. Cas. 431, 2 Dick. 712, the bonds, though capable of assignment, were not in fact assigned, and therefore the bankers had not the legal interest; yet it was held that the pledge could be taken from them only upon the ground of implied fraud." Moreover, the reasons given by the judges for the decisions I have above referred to apply equally to legal and equitable assets.

The chief reasons given are that unsatisfied creditors have no lien or charge on any asset, and that persons dealing with the executor in good faith are entitled to look to him alone, and are not bound to ascertain that all debts and liabilities have been discharged. For if they were so bound they would never be safe in dealing for valuable consideration with any asset, even though a considerable time might have elapsed since the testator's death (as happened in the case before me), and so a legatee whose legacy was assented to by the executor would be unfairly and unduly hampered in dealing with it. Further, the case of an executor who is a residuary legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the executor, and who deals with his legacy for valuable consideration. In the last case unsatisfied creditors have the right to follow the legacy as against the legatee or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration; and I do not find that this immunity on the part of the purchasers is limited to cases of legal assets, or to cases where the purchasers have obtained the legal estate or its equivalent, and in my judgment it ought not to be so limited.

But, in order to prevent misunderstanding, I desire to point out that the cases I have been considering must not be confused with those where an executor has not so parted with his control over the asset as to prevent his having recourse to it in order to satisfy creditors subsequently appearing. If the executors could have recourse to the asset, so, of course, could the unsatisfied creditors. So if the court administering the testator's estate retains the control over an asset, it can apply it in favour of creditors at any time, notwithstanding that the legatee of the asset may have dealt with it for valuable consideration; for in cases of this class the title acquired by the purchaser from the legatee is really one subject to the right of the executor or of the court, as the case may be, to have the asset applied in satisfaction of any creditors who may appear at any time before the executor or court loses control over it.

In the case now before me Mrs. Champagné, as

against the plaintiff, could not possibly have said that she retained the right to disregard the charge which she had given, and to have the assets charged applied in payment of the unsatisfied creditors. The plaintiff's charge was in no way subject to any right or control by the executrix. The stocks charged were transferred to the first mortgagees, who admittedly got a title, and that before they had any notice of the existence of the creditors now claiming. The plaintiff in fact completed his title by giving notice to those having legal control over the assets, and the stocks could, as against him, in no way be reached by the executrix or by the creditors.

For these reasons I think the plaintiff is entitled to the relief he asks. But before parting with the case I ought to say a few words about the authorities cited on behalf of the creditors. *Noble* v. *Brett* was a case where the court held that the executor had not parted with his control over the assets, and had retained his right to have recourse to them to satisfy the unsatisfied creditor, and, further, that the assets had come under the control of the court for the purpose of administering the estate of the testator. That these were the grounds of the decision is shown by the passages in the judgment of Sir John Romilly, M.R., at pp. 510, 511, and 512 of the report. *Hooper* v. *Smart* was a case where the fund was in the control of the court in an action administering the estate of the testator, and was subject to the right of the court to apply it in payment of any creditor who established his claim before it was paid out; and where, though all known debts of the testator had been paid, the purchasers from the legatees had bought subject to the court's right, as was pointed out by Hall, V.C., at p. 98 (1 Ch. D.) of the report in these words: "This fund remained in court, and the purchasers took subject to the risk that other claims might be brought in and established." Lastly, *Re Morgan* has no real bearing on the point now before me. That was the case where an executor and trustee held a lease in trust for certain beneficiaries under a will and renewed that lease. Of course he held the renewed lease as trustee. He then, concealing the fact that he was only trustee of the renewed lease, gave an equitable charge on it in favour of a third person, and it was held, under these circumstances, that the third person's charge could not be set up as against the prior equity of the beneficiaries.

Solicitors, *Gibson, Weldon, & Bilbrough; Philips, Close, & Lowe; Lowe & Co.; S. P. Clare.*

Q. B. Div.
(Pollock, B., and Bruce, J.)

May 15.

LONDON COUNTY COUNCIL (*Appellants*) *v.* GROVE, SURVEYOR OF TAXES (*Respondent*). (*a.*)

Inland revenue—Income tax—County council—Interest arising on loans—Deductions—16 & 17 *Vict. c.* 34, *Schedule D.*

The London County Council, under the powers and provisions of various Acts of Parliament, borrowed large sums of money for their own purposes and for the purpose of lending sums of money to various local bodies. Upon these borrowed sums they paid interest, income tax being deducted by the Bank of England and paid over to the Inland Revenue, and upon the sums they lent they received interest. In 1894 *they were served with a notice of assessment under Schedule D of the Income Tax Act* (16 & 17 *Vict. c.* 34) *in respect of a sum of* £352,021, *being interest received by them in the year ending March,* 1893, *in full without deduction of income tax, upon loans advanced by them.*

Held, that the London County Council were properly so assessed. The interest they received was part of their funds and part of the corpus *of the property which they enjoyed, and they ought to pay income tax on it.*

The London County Council could not be treated as a trading concern so as to bring the money they borrowed, on the one side, and the money they lent, on the other side, into an account.

Special case.

This was a case stated by the General Commissioners of Inland Revenue for the District of St. Martin-in-the-Fields, in the County of London, upon the determination of an appeal to them under the Income Tax Acts, which appeal related to a claim for the payment of Income Tax upon the sum of £352,021 6s. 10d., the interest received in 1892-1893 by the London County Council upon loans advanced by them to the School Board for London, the Managers of the Metropolitan Asylum District, the Receiver for the Metropolitan Police District, and other local bodies, and related to other questions as to sums received by the Commissioners for Inland Revenue in respect of income tax payable in respect of properties assessed under Schedule A.

For many years past the Metropolitan Board of Works and, under the Local Government Act, 1888, their successors, the London County Council, had under and pursuant to certain statutes borrowed money for the purpose of making advances by way of loan to the School Board for London and other local bodies.

By the Metropolitan Board of Works (Loans) Act, 1869 (32 & 33 Vict. c. 102), it was provided that for the purposes therein mentioned the Board might create capital stock, to be called Metropolitan Consolidated Stock, in certain amounts and at certain prices; and by section 5 it was provided that all Consolidated Stock created for the purposes therein mentioned or of any Act thereafter to be passed, and the dividends thereon, and the sums required for redemption thereof, should be charged indifferently on the whole of the lands, rents, and property belonging to the Board under the Acts mentioned in the first schedule to the said Act, and on all moneys which could be raised by the Board by rates under that Act.

By section 26 a fund to be called the Consolidated Loans Fund of the Metropolis was created.

By section 37 it was enacted that the Board should have power to raise money by the creation of Consolidated Stock for the purpose of making the loan to the managers of the Metropolitan Asylum District, and it was enacted that all sums received by the Board from the managers in respect of interest on or the principal of such loan should be carried to the Consolidated Loans Fund.

Section 28 of the above Act relating to the application of the Consolidated Loans Fund was repealed and re-enacted by the London County Council (Money) Act, 1889.

This statute enacted (section 15) that the Consolidated Loans Fund should be first applied in the payment of the dividends on Consolidated Stock, and then in purchasing and redeeming Consolidated Stock, and contained further provisions as to the application of such Consolidated Loans Fund.

From time to time Consolidated Stock was created under and pursuant to the above Acts.

By the Metropolitan Board of Works (Loans) Act, 1878 (41 & 42 Vict. c. 37), it was provided (section 2)

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

that the Act should be read and have effect as one with the Metropolitan Board of Works (Loans) Act, 1869. The Board were thereby authorized to create a specified amount of Consolidated Stock to lend to various public bodies sums of money to a specified amount, in addition to sums previously lent to such public bodies respectively. The Act, by section 10, further provided that where a vestry or district board desired to borrow money for certain specified purposes, then from time to time up to the 31st of December, 1879, the Board might lend to such vestry or district board, and the vestry or district board might borrow, such money as the Board thought fit, and the vestry or district board were authorized and desired to borrow.

By section 11 power was given to lend £200,000 to boards of guardians, and for that purpose to create Consolidated Stock.

By section 23 it was provided that all sums received by the Board for interest on or principal of any loan made by them under the Act should be carried to the Consolidated Loans Fund.

Under the powers and provisions of this statute Consolidated Stock to the amount of £2,150,000 was on the 5th of May, 1879, created and issued. Upon this stock interest after the rate of 3½ per cent. per annum was payable. The sum of £12,000 was lent by the Board to the Vestry of the parish of Bermondsey.

By the Metropolitan Board of Works (Money) Act, 1884 (47 & 48 Vict. c. 50), it was provided that the said Act should be read and have effect as one with the Metropolitan Board of Works (Loans) Acts, 1869 to 1871, and the Metropolitan Board of Works (Money) Acts, 1875 to 1883.

This Act provided for the creation and issue of Consolidated Stock for certain specified purposes. By sections 12 and 13 it was provided that the Board might from time to time during the year ending the 31st of December, 1885, lend to the School Board for London such sums as such Board was authorized to borrow, not exceeding in the whole the sum of £700,000, and that the Metropolitan Board might in order to raise money for such purpose create Consolidated Stock, and that the moneys so lent should be repaid to them by the School Board with interest as therein set forth. It was (section 21) provided that all sums received by the Board in respect of interest on or principal of any loan made by them under the said Act should be carried to the Consolidated Loans Fund.

Under the powers and provisions of this statute Consolidated Stock to the amount of £1,750,000 was on the 20th of May, 1885, created and issued. Upon this stock interest at the rate of £3 per centum per annum was and still is payable. On the 9th of October, 1885, the sum of £150,000 was lent by the Board to the said School Board for London.

Under the powers and provisions of Acts of Parliament enacted in each of the years 1869 to 1871 and 1875 to 1892 the Metropolitan Board of Works and their successors, the London County Council, respectively continued to lend sums of money to the School Board for London, the Managers of the Metropolitan Asylum District, the Receiver for the Metropolitan Police District, and other local bodies, and created and issued Consolidated Stock for the purpose of raising such money. The total amount of money so raised and lent amounted on the 31st of March, 1892, to the sum of £6,674,751.

Up to the year 1881 the Metropolitan Board of Works had applied money from the Consolidated Loans Fund in the redemption of debt by repaying old outstanding loans raised prior to the creation of Metropolitan Consolidated Stock in 1869. The Metropolitan Board of Works up to this time had always created new stock in order to raise the moneys required for the loans to local bodies in each year under the various money Acts hereinbefore mentioned.

By the Metropolitan Board of Works (Money) Act, 1881 (44 & 45 Vict. c. 48), it was provided (section 20) that the Board might for the purpose of making loans, instead of raising money by the creation of Consolidated Stock, use for any such loan any moneys for the time being forming part of the Consolidated Loans Fund and not required for the payment of dividends on Consolidated Stock.

The Metropolitan Board of Works (Money) Acts enacted in each of the years 1882 and 1883 contain a similar provision.

From and after the year 1881 the Metropolitan Board of Works and its successors, the London County Council, in pursuance of the Acts above mentioned, used, in addition to moneys raised by issue of Metropolitan Consolidated Stock, for the purpose of loans to the School Board for London, the Managers of the Metropolitan Asylum District, and other local bodies, moneys forming part of the Consolidated Loans Fund and not required for the payment of dividends on Consolidated Stock.

The total loans outstanding on the 31st of March, 1893, amounted to £10,297,675 8s. 2d.

The total nominal amount of the Consolidated Stock existing on the 31st of March, 1892, was £28,811,637.

The sum of £352,021 6s. 10d. was the aggregate amount paid to the London County Council in the year 1892-3 by the Managers of the Metropolitan Asylum District, the Receiver for the Metropolitan Police District, and other local bodies, respectively, for interest upon money advanced by the Metropolitan Board of Works and the London County Council to the local bodies above mentioned under the provisions of the statutes hereinbefore mentioned.

The said amount of £352,021 6s. 10d. exceeded the corresponding interest payable upon the Consolidated Stock created and issued by the Metropolitan Board of Works and the London County Council by the sum of about £25,000, but the London County Council incurred further expenses in the issue, management, and redemption of the loans amounting to £10,000.

The interest payable upon the Consolidated Stock so created and issued as aforesaid was paid by the Bank of England, as the bankers of the London County Council, to the stockholders, and the Bank of England deducted from the interest payable to each stockholder income tax at the authorized rate, and paid over the balance of such interest to the stockholders respectively. The aggregate of the sums so deducted by the Bank of England was paid over to the Commissioners of Inland Revenue, and no part thereof was paid by the Bank of England to the London County Council.

On the 12th day of July, 1894, the London County Council were served with a notice of additional first assessment under Schedule D of the Income Tax Acts made by the commissioners for putting into execution the Income Tax Acts in respect of the sum of £352,021 6s. 10d.

Up to this date income tax on such amount had not been demanded or paid.

The London County Council contended (1) that no duty was payable in respect of the sum of £352,021 6s. 10d., but only such part of it as was profit (if any); (2) that if the duty was payable on such sum or any part thereof, then the London County Council were entitled for their own benefit to a sum equal to such duty out of the income tax deducted by the Bank of England from the interest

payable to holders of Consolidated Stock, which the said Bank of England paid over to the Commissioners of Inland Revenue.

The London County Council are the owners and occupiers of certain lands, tenements, and hereditaments within the parish of St. Martin-in-the-Fields.

Such lands, tenements, and hereditaments were purchased either by the London County Council or their predecessors, the Metropolitan Board of Works, with money borrowed under the provisions of various Acts of Parliament. All the Consolidated Stock of the London County Council, and the dividends thereon, are charged upon the whole of these properties. The London County Council receive nothing in respect of any of such lands, tenements, and hereditaments, except rent in respect of such as are in the occupation of tenants.

Up to the year 1891 the commissioners annually returned or allowed to the London County Council a sum equal to the amount of duty deducted from or paid on the rents received by the London County Council.

In May, 1894, the London County Council were served with notices of assessment under Schedule A of the Income Tax Acts made by the commissioners for putting into force the Income Tax Acts in respect of the said lands, tenements, and hereditaments, which, together with the duty claimed thereon, are described in Schedules A and B to this case.

The London County Council contended (1) that no duty was payable by them in respect of such lands, tenements, and hereditaments; (2) that if such duty was payable, they were entitled for their own benefit to a sum equal to such duties out of the income tax deducted by the Bank of England from the interest payable to holders of Consolidated Stock, and paid over to the Commissioners of Inland Revenue; (3) that they were entitled for their own benefit to a sum equal to the amount of duty deducted from the rent payable to the London County Council in respect of so much of the said lands, tenements, and hereditaments as were not in their occupation.

It was contended by the surveyor of taxes on behalf of the Crown that each of the hereditaments in question had been duly inserted in the valuation list of the parish where situated.

The charging schedule of the Act of 1853 runs thus:—

Section 2. Schedule A.

"For and in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, and to be charged for every twenty shillings of the annual value thereof."

That by rule 1, section 60, 5 & 6 Vict. c. 35, "all lands, tenements, hereditaments, or heritages capable of actual occupation, of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value, are chargeable on their annual value."

That the fact of the Council deriving, as alleged, no pecuniary profits from the occupation of such properties as the Sewer Cottage, the Fire Brigade stations, and properties of a similar character does not affect the liability of the London County Council to income tax in respect of such properties, for the reason that the test of liability to income tax under Schedule A is not profit, but annual value.

That the assessment on the London County Council under Schedule D of £352,021 for 1892-3 was in respect of interest received by the Council in the year ended the 31st of March, 1893, in full, without deduction of income tax.

That the assessment was made under the charging schedule of the Act 16 & 17 Vict. c. 34, s. 2, Schedule D. The words are: "And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act."

That this interest was also chargeable under the first clause of section 102 of the Act 5 & 6 Vict. c. 35. The words are: "Upon all annuities, yearly interest of money, or other annual payments, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly, or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of seven pence."

That by the 40th section of the last-named Act it was enacted as follows: "All bodies politic, corporate, or collegiate, companies, fraternities, fellowships, or societies of persons, whether corporate or not corporate, shall be chargeable with such and the like duties as any person will under and by virtue of this Act be chargeable with.

That all annual interest received by the Council in full without deduction of tax is chargeable with income tax, and should have been returned to the assessor for the parish by the Council for assessment, and that the sum of £352,021 of untaxed interest received by the Council in the year ended the 31st of March, 1893, was duly and properly assessed.

That the assessments under Schedule A and Schedule D of the income tax on the lands, tenements, and hereditaments belonging to the Council, and on the untaxed interest received by the Council, having due regard to the assessment at the Bank of England in respect of the income tax deducted from and borne by the recipients of the dividends on the Consolidated Stock, did not constitute a double assessment within the provisions of section 171 of 5 and 6 Vict. c. 35 and section 60 of the Taxes Management Act of 1880. That the major part of the security for the Consolidated Stock was the county rate, and not the lands, rents, and property of the Council; whereas the interest on the stock which had been paid by the Council was assessable under the specific provision of section 102 of 5 & 6 Vict. c. 35, and such interest had been so assessed on the Bank of England.

The commissioners decided (1) that in point of law the whole of the duty, amounting to the sum of £10,267 5s. 7d., was payable by the London County Council; (2) that the London County Council was liable to the duty assessed in respect of the lands, tenements, and hereditaments under Schedule A; (3) that the London County Council was not entitled to the return of any such duty as claimed.

The London County Council appealed.

Sir E. Clarke, Q.C., Bosanquet, Q.C., and *English Harrison*, for the appellants; *Sir R. Webster, A.G.*, and *Danckwerts*, for the respondent.

The arguments of counsel sufficiently appear above and in the following judgment.

POLLOCK, B.—In this case it appears to me that the Crown are entitled to judgment. Now, this special case states that it is a claim made by the Crown for the payment of income tax upon the sum of £352,021 6s. 10d., and that amount is arrived at as being interest received in 1892-1893 by the London County Council, the appellants, upon loans advanced by them to the School Board, the Metropolitan Asylum District, the Receiver for the Metropolitan Police District, and other local bodies.

It appears that by different Acts of Parliament this vast body, which is now the London County Council, and those who preceded it has a power, first, of

borrowing money for their own purposes and paying interest upon that, the interest being charged upon their property, the land that they occupied, and also upon the rates which they had the power of raising by Parliamentary powers. In later years it was found convenient that they should not only have that power of borrowing which the old Metropolitan Board of Works had, and which every public body of this kind must have, but that it would be a great convenience to other boards, such as the School Board, the Metropolitan Asylum District Board, and others, that they should have the power to borrow for other purposes, and accordingly large sums were borrowed by the London County Council upon which they paid interest. Large sums were lent by the London County Council to different local boards, and then there came a period when those sums that were lent were repaid, and therefore the balance of accounts is much more in favour of the London County Council than it was at the beginning.

The sums in question became payable in the two years 1892-1893. It is provided by the Act of Parliawhich we are dealing with now that the London County Council and all corporations are to be in the same position as individuals, and it is also found as a fact that the assessment which is complained of of the London County Council under Schedule D, of £352,021, "is in respect of interest received by the Council in the year ended the 31st of March, 1893, in full without the deduction of income tax." That, therefore, is clear. They received this sum as interest. No sum is deducted by those who paid that interest, as is usual in such cases. It appears that the London County Council for some reason desire that it should be paid in full, and the question is whether they are entitled to deduct that sum, including the income tax, which beyond all doubt the borrowers of the money, when they paid income tax, ought to have deducted and would have deducted under ordinary circumstances before they paid it.

I think the whole difficulty that has arisen here has been caused by Sir Edward Clarke's ingenious dealing with the case, which he has presented as if it were a case of profit and loss arising out of some large bank or mercantile body who were dealing with money, borrowing on the one side, and paying out on the other, and incurring certain expenses which would have to be deducted, and then making up a sort of profit and loss account, and saying, "We are to pay upon the balance of the net profits upon that account." But in truth that is absolutely foreign to the consideration of the present case. In the present case the assessment is made under the charging schedule, which is Schedule D of 16 and 17 Vict. c. 34, s. 2, which has these words: "And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act."

Now, here the question is whether this is an interest which is payable quite apart from any question of annual profits. It is pointed out first by Lord Esher, M.R., in the case of *The Clerical, Medical, and General Life Society* v. *Carter*, 37 W. R. 346, 22 Q. B. D. 444, that it is quite sufficient to say that the words in this Schedule D are perfectly plain, and are to be construed, as all other words are in an Act of Parliament, according to their ordinary meaning, unless that construction, applied to the subject matter with which they are dealing, would lead to some gross and manifest absurdity. This is not so in the present case, because here, so far from leading to a manifest absurdity, the construction put upon this schedule in that case, and which we are now putting upon it, is entirely in accordance with the scheme of the whole Act throughout. How that word "interest" came to be used, instead of mere profits, is described in the very interesting note by Mr. Dowell in his book, which seems to say that it is only found by reverting to some of the older Acts in the last century, where the same sort of language was used, but which somehow slipped out of the intermediate Acts. But there we find it, and there we must deal with it, and, to my mind, nothing can be more extravagant than to suppose that we ought to deal with this London County Council as if it were a trading corporation. Then how does the matter rest? This income tax is income tax that is payable by the London County Council as the recipients of interest; it is a part of their funds which they have received, it is a part of the *corpus* of the property which they enjoy, and they ought to pay it. But they say, "We, on our side, when we are the borrowers, and when we are paying our interest to those who lend us the money, stop the income tax through our bankers," and accordingly the Bank of England, who act for them, as bankers do in the ordinary case where interest or dividends are paid, stop the income tax which is due upon the interest so payable. But whose income tax is that? That is not the income tax which is to be levied upon the London County Council. Instead of being any advantage or profit to them, it is a debt they are paying, and they are paying it to persons who have lent them that money, and who are being paid through the bankers in accordance with the practice which has been adopted for many years in the collection of all these income taxes. The Government go to the source, and they say, "Instead of going round to each person who receives a dividend warrant from the London County Council or the Bank of England, their bankers, and asking the recipient for the income tax, we will go to the London County Council, and say, 'You must pay your creditors minus the income tax, and you must pay that to us.'" But that is in no sense a payment upon their property. As I have said before, it is a payment upon the property of the persons who are receiving the dividend. That is, therefore, foreign altogether to this matter.

It was argued that if you could treat the London County Council as a trading concern, and bring all the money they borrowed on one side, and all the money they lent upon the other, into an account, treating it as a trading account or a bankers' account, then a different result would be produced as to the actual financial condition, and you could treat them as annuities payable, or interest payable, or money borrowed on the one side, and annuities or interest on money lent on the other side. It never has been so treated that, because a man has £1,000 a year and he chooses to charge £300 upon it by granting an annuity to a relative or to a money lender for a money consideration, that therefore he is to say: "My income is only £700, because I have charged the other with an annuity." That is not the mode in which the income tax gets at people's property. If they have property, they may deal with it as they like; but so long as that property is theirs within the schedules of this Act they must pay income tax upon it. This seems to me to be so clearly declared and acted upon in *The Clerical, Medical, and General Life Society* v. *Carter*, and also in *The Gresham Life Insurance Co.* v. *Styles* in the House of Lords (41 W. R. 270, [1892] A. C. 309), especially in the judgment of Lord Watson, that I think it would be really only waste of time to argue all the different points which are alluded to here. It seems to me that this case stands on those clear and simple principles, and that if we were to decide otherwise we should be making not only an exception from the language of the Income Tax Acts

which does not exist, but altogether inventing a theory of dealing with this taxation which has never been suggested before.

It seems to me therefore that our judgment in this case ought to be for the Crown, with costs.

BRUCE, J.—I am of the same opinion.

Judgment for the Crown.

Solicitors, *Blaxland; Solicitor of Inland Revenue.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.)

April 23.

REG. *v.* THE JUSTICES OF KENT AND OTHERS. (*a*.)

Licensing—Objection to renewal of licence—Refusal of justices to renew—Appeal to quarter sessions—Jurisdiction to order non-appearing objector to pay costs—Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 31, *sub-sections* 2, 5—*Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 13, *sub-section* 11.

The licensee of a licensed house received notice of objection to the renewal of his licence, and the objector appeared at the annual licensing meeting and opposed the renewal. The licensing justices refused to renew the licence, and the licensee appealed to the court of quarter sessions, having served due notice of the appeal upon the objector. The objector took no part in the appeal, and did not appear before the court, which allowed the appeal and ordered the objector to pay the costs.

Held, that the court of quarter sessions had jurisdiction to order the objector to pay the costs, as he was a "party" to the appeal within section 31 *of the Summary Jurisdiction Act*, 1879, *although he had not appeared before the court.*

Rule calling on the justices of Kent and others to show cause why a writ of *certiorari* should not issue to bring up and quash an order made by the East Kent Quarter Sessions, in so far as such order ordered a Mr. Boulter to pay the costs of an appeal, on the ground that the justices had no jurisdiction to make the order.

Mr. Boulter, at whose instance the present rule was obtained, had given a written notice of opposition—under section 42 of the Licensing Act, 1872—to the renewal of the licence of a certain licensed house in Dover, which had been licensed for many years. This notice was given on the 16th of August, 1895, and was served on Mr. Sharp, the licensee of the house, and stated that the objector intended at the general annual licensing meeting for the borough of Dover, to be held on the 26th of August, to oppose the renewal of the licence, on the ground that the licence was not needed for the requirements of the neighbourhood.

Mr. Boulter, the objector, appeared by his solicitor before the licensing justices at the Town Hall, Dover, on the 26th of August, and opposed the renewal of the licence. There was no other opposition except the opposition of the solicitor who appeared for the objector and the Temperance party. In consequence of the opposition the renewal of the licence was refused by the licensing justices.

The licensee and the lessees of the house appealed to the East Kent Quarter Sessions, and notices of the appeal were duly served upon the objector, Mr. Boulter, and upon the clerk of the justices.

The appeal was heard before the East Kent Quarter Sessions at Canterbury on the 15th of October, 1895, and neither the objector nor the licensing justices who had refused the licence appeared. The court allowed the appeal, and granted a renewal of the licence, and they also made an order that the objector, Mr. Boulter, who had not appeared before them, should pay the taxed costs of the appeal, which were afterwards taxed at £73.

Mr. Boulter objected to pay these costs upon the ground that, as he had not appeared before the court of quarter sessions to oppose the appeal, he was not a party to the appeal, and that therefore the court had no jurisdiction to make an order ordering him to pay the costs; and he then obtained the present rule to bring up and quash the order in so far as it ordered him to pay the costs of the appeal. The question now was whether the court of quarter sessions had jurisdiction to order the objector, who had not appeared before them, to pay costs.

The Summary Jurisdiction Act, 1879 (42 & 43 Vict c. 49), provides:—

Section 31: "Where any person is authorized to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court, subject to the conditions and regulations following: (2) The appellant shall . . . give notice of appeal by serving on the other party and on the clerk of the said court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal; (5) The court of appeal may adjourn the hearing of the appeal, and upon the hearing thereof may confirm, reverse, or modify the decision of the court of summary jurisdiction, . . . and may by such order exercise any power which the court of summary jurisdiction might have exercised, and such order shall have the same effect, and may be enforced in the same manner, as if it had been made by the court of summary jurisdiction. The court of appeal may also make such order as to costs to be paid by either party as the court may think just."

The Interpretation Act, 1889 (52 & 53 Vict. c. 63), provides:—

Section 13, sub-section 11: "The expression 'court of summary jurisdiction' shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by or who is authorized to act under the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law."

Dickens, Q.C. (*Lawson Walton, Q.C.*, and *Bodkin* with him), for the licensee, showed cause.—We concede that under the Alehouse Act, 1828 (9 Geo. 4, c. 61), the court would have had no jurisdiction in this case to grant costs. The important sections in that Act are sections 27 and 29. Under section 27 there was a right of appeal given to the quarter sessions, and under section 29 costs could be given either to or against the justices, and if costs were given against the justices then the justices were indemnified out of the county fund. Then section 42 of the Licensing Act, 1872, gave for the first time a right to any person to come in and object to the renewal of a licence, and whether the objector would or would not have been liable to costs before the Summary Jurisdiction Act, 1884, since that time he is a "party" to the appeal within the meaning of section 31, sub-sections 2 and 5, of the Summary Jurisdiction Act, 1879. By the definition of a "court of summary jurisdiction" given in section 7 of the Act of 1884, which is now repealed but replaced by section 13, sub-

(*a*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

section 11, of the Interpretation Act, 1889, it is clear that licensing justices acting in these matters are a court of summary jurisdiction. That being so, section 31 of the Act of 1879 applies, and the objector, whether he appeared in the court of quarter sessions or not, was a "party" whom the court could order to pay the costs. The case is really concluded by several authorities, such as *Reg.* v. *The Justices of Glamorganshire*, 40 W. R. 436, [1892] 1 Q. B. 621; *Reg.* v. *The Licensing Justices of Bristol*, 41 W. R. 379, 68 L. T. N. S. 225; *Price* v. *James*, 41 W. R. 57, [1892] 2 Q. B. 428; *Reg.* v. *The Justices of London*, 43 W. R. 387, [1895] 1 Q. B. 616; *Reg.* v. *Purdey*, 13 W. R. 75, 5 B. & S. 909. The objector therefore was the "other party" to the appeal within sub-sections 2 and 5 of the Act of 1879, and the court had jurisdiction to order him to pay the costs of the appeal, although he took no part in the appeal.

Asquith, Q.C. (*Blaiklock* with him), in support of the rule.—The right of appeal under the Licensing Acts remains as it was before the Act of 1884; it has neither been enlarged, diminished, nor modified. To come within section 31 of the Act of 1879, the party must be the party who is really litigating the appeal. "Either party" there means "either party who is litigating the appeal," which the objector here was not.

He then referred to the cases above cited.

Lord RUSSELL OF KILLOWEN, C.J.—I think that this rule must be discharged. One cannot have listened to this argument without seeing that the question is one of very general importance, and that the whole of the law relating to this matter is in a most unsatisfactory condition. It is very far from clear, and is most confused. The question is one of very great importance, because the Licensing Act of 1872, for some good public purpose, does undoubtedly give power to anyone to come before the justices upon an application for the renewal of a licence, having first given notice stating the grounds of objection; or without any such notice at all the party may appear and object; and in the latter case where no preliminary notice has been given the court has power to adjourn, and may upon its own motion make such inquiry as it thinks right. It is quite clear that that salutary power may be made very limited if parties who think that they ought to object have before them the danger of possibly being visited with costs, or the danger of being committed to what may be a very expensive course of litigation, leading up by one course of procedure to the House of Lords. There lies outside this immediate question a very important question indicated during the argument, whether the class of authorities, of which *Reg.* v. *The Justices of Glamorganshire* is an example, is a true exposition of the law, or whether the procedure having relation to the Licensing Acts is to be treated for all purposes, and especially for the purposes in question here, as analogous to the ordinary case of litigation in some courts of summary jurisdiction, where there is a distinct informant or complainant, and a distinct person called on to answer the charge made in that information or complaint.

It is, however, enough for the purposes of this case to say that, in the face of the decision in *Reg.* v. *The Justices of Glamorganshire*, we must assume that the court in this case was acting under the powers conferred by the Summary Jurisdiction Acts. We must assume that that case was correctly decided; and the question then is shortly this: Whether or not the applicant for this rule was a "party" within the meaning of section 31 of the Summary Jurisdiction Act, 1879? The facts were these. [His lordship having stated the facts, proceeded:] Were the justices within their jurisdiction in making the order they made? That depends mainly upon the proper construction of section 31 of the Act of 1879. [His lordship read section 31, sub-sections 2 and 5.] Was the applicant in this case, the objector in the court below, a "party"? On the whole I think he was. A good deal might be said if this were open for us to consider as a matter of principle, even upon the minor point, and especially upon the foundation of some of the language used by the members of the court in the decision of *Reg.* v. *The Justices of London*; but I think there is express authority by which, sitting in this court, we must consider ourselves bound, and to which our decision must conform. I need not mention the authorities in detail, but they are *Reg.* v. *The Justices of Bristol*, where the superintendent of police having opposed in the court below, it was held that having done no more he was the "other party" within the meaning of sub-section 2; and to say that the same person who is the "other party" for the purpose of that sub-section is not also the "other party" within and for the purposes of sub-section 5 would be a very difficult thing. There is also the case of *Price* v. *James*, which, although not so decidedly in point, as it was the case of making a person a respondent on the statement of a special case, nevertheless is a decision in the same direction. Finally, there was the case of *Reg.* v. *Purdey*, which, although not under the Licensing Acts, is in point here. There the informant before the court below procured a decision or conviction from magistrates and did not appear on the appeal; but it was decided by the court—and on that decision we feel ourselves bound to act—that he was a party to the appeal, and so liable to costs.

Upon these short grounds, and within the very limited area in which I feel justified in exercising my own judgment, I think, in view of these decided cases, that this rule must be discharged.

WRIGHT, J.—I am of the same opinion. The applicant, Mr. Boulter, gave a notice which in fact had the effect of preventing the renewal of Sharp's licence, and that obliged Sharp to appeal. That being so, I cannot see that there is anything wrong or unjust in saying that Sharp ought to have his costs of that appeal if the quarter sessions had power to give them. Whether they had that power or not depends on whether the Summary Jurisdiction Acts, 1848 and 1879, have been applied to these licensing matters by the Interpretation Act, 1889; and, secondly, whether Boulter could be said to be a party to this appeal. I think we are bound on both points. Long before the case of *Reg.* v. *The Justices of Glamorganshire* was decided there was an authority which bound the court in that case, that the Summary Jurisdiction Act did apply to matters to which it was not previously supposed to apply. On the other point also we are bound by the case of *Reg.* v. *The Justices of Bristol*, that the objector before the licensing magistrates is, for some purposes at any rate, to be treated as an objector in relation to the appeal, and therefore a party in relation to the appeal.

Rule discharged with costs.

Solicitors for the prosecutor, *Hicks, Davis, & Hunt*, for *A. M. Bradley*, Dover.

Solicitors against the rule, *Godden, Son, & Holmes*, for *Mowll & Mowll*, Dover.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.)

April 14.

REG. *v.* PAYNE AND COOPER. (*a.*)

Contempt of court—Pending criminal charge—Newspaper comments tending to prejudice trial.

On an application for a writ of attachment for contempt of court by the respondents in respect of certain newspaper articles, it appeared that the applicant had been arrested on a charge of arson and that the charge had been dismissed; that an article published in the paper while the applicant was under remand referred to the fact that he had been charged with arson and imputed dishonesty to him. The applicant was afterwards committed for trial for larceny and embezzlement, and the trial was still pending at the date of the application. While he was awaiting trial there were published in the paper an article alluding to the charges pending against the applicant and a report of the proceedings at a meeting of the standing joint committee of the county, at which the prosecution of the applicant was considered and ex parte *statements made as to that prosecution.*

Held, that none of the publications appeared to be intended or calculated to prejudice the pending trial of the applicant, and that no attachment ought to issue.

Principles regulating applications to commit for contempt of court considered.

Argument of an order *nisi* obtained on the 25th of March on behalf of Gower calling upon the respondents Payne and Cooper to show cause why a writ of attachment should not issue against them for contempt of court for writing, printing, and publishing in the *Huntingdonshire Post* of the 30th of November, 1895, and 15th of February, 1896, certain comments relating to the applicant, and in the same newspaper of the 7th of March, 1896, a report of the proceedings at a meeting of the Huntingdonshire Standing Joint Committee at which the question of confirming the action of the chief constable in obtaining legal assistance for the police in a case against the applicant was discussed, the applicant being at the time of the publication complained of under remand or committal for trial on charges of larceny and embezzlement.

The applicant was, up to the 22nd of November, 1895, sub-editor and manager of the *Huntingdonshire Post*, a newspaper published by the Huntingdonshire Post Co.

On the 28th of November the applicant was charged with attempting to set fire to the offices of the company, and was remanded to the 5th of December, when the charge was dismissed.

On the 30th of November an article written by Payne was published in the newspaper in which the charge of arson against the applicant was alluded to. It contained the following passages: "At all events a systematic suppression of all letters, an elaborate and unauthorized correspondence in his employer's name on his own behalf appears to be the only necessary step to be taken by a sufficiently skilful and dishonest person in a position of trust in such offices." "It was evident that they (the company) had been the victims of an elaborate and prolonged system of fraud."

The applicant was further charged with forgery, larceny, and embezzlement, and was committed for trial on those charges. At the assizes in January, 1896, the grand jury threw out the bill for forgery, but returned true bills for larceny and embezzlement. The trial was postponed to the summer assizes.

On the 15th of February the respondent Cooper, who had purchased the *Huntingdonshire Post* from the liquidator of the company, published in that paper an article containing the following passage "As our readers are aware, owing to most unfortunate occurrences, the company has been in liquidation, the cause of which has to some extent appeared in our columns, and further information on the subject will probably become public after the assizes to be held at Huntingdon in May. Meanwhile it is obviously our duty to make no further reference to the matter."

On the 7th of March, 1896, a report was published in the paper of the proceedings at a meeting of the Huntingdonshire Standing Joint Committee at which a resolution was passed confirming the action of the chief constable in obtaining legal assistance for the police in the prosecution pending against the applicant. The meetings of the committee were open to the public, and reports of the proceedings were commonly published in the local newspapers.

Shearman, for the respondent Payne, and *Dickens*, *Q.C.*, and *Brooke Little*, for the respondent Cooper, showing cause against the order *nisi*, were stopped by the court.

Poyser, for the applicant, in support of the order.—These publications amount to a contempt of court; they are comments on pending proceedings, and are calculated to prejudice the fair trial of the applicant: *Ex parte Crown Bank*, *In re O'Malley*, 39 W. R. 45, 44 Ch. D. 649; *Coats* v. *Chadwick*, 42 W. R. 328, [1894] 1 Ch. 347.

Lord RUSSELL OF KILLOWEN, C.J.—In this case an order has been obtained calling upon the respondents to show cause why they should not be committed for contempt of court in printing and publishing certain articles referring to the applicant, a person who is awaiting his trial for larceny and embezzlement, which articles he contends are calculated to prejudice his case in the eyes of the jury who are to try him. In my opinion the application is unfounded, and the order ought to be discharged with costs; but I wish to express the view which I entertain that applications of this kind have, in many cases, gone too far. The power which the court possesses in such cases is no doubt a salutary power, and it ought to be exercised in cases where there is a real contempt, but only where there are serious grounds for its exercise. It is not every libel upon a person awaiting his trial which is a contempt of court; the applicant must show that what has been published is clearly intended, or at least is calculated, to prejudice the pending trial. In the present case the applicant was on the 28th of November last charged with attempted arson, and on the 30th of November the first article complained of appeared. In my opinion that article is no more than a reasonable explanation for the information of the shareholders and other persons interested in the company to whom the newspaper then belonged. The article states facts which certainly imply that the applicant was charged with arson, and he was in fact so charged at that time; on the 5th of December that charge was dismissed, so that at the date when the application for this order was made there was no charge of arson pending against the applicant. As to the articles of the 15th of February and the 7th of March, 1896, I think that they contain perfectly innocuous statements. The last article is merely a fair report of the proceedings of a public body. No doubt statements of an *ex parte* character were made in the course of those proceedings, but it is ridiculous to assert that the publication of those statements would prejudice the pending trial. I will not refer to the decisions in the Chancery Division

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

which have been cited, further than to say that in my opinion in some instances the courts have gone rather too far.

In *Hunt* v. *Clarke*, 37 W. R. 724, an application to commit was refused by Mathew and Grantham, JJ., and the Court of Appeal affirmed their decision. Cotton, L.J., in his judgment, after referring to several cases, and in particular to *In re Clements, Republic of Costa Rica* v. *Erlanger*, 46 L. J. Ch. 375 (before Jessel, M.R.), says: "Now that I apply and adopt as the principle which ought to regulate these applications—that there should be no such application made unless the thing done is of such a nature as to require the arbitrary and summary interference of the court in order to enable justice to be duly and properly administered without any interruption or interference. That is what we have to consider; and in my opinion although, as I say, there is here that which is technically a contempt, and may be such a contempt as to be of a serious nature, I cannot think there is any such interference or any such fear of any such interference with the due conduct of this action, or any such prejudice to the defendant who is applying here, as to justify the court in interfering by this summary and arbitrary process. When it is clear and evident on the facts of the case and on the documents . . . that such is the case in my opinion no such application ought to be made." I wish to adopt the view of the law stated by Cotton, L.J., in that judgment.

For these reasons I think that this order *nisi* ought to be discharged with costs.

WRIGHT, J.—I agree with all that the Lord Chief Justice has said, and I will only add that, in my opinion, in order to justify an application to commit, the publication must be calculated really to interfere with a fair trial, and if this is not the case the question does not arise whether the publication is so objectionable in its terms as to call for the interference of the court. If the publication is found to be likely to interfere with a fair trial, a second question arises whether, in the circumstances, the jurisdiction which the court in that case possesses ought to be exercised, not so much for punishment as with the object of preventing the repetition of similar conduct. That is the rule which I wish to adopt as to applications of this nature.

Order discharged.

Solicitor for the applicant, *A. G. Watts*, for *W. A. Watts*, St. Ives.

Solicitors for the respondent Payne, *Shearman & Rayner*.

Solicitors for the respondent Cooper, *Peacock & Goddard*, for *Maule & Sons*, Huntingdon.

Q. B. Div.
(Wills and Wright, JJ.) March 2.

CLEGG, PARKINSON, & CO. *v.* EARBY GAS CO. (*a*.)

Gas company—Supply of gas—Breach of statutory duty—Remedy—Right of action—Gasworks Clauses Act, 1871 (34 & 35 *Vict. c.* 41), *ss.* 11, 12, 36.

Where a gas company to whom the provisions of the Gasworks Clauses Act, 1871, *apply cause damage to a consumer by reason of their failure to supply to him gas sufficient in quantity and quality to satisfy the requirements of the Act, an action will not lie by the consumer against the company in respect of such damage. The only remedy for breach of the statutory obligation of the company is by proceedings for penalties under section* 36 *of the Act.*

Appeal of the plaintiffs from the County Court of Yorkshire holden at Skipton.

The action was brought to recover £50 damages from the defendants for breach of a contract to supply gas continuously as required by the plaintiffs, and in accordance with the Earby and Thornton Gas Order, 1894, under which order (and the Act 57 & 58 Vict. c. cxvi. confirming it) the defendants supplied gas within the prescribed limits. In the alternative the plaintiffs claimed damages for breach of the defendant's statutory duties under the gas order and confirming Act, and under the Gasworks Clauses Act.

The plaintiffs had paid for a supply of gas by the defendants, but there was no express contract between them. They adduced evidence to show that on certain days no gas had been supplied, and that on other days the supply of gas had been deficient and impure and at less than the prescribed pressure.

The Gasworks Clauses Act, 1871, which was incorporated in the gas order, provides (section 11) that "the undertakers shall, upon being required so to do by the owner or occupier of any premises, . . . give, and continue to give, a supply of gas for such premises under such pressure in the main as may be prescribed." Section 12 requires that the quality and purity of the gas shall be such as to satisfy certain tests. Section 36 imposes certain penalties upon the undertakers if they neglect or refuse to supply gas under less than the prescribed pressure, or of less illuminating power, or of less purity than it ought to be according to the provisions of the Act.

The county court judge found that the plaintiffs had sustained damage to the amount of £50 by reason of the supply of gas having been insufficient and impure; but he gave judgment for the defendants, on the ground that the action was not maintainable.

The plaintiffs appealed.

R. M. Bray (*T. T. Paine* with him), for the plaintiffs.—The action will lie. The defendants are under a statutory obligation to supply sufficient gas of the quality prescribed by the Gasworks Clauses Act, 1871, and at the proper pressure. Where they are paid by a person for a supply of gas their obligation is the same as if it arose from express contract, and if the supply to that person is insufficient or impure they are liable in damages if he suffers thereby. The penalties imposed by section 36 are no sufficient remedy. The case of *Atkinson* v. *Newcastle Waterworks Co.*, 25 W. R. 794, 2 Ex. D. 441, is distinguishable, for there the breach was of a public duty to supply water to the public: here there is a duty to the individual, for which payment is made; nor are *Hoddesdon Gas Co.* v. *Haselwood*, 7 W. R. 415, 6 C. B. N. S. 239, or *Milnes* v. *Mayor of Huddersfield*, 34 W. R. 761, 11 App. Cas. 511, in point. Where there is a breach of a statutory duty causing loss to an individual an action lies: *Couch* v. *Steel*, 2 W. R. 170, 3 E. & B. 402.

C. A. Russell, for the defendants.—There was no contract between the plaintiffs and the defendants. The statute provides penalties for breaches of the statutory duties of gas companies, and this is the only method of enforcing the performance of those duties. There is no right of action on the part of individual consumers.

R. M. Bray replied.

WILLS, J.—This is a question of importance, but I feel no difficulty in deciding it. The question is as to the remedy in a case where a gas company fails to

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

supply gas according to the statutes under which it acts. These statutes have been in force for many years, and no case is to be found of an action of this kind which has succeeded. The principle which governs this case is that where a duty created by statute affects the public as the public, the remedy for a breach of the duty is to indict or to take the proceedings authorized by the statute itself. If any individual could bring an action of this kind, the undertakers might very speedily be ruined. I think therefore that on this principle this action cannot be maintained. This is not the same case as *Atkinson* v. *Newcastle Waterworks Co.* or *Milnes* v. *Mayor of Huddersfield;* but I think the principle which is applicable here is deeper than that on which those cases were decided—that is, that where a statute creates an obligation to do something for the benefit of the public generally or of a body of persons so large that they can only be dealt with *en masse*, and the failure to fulfil the obligation is liable to injure all those persons in like manner (though in a greater or less degree), there is no separate right of action to each person injured. Often a specific remedy is provided by the statute, as in the present case, but not always; for instance, there is no specific remedy for the failure of an urban authority to perform their duty of providing an efficient system of sewerage. Yet no action will lie on the part of individual members of the public who suffer from the breach of that obligation. The appeal must be dismissed.

WRIGHT, J.—I am of the same opinion. The obligation of the defendants depends upon statute, not upon contract. The general rule is that when an obligation is created by statute and a remedy for breach of it is provided the statutory remedy is the only remedy. That is laid down in *Doe* v. *Bridges*, 1 B. & Ad. 847, 859; *Stevens* v. *Jeacocke*, 11 Q. B. 731; *Marshall* v. *Nicholls*, 18 Q. B. 882; and other cases. That principle applies here. In this case I am not sure that there is an absolute obligation to supply gas at all; there is clearly no contractual obligation. And I doubt whether an action for a nuisance would lie in such a case as this, for it is the plaintiffs who have brought the gas upon their own premises.

Appeal dismissed; leave to appeal granted.

Solicitors for plaintiffs, *Turner, Smith, & Co.*, for *W. A. Robinson*, Keighley.

Solicitors for defendants, *Littledale & Lefroy*, for *Artindale & Southern*, Burnley.

C. C. R.
(Lord Russell of Killowen, C.J., Pollock, B., and Hawkins, Cave, and Wills, JJ.) } May 2; June 2.

REG. *v.* ERDHEIM. (*a*.)

Criminal law—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 11—*Public examination of bankrupt—Admissions—Parol evidence—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 17.

At the public examination of a bankrupt under section 17 *of the Bankruptcy Act*, 1883, *a shorthand writer took down the evidence given by him, and made a transcript of it; the transcript was not read over to or by or signed by the bankrupt, and the public examination was adjourned* sine die. *The bankrupt was afterwards tried upon an indictment charging him with misdemeanours under section* 11 *of the Debtors Act*, 1869, *and at the trial the shorthand writer gave parol evidence of admissions made by the bankrupt at his public examination tending to establish the misdemeanours with which he was charged.*

Held, that the evidence was rightly admitted.

Case stated by the deputy recorder for the city of Leeds.

The facts and arguments appear from the judgment of the court.

May 2.—*C. Mellor*, for the defendant.

Sir R. Finlay, S.G. (*Henry Sutton* and *G. J. Banks* with him), for the prosecution.

Cur. adv. vult.

June 2.—The judgment of the court (Lord RUSSELL OF KILLOWEN, C.J., POLLOCK, B., and HAWKINS, CAVE, and WILLS, JJ.) was delivered by

Lord RUSSELL OF KILLOWEN, C.J.—The defendant was charged with certain misdemeanours under the Debtors Act, 1869. On the 20th of May, 1895, he had been duly adjudicated bankrupt, and, under the Bankruptcy Act, 1883, s. 17, he had been duly examined on oath on five different days, and on the last of those days, namely, the 19th of November, 1895, the examination was adjourned *sine die*. During his examination a shorthand writer had taken down in shorthand the evidence of the defendant and made a transcript of it, but the transcript was not read over to or by or signed by the defendant. At the trial parol evidence of the shorthand writer was tendered and received of statements or admissions made by the defendant in the course of his examination of facts tending to establish the misdemeanours with which he was charged. The question is, Was that parol evidence properly admitted?

It was argued that it was improperly admitted, first, on the ground that the examination, having been adjourned *sine die*, was not completed, and therefore the defendant might not have had the opportunity of making a complete statement and explanation. As to this it is to be observed that the deputy recorder has, in the case before us, found as a fact that no incomplete statement was given in evidence, by which I understand him to mean that the statements of which evidence was given were not fragmentary, but were, so far as the particular facts dealt with by them, complete. This is not, however, I apprehend, the character of the objection in fact urged. That objection I understand to be that, even if otherwise admissible, the parol evidence of the statements made was not admissible because the examination was adjourned *sine die*, and was not in that sense complete. In my judgment, whichever form the objection takes, it is one which goes only to the effect and weight of the evidence, and not to its admissibility. If the jury thought that the statements were fragmentary or incomplete, it would properly affect the weight they would think it just to attribute to them, but their admissibility would not be thereby affected.

The second and main objection urged is that upon the true construction of the 17th section of the Bankruptcy Act, 1883, the only evidence which can be received of the statements made by the bankrupt is the transcript taken down in writing and read over to and signed by the debtor under that Act, or read over by the debtor and signed by him under the later Act of 1890. A further objection urged was that any such transcript, even if read over and signed, would not be admissible in a criminal prosecution, and that, *a fortiori*, parol evidence of statements made during examination was not admissible in such a prosecution. In support of these objections the

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

lawfully detained as a lunatic, though she has not been so found, and in one sense she is lawfully detained—that is to say, the law of Belgium has been complied with.

A difficulty has, however, arisen which was suggested by the officers of the Lunacy Department—namely, that the expression "lawfully detained" in the section which I have read means lawfully detained under the powers of this Act of Parliament.

I have had an opportunity of looking through the whole of the Lunacy Act, 1890, and I have come to the conclusion (reluctantly, I must confess) that the view taken by the master is right, and that by the expression "lawfully detained" is meant lawfully detained under that Act. The law about detention is to be found in Part I. of the Act, and it is impossible to read sections 4 and 9 and those which relate to reception orders without seeing that "lawfully detained" means lawfully detained under the Act. Then sections 85 and 86, and the clauses relating to visitation and to actions for unlawful detention, all lead to the same view. Therefore upon the true construction of the whole Act we are, I think, bound to come to the conclusion that we cannot make this order at this time. There are two ways of getting out of the difficulty—namely, that the lady be found a lunatic by inquisition although she is out of the jurisdiction, or she may be brought within the jurisdiction. If it is likely that she can be brought into this country, this application had better stand over.

LOPES, L.J.—I have come to the same conclusion as that which has just been expressed by my lord. I am of opinion that "lawfully detained" means lawfully detained under the provisions of this Act, that is to say, lawfully detained within the jurisdiction.

There may be a certain amount of inconvenience about it, but I am reconciled to that by the fact that there are the ways of overcoming the difficulty which Lindley, L.J., has pointed out, and I am unable to resist the conclusion that the meaning of "lawfully detained" is that which I have stated.

RIGBY, L.J.—I am of the same opinion, and have nothing to add to what has been said.

Solicitors, *Ingle, Holme, & Son.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) May 4, 5.

In re STUART & OLIVANT AND SEADON'S CONTRACT. (*a.*)

Vendor and purchaser—Expenses of obtaining documents of title not in vendor's possession—Liability of purchaser where no special condition—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-section* 6.

A purchaser of land or leaseholds under a contract which contains no special condition as to the expenses of procuring documents of title or information not in the vendor's possession is liable, under section 3, *sub-section* 6, *of the Conveyancing Act*, 1881, *to pay the expenses of procuring or ascertaining the whereabouts of a document which is the root of the title abstracted.*

In re Johnson and Tustin, 33 *W. R.* 737, 30 *Ch. D.* 42, *and* Moody to Yates, 33 *W. R.* 785, 30 *Ch. D.* 344, *distinguished.*

Appeal from Stirling, J.

In November, 1895, Messrs. Stuart & Olivant contracted with Mr. Charles Seadon for the sale to him, at the price of £195, of certain leasehold property of which the vendors were mortgagees. The root of the vendors' title was an underlease of the 13th of October, 1865. The conditions of sale contained nothing to show that this underlease was not in the vendors' possession, or that it would not be produced to the purchaser and handed over to him on completion; but on the investigation of title it appeared that the underlease comprised other property besides that agreed to be sold to the purchaser, and that the vendors had only an attested copy of the deed, and did not even know where the original was. The vendors' solicitor offered to make, at the purchaser's expense, further searches with the view of finding in whose possession the original was, insisting that the case was governed by section 3, sub-section 6, of the Conveyancing Act, 1881, which throws upon the purchaser "the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession." The purchaser then took out a vendor and purchaser summons, claiming a declaration that by reason of the vendors' refusal to furnish the purchaser, save at his own expense, with information as to the whereabouts of the underlease, a good title had not been shown. Stirling, J., on the 10th of March, 1896, decided that the purchaser was not entitled to the declaration he claimed, and the purchaser appealed.

Swinfen Eady, Q.C., and *Stewart Smith*, for the appellant.—Section 3, sub-section 6, of the Conveyancing Act was intended to draw a distinction between collateral matters of evidence, as to which it throws the expenses on the purchaser, and matters relating to the title itself.

They cited *In re Johnson & Tustin*, 33 W. R. 737, 30 Ch. D. 42; *Moody to Yates*, 33 W. R. 785, 30 Ch. D. 344; *In re Willett & Argenti*, W. N. 1889, p. 66, 60 L. T. N. S. 735; *Reeve* v. *Berridge*, 36 W. R. 517, 20 Q. B. D. 523; Dart on Vendors and Purchasers, 6th ed., p. 470; and Wolstenholme on the Conveyancing Acts, 6th ed., note on section 3, sub-section 6, of the Act of 1881.

Elgood, for the respondents, was not called upon.

LINDLEY, L.J.—I do not think we can take a different view of the construction of the Act from that which has been taken by Stirling, J. One cannot but bear in mind that there was a time when, owing to the requisitions of purchasers, very heavy and unnecessary expenses were thrown upon vendors. The object of section 3, sub-section 6, of the Conveyancing Act, 1881, was to check that abuse. Whether in doing that the Legislature has not gone a little too far, and imposed too onerous terms on a purchaser, is another matter. I rather think they have; but what we have to do is to construe the Act. What strikes one on reading the sub-section is, in the first place, that it deals only with expenses. It has nothing whatever to do with the duty of making out titles or of procuring deeds. Accordingly, it was held by the Court of Appeal in *In re Johnson & Tustin* that the vendor is bound to supply a proper abstract, and must pay the expense of procuring any deed which is necessary for that purpose; and in *Moody to Yates*, that the vendor must complete his title by producing any document which is essential to show that he has a title. Those were questions of title; but we have here to do with

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law

that to which the sub-section is addressed, expenses of obtaining information. Well now, for the life of me I cannot get out of the language of this section. The section appears to me to have thrown this particular expense on the purchaser, in language too plain to be escaped from. To give effect to the very ingenious argument of Mr. Swinfen Eady and Mr. Stewart Smith would be to cut down the language of the Act to an unjustifiable extent. I think the case is a hard one, but I cannot help it. I think Stirling, J., was quite right, and that the appeal must be dismissed.

Lopes, L.J.—I am of the same opinion. I must say that if I thought it at all possible I should very much like to relieve the purchaser of the expenses which have been cast upon him. In a case like this it is to be observed that this section has nothing to do with production of documents, as to which it leaves the vendor's duty unchanged. It does not relieve him of the duty to produce, it only treats of expenses. I suppose the object of this section must have been to relieve vendors from vexatious requisitions; and I venture to think that the Legislature has wandered further than was requisite, and that mischief has been done on that account, because I cannot help thinking that in a case like this the vendor ought to protect himself by conditions. It seems to me that as the matter stands the best thing for a vendor would be always to sell under an open contract, and to cast on the purchaser the expense of finding any of the title deeds which are not in the vendor's possession. That expense, I think, as a matter of justice, the purchaser ought not to bear. But there is the Act of Parliament. No doubt it has materially altered the old law; because that is very well stated in Sugden on Vendors and Purchasers, 8th ed., at p. 387. But I again say there is the Act of Parliament, which, being read, appears to me to cover a case like this. I do not feel that I can give effect to the ingenious argument addressed to us. I think Stirling, J., has taken the right view of that section, and that the appeal ought to be dismissed.

Kay, L.J., after stating the facts, proceeded:—Before the Conveyancing Act there would not have been a question about it. The vendors would have been bound to get the information at their own expense, because it was information necessary to enable the purchaser to verify the abstract of title; and before the sale was completed, and whether it was completed or not, the vendor was bound to give the purchaser every facility of that kind, and if there was expense in doing so to pay the expense. No doubt it happened very often that useless requisitions were made which exposed the vendors to expense, and that Act, in this part of it, was passed for the purpose of checking that abuse and throwing the expense of obtaining information on the purchaser. In this case it seems to me an uncommonly hard thing. The purchaser says: "The underlease is the very root of the title which you abstracted. For anything I know it may be in the possession of a mortgagee, and I want to know where it is." The vendors say: "We don't know where it is; but if we find it for you, you must pay the expense." The question is whether under this Act there is any possibility of escaping from the conclusion which the learned judge has arrived at. [The Lord Justice stated the provisions of the sub-section, and proceeded:—] That word "information" is as large as it can be; but it is tried to limit it by the words associated with it, and it is argued that the words "certificates, declarations, and evidences" limit the general meaning of the word "information," and make it mean something like certificates, declarations, and evidences. But it is obvious that it cannot be so, because a certificate, for instance, is not information. Take the ordinary case of a certificate of birth, death, or marriage. So "declarations," which is intended, I suppose, to mean statutory declarations of some fact in the title. That is not information. The language is not "certificates, declarations, evidences, or any other information," nor indeed is it even "certificates, declarations, evidences, or information." It is "and information." Information means something different, essentially different, from certificates, declarations, or evidence. Therefore you may leave out those words, for the association does not limit the meaning of the word information, and it will read, "the expenses of searching for and procuring all information." I would escape from the words if I could, because I think they do in this case produce considerable hardship. A vendor might not have any of the deeds in his possession. All the deeds in a long chain of title might be out of his possession, and he might be ignorant where every one of them was. He need not make any condition throwing the expense of obtaining them on the purchaser; but when the purchaser asks for them he might safely answer: "I don't know. If you want the information, I will get it for you, at your expense." If the Legislature had carefully considered what they were doing, I think they would not have made the section quite so wide; but I cannot possibly construe the words so as not to apply to the case before us—a case in which the purchaser wants information where the deed the root of title is, and the vendor says: "Yes, I will get it for you, but you must pay for it."

Appeal dismissed.

Solicitors, *J. Howard Smith; Layton, Sons, & Lendon.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) May 1, 2.

In re Lands Securities Co. (Limited). (*a*.)

Company—Winding up—Mortgage of charges payable quarterly—Mortgage principal and interest in arrear—Proof by mortgagee as unsecured creditor for sum in arrear.

A company mortgaged certain charges entitling the mortgagors to receive certain quarterly payments, and covenanted to pay to the mortgagees on the same quarter days, in discharge of principal and interest under the mortgage, sums equal to those payments; the understanding being that so long as the instalments were regularly paid to the mortgagees the mortgagors should continue to receive the payments under the charges. The payments due under the mortgage having fallen into arrear, and the mortgagors being in course of being wound up,

Held, that the mortgagee was entitled to keep the mortgage as a security for future payments payable thereunder, and to prove in the winding up, as for money had and received, for any payments received by the mortgagors in respect of the mortgaged property after the instalments due under the mortgage ceased to be paid.

Appeal from Vaughan Williams, J.

By a deed dated the 14th of May, 1886, the Lands Securities Co. mortgaged to the Norwich Union Life Insurance Society, to secure a sum of £38,381 11s. 9d. and interest thereon, certain charges executed by the

(*a*.) Reported by R. C. Mackenzie, Esq., Barrister-at-Law.

Enclosure Commissioners for England under the Limited Owners' Residence Acts, 1870 and 1871, and the Improvement of Land Act, 1864; and by another deed of even date, made between the same parties, to secure the sum of £10,636 15s. 9d. and interest, mortgaged certain rate loan charges created under the Mortgage Debenture Act, 1865. The principal sums secured by the mortgages were repayable by quarterly instalments, so arranged that as each quarterly payment of the charges comprised in the mortgages became payable to the mortgagors a like sum became payable by the mortgagors to the mortgagees. In April, 1894, the company went into voluntary liquidation, and in May, 1894, the liquidation was ordered to be continued subject to the supervision of the court. At Lady Day, 1894, the company had received in respect of the charges already mentioned sums amounting to £839 9s. 7d. All previous instalments of the mortgage money and interest had been duly paid, but nothing was paid to the Norwich Union in respect of the principal and interest due at Lady Day, 1894. The Norwich Union, as mortgagees, afterwards entered into receipt of the charges comprised in the mortgages, and claimed to be entitled to retain the mortgages as security for future payments thereunder, and to prove as unsecured creditors for the sum in arrear. The liquidator having rejected the claim, the Norwich Union took out a summons asking for a declaration that they were entitled in accordance with their claim. Vaughan Williams, J., made the declaration, and the liquidator appealed.

A. R. Kirby, for the appellant.

Henry Terrell, for the respondent Society, was not called upon.

LINDLEY, L.J.—I think the order made by the learned judge is quite right. This is a very unusual case, in fact I do not know that I have ever seen one exactly like it before. The difficulty arises from the nature of the property mortgaged, and from the arrangement made for securing the advance. The sum of £839 9s. 7d. is not the rents of the mortgaged property. It is the actual property which forms the mortgage security. Apart from bankruptcy or winding up, what is the position of the mortgagees? If the mortgagors are paying the instalments regularly, there is an implied understanding that the mortgagors shall continue to receive the money as before. But the money does not become the property of the mortgagors, except subject to the condition that they shall pay the sum that becomes due to the mortgagees. I do not think this mortgage would work if it were not so. I agree that if all works smoothly the mortgagees cannot claim anything in respect of those receipts, and that, I think, is quite intelligible. But if the instalments are not paid, I cannot conceive what answer there could be to an action by the mortgagees for money had and received. But that is complicated by the winding up of the company, the mortgagors, who rely upon the well-known rule that a secured creditor must elect between his right of proof and his security, he cannot both retain his security and prove for his debt. But that is not what the Norwich Union claim to do. They say, "You have got part of our security, give it up to us." That is their claim, and I do not see any answer to it.

LOPES, L.J.—I am of the same opinion.

KAY, L.J.—I am entirely of the same opinion. It seems to me that the argument for the appellants is based on a confusion between this case and the case of a claim by a mortgagee for back rents. It is in fact a claim for the actual subject of the security, those rents and charges which become due quarterly, and which the mortgagor receives, and is to be allowed to receive so long as he pays the instalments. If he does not pay these, the mortgagee can at once say to him, "Hand me over that which is my property"; and if he can follow it *in specie* he is entitled to get it *in specie*, because it is exactly that which the mortgagor has assigned to him in security for the debt. As he cannot follow the actual coins received by the mortgagor, the only remedy is to say to the mortgagor, "You have received part of my security, and I claim to prove for that." The proof is not a proof under a covenant in the mortgage; that is exactly what the mortgagee is not trying to do. He is trying to realize that part of his security which is the only part he can realize at present. I agree that where the mortgagor has kept down the instalments, then the rent-charges which he has received up to that time could not be recovered from him by the mortgagee. That is not explicitly stated in the mortgage, but the whole arrangement seems to involve an understanding that if the mortgagor does pay regularly the mortgagee shall not recover from him the rent-charges which have become due up to that time. I think the learned judge below was quite right.

Appeal dismissed.

Solicitors, *Ashurst, Morris, Crisp, & Co.; Hartcup & Davis.*

From Chan. Div. (Lindley, Kay, & A. L. Smith, L.JJ.) March 3, 4, 26.

LIQUIDATION ESTATES PURCHASE CO. (LIMITED) v. WILLOUGHBY. (*a*.)

Mortgage—Purchase of mortgaged property—Payment off by purchaser of incumbrance—Intention to keep alive incumbrance—Presumption.

Where a purchaser of a property pays off a mortgage on it without showing an intention to keep it alive, still, if its continuance as an existing charge is beneficial to him, it will be treated in equity as subsisting unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence. But the opportunity of making a very doubtful claim against third parties is not such a benefit as is meant in this enunciation of the doctrine. Further, if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the property was assigned to the purchaser, the charge cannot be treated as still subsisting simply because the purchaser afterwards finds it would have been better for him to have kept the charge alive.

So held, by Lindley *and* A. L. Smith, L.JJ. (Kay, L.J., *dissenting*), *affirming the decision of* North, J. Toulmin *v.* Steere, 3 *Mer.* 210, *questioned.*

Appeal from a decision of North, J.

The facts of the case, as stated in the written judgment of Kay, L.J., were as follow.

On the 20th of June, 1888, E. J. Walker, having contracted to purchase a business for £502,000, agreed with the defendant Willoughby, Lord Henry Paulet, and Kennedy to borrow from them respectively £10,000, £9,000, and £6,000, for which he gave them a charge upon all his interest, present and future, in his contract. For these loans the lenders were to receive a bonus equal to their respective advances.

In January, 1889, Walker sold the business to a joint-stock company for £850,000.

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Kennedy's claim against Walker was £12,000. On the 21st of September, 1888, Kennedy mortgaged his interest to Norton for £6,200. Notice of this charge was at once given to Walker. In April, 1889, £5,122 was paid by Walker's direction to Kennedy, and in June, 1890, property worth £5,000 was in like manner transferred to Kennedy, thus reducing his claim against Walker to £1,878. In the meantime Kennedy had mortgaged his equity of redemption to Lord Windsor, and in December, 1890, this mortgage was transferred to Forrest as his trustee. This was confirmed by Kennedy in 1891.

On the 17th of March, 1893, a deed was executed whereby, after reciting the above-stated facts and that Lord Windsor had agreed to sell to the Capital Finance Co. for £6,000 (*inter alia*), "all the interest of the said Lord Windsor, or of the said John Norton, of and in the premises comprised in and charged by the said instrument of 20th June, 1888," and that Norton concurred on the terms that he should receive £1,000 out of the £6,000 "as the consideration for the sale and assignment of" his "rights, benefits, and interest," and reciting that the Capital Co. had paid to Lord Windsor £4,000, and that the Liquidation Co., who were plaintiffs in this action, would pay the balance of the £6,000, it was witnessed that Norton, "at the request of Lord Windsor, and in respect of his rights, powers, benefits, and interests under the said agreement of the 21st of September, 1888," assigned, and Lord Windsor and Forrest as his trustee assigned, and the Capital Co. released and confirmed to the plaintiff company, all their "estate and interest of and in the interest formerly of Kennedy in or under the agreement of the 20th of June, 1888, and the moneys and bonuses thereby secured" absolutely. Then followed a provision that if Norton or Lord Windsor had a power of sale, such power should be exercised by that deed.

Lord Windsor had a power of sale, and the deed accordingly took effect as an exercise of the power so far as he was concerned. But Norton had no such power, and the question was whether this deed operated as a transfer of his mortgage or only as a release of his interest in the fund charged.

In June, 1889, Willoughby brought an action against Lord Henry Paulet, Kennedy, Walker, and others to realize his security. Norton was not made a party to that action. In January, 1891, a decree was made for an account of what was due to the three mortgagees, Lord Henry Paulet, Willoughby, and Kennedy, and of their respective receipts.

In that action a considerable sum, part of the fund mortgaged by Walker, was paid into court, and was still there. By order of the court that sum was to be applied in paying Lord Henry Paulet and Willoughby, so as to make them equal to Kennedy, before anything more was paid in respect of Kennedy's share, and this the fund was barely sufficient to do, so that no part would go to those who represented Kennedy.

The plaintiffs in their present action claimed to stand in the shoes of Norton, and to share rateably in that fund. Two answers were given to their claim: first, it was denied that the present plaintiffs had any transfer of Norton's mortgage; and secondly, it was urged that the payments to Kennedy were with Norton's sanction, and were consequently good against the plaintiffs as assigns from him.

The question was whether Norton's mortgage was to be treated as subsisting for the benefit of the plaintiffs as his assigns, or whether that mortgage was merged and extinguished by the deed of the 17th of March, 1893.

North, J., held that the mortgage could not be treated as subsisting for the benefit of the plaintiffs.

The plaintiffs appealed.

Swinfen Eady, Q.C., and *Dauney*, for the appellants, referred to *Thorne* v. *Cann*, [1895] A. C. 11, 43 W. R. Dig. 121, and *Stevens* v. *Mid-Hants Railway*, 21 W. R. 858, L. R. 8 Ch. App. 1064.

Vernon R. Smith, Q.C., and *W. C. Druce; Edward Ford, Herbert Brown, Peterson*, and *Abinger*, for the respondents.

Swinfen Eady, Q.C., replied.

Cur. adv. vult.

March 26.—LINDLEY, L.J., read a judgment, in which A. L. SMITH, L.J., concurred. After stating the facts, his lordship continued as follows:—There is no doubt that the deed of the 17th of March, 1893, was intended to transfer and did transfer to the plaintiffs all Norton's interest in the security of June, 1888. But the question is whether the interest so transferred was transferred in order to be extinguished, so that the plaintiffs might obtain Kennedy's interest in the security of June, 1888, free from incumbrances; or whether Norton's interest was so transferred as to enable the plaintiffs to treat that interest as still subsisting, so as to confer upon them rights against third parties which Lord Windsor and Forrest could not confer. The answer to this question depends upon the intention of the parties at the time, and that intention must be found from the terms of the deed and the circumstances under which it was executed. The fact that Norton assigned his interest, and that the Capital and Finance Co. released theirs, is relied upon by the plaintiffs as showing that Norton's assignment was not intended to operate as a release; but the interests of Norton and of the Capital and Finance Co. were of such different characters that the use of different operative words to dispose of them is easily accounted for. Moreover, Norton assigned as mortgagee, and it seems to have been thought that he had or might have had a power of sale. Under those circumstances I cannot think the argument based on the above-mentioned difference of language in the operative words at all conclusive. We must look further and see what the real object of the parties was. The law upon this subject was laid down by the late Master of the Rolls in *Adams* v. *Angell*, 25 W. R. 139, 5 Ch. D. 634, as follows: "If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way; but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. So, in the case of a purchase, there is no doubt that the purchaser who pays off a charge, though merely equitable, may have it assigned to a trustee for himself, and it will protect him against mesne incumbrances if there are any. So also it is admitted that if, without going through the ceremony of the assignment of an equitable charge—an assignment which really passes nothing—a declaration is inserted in the deed that the charge shall be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances,

then the charge is treated as remaining on foot, and protects him. The intention, therefore, if expressed, governs the case; but if no intention is expressed, then *Toulmin* v. *Steere*, 3 Mer. 210, says that the incumbrance which is paid off is merged, and the subsequent incumbrancers let in." According to this statement, a purchaser who pays off a charge must show an intention to keep it alive if he wishes to prevent its merger. Such an intention was shown in that case and also in *Thorne* v. *Cann*. Having regard to this decision, it is perhaps now safe to go a little further, and to say that where a purchaser of a property pays off a charge on it without showing an intention to keep it alive, still, if its continuance as an existing charge is beneficial to him, it will be treated in equity as subsisting, unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence. I do not, however, think that the opportunity of making a very doubtful claim against third parties is such a benefit as is meant in such an enunciation of the doctrine under consideration. I am not aware of any case which shows that it is. But, further, I take it to be clear that if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, such charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive. That, in my opinion, is the case here. The speculative character of Norton's claim against the other lenders, the absence of all allusion to the existence of any such claim, the absence of any assignment of his debt, the ignorance we are in even now of the amount due to him (for it is admitted that £6,200 is not), the recital of the agreement with Lord Windsor, and, lastly, the unusual clauses which follow the *habendum*, lead me to the conclusion that it was intended to extinguish Norton's claim, and not to keep it alive except in the event of the plaintiffs failing to obtain a good title under a valid power of sale. In that event no doubt, as Kennedy would have a right to redeem, both Norton's and Lord Windsor's charges would have to be treated as subsisting. What the plaintiffs, however, wanted was to purchase Kennedy's interest free from incumbrances under a power of sale. The recitals show that the real transaction was a sale by Lord Windsor under his power, but £1,000 of the purchase money was to be paid to Norton to get rid of his claim. The plaintiffs have got exactly what they expected and what they intended to buy, and they are not entitled now to treat Norton's charge as a subsisting charge. If, indeed, there were some unknown mesne incumbrancer who would be let in as a first incumbrancer if Norton's charge were not treated as subsisting, it may be that, notwithstanding *Toulmin* v. *Steere*, it could be so treated. But why? Because in that case the purchaser would not have got what he bargained for—namely, the property free from incumbrances, and it would be manifestly unjust to allow a third party to avail himself of the terms of a deed to which he is a stranger, in order to defeat the real intentions of the parties to it. It is on this ground that the courts have gone a long way, and very properly, to prevent a second or third incumbrancer from obtaining a priority by a mere accident, and at the expense of other people who never intended to benefit him—see, for example, *Phillips* v. *Gutteridge*, 4 De G. & J. 531, and *Anderson* v. *Pignet*, 21 W. R. 150, L. R. 8 Ch. App. 180.

This, however, is not a case in which the charge is wanted for any such purpose, and to treat Norton's charge as still subsisting under the circumstances of this case would be to stretch the equitable doctrines to which I have alluded much too far.

I am of opinion that the decision appealed from is correct, and that the appeal therefore ought to be dismissed with costs.

KAY, L.J., after stating the facts as above set out, continued as follows:—I was struck at first with the second defence; but there is no evidence that Norton sanctioned or knew of these payments. Norton was in court at the trial of this action, but was not called as a witness by either side. The plaintiffs alleged in their pleadings that Norton had sanctioned these payments, and at first it seemed to me that they ought to prove this allegation; but on consideration I am of opinion that the burthen of this proof was entirely on the defendants. The case must therefore be dealt with as though Norton was ignorant of the payments made by Walker to Kennedy, and must depend upon the decision of the first of the two points I have mentioned—namely, Is Norton's mortgage to be treated as subsisting for the benefit of the plaintiffs as his assigns? Or was that mortgage merged and extinguished by the deed of 1893?

No express intention to keep the mortgage alive appears on the face of the instrument. The debt due to Norton is not in terms assigned, as in the case of an ordinary transfer. But Norton does not, like the Capital Co., release his debt. On the contrary, he assigns, in the largest terms, all his "rights, powers, benefits, and interests." This does seem inconsistent with an intention to release and merge his charge. If that were all that was intended, a simple release would have been sufficient. Norton would hardly have assigned his "rights, powers, benefits, and interests" unless the parties intended the plaintiffs to have the use and advantage of these.

In many cases where no actual intention to keep a mortgage debt on foot could be discovered, the Court of Chancery has refused to treat it as merged where its existence was necessary for the protection of a *bonâ fide* purchaser. In *Toulmin* v. *Steere* the purchaser of an estate paid off two mortgages with part of the purchase money, and the owner of those mortgages joined in the conveyance. There was an incumbrance, subsequent to one of those mortgages but prior to the other, of which the purchaser had constructive notice. There was no evidence of an intention by the purchaser to keep the first mortgage alive, and Sir W. Grant (the Master of the Rolls) held that it was merged for the benefit of the unpaid incumbrancer.

This case has been much criticized, and I do not think would be so decided if the question arose now for the first time.

Take, for example, *Phillips* v. *Gutteridge*. Two mortgagees and the executor of the mortgagor joined in a mortgage for £1,200, part of which, the deed stated, was to be applied in paying off £400 due on one mortgage, and £300 due on the the other. The mortgage debts were not assigned. The mortgagees assigned, and the executor assigned and confirmed to the new mortgagee the property which was leasehold and all their respective estates and interests therein. There was no intention to keep the mortgage alive expressed, and the form of the deed was rather against such intention. But though Knight-Bruce, L.J., in his judgment, said that the deed was so constructed as to render it possible that the payment to the original mortgagees extinguished the mortgage debts, the intention to preserve the priority of those debts over charges created by the will of the mortgagor was indubitable. This conclusion was obviously nothing but a presumed intention from the fact that the existence of those mortgages was impor-

tant to protect the new mortgagee against the charges created by the will.

In *Adams* v. *Angell* the Master of the Rolls (Sir George Jessel) said that where the owner of an estate in fee or tail pays off a charge the presumption is that he does not mean to keep it alive, but by expressly declaring his intention he may either keep it alive or destroy it. "If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it. But if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. . . . The intention, therefore, if expressed, governs the case; but if no intention is expressed, then *Toulmin* v. *Steere* says that the incumbrance which is paid off is merged." Sir George Jessel treats the existence of another incumbrance as one reason, but says if there is any reason such as that the court will treat the mortgage as subsisting.

In *Thorne* v. *Cann* the case of *Toulmin* v. *Steere* was mentioned as having been criticized, but it was not overruled. Lord Macnaghten stated the law thus: "Nothing, I think, is better settled than this—that where the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot."

The purchasers paid £1,000 for Norton's concurrence. The words are large enough to pass any claim of Norton against the fund. Then is there, in the language of Sir George Jessel, any reason for keeping Norton's charge alive? Considering, in Lord Macnaghten's words, whether it is for the benefit of the purchaser to do so, must the intention to keep it alive be presumed?

If a charge were to be discovered, next after Norton's and before that of Lord Windsor, would Norton's debt be treated as merged? In my opinion it would not. It cannot be treated as alive for one purpose of benefit, and yet extinguished as regards another. In the circumstances of this case there is a material advantage to the plaintiffs, who are purchasers for value, in treating the debt as subsisting, and I cannot discover any reason to prevent them from invoking this doctrine of equity in their favour.

If Norton did not sanction the payments to Kennedy, Norton at the date of the assignment in 1893 had a claim, to the extent of the debt owing to him by Kennedy, upon the fund which is now in court in the other action, to share rateably in the proportion of Kennedy's original claim with Willoughby and Lord Henry Paulet. This right or benefit he assigned. If Kennedy had not such a right, it would obviously be for the benefit of the purchaser to keep Norton's right alive. Willoughby and Lord Henry Paulet are, I assume, innocent of any participation in Walker's wrong-doing by the payment he made to Kennedy. But Norton must be treated as equally innocent, and they, although they knew of his charge, would not make Norton a party to their action against Walker, in which the fund remaining was ultimately secured in court. I cannot see that Willoughby and Lord Henry Paulet, or those who represent him, have any equity to rebut this claim in the name of Norton.

On the whole, I think there was a strong reason in 1893 for keeping alive Norton's debt, and that there was a benefit to the plaintiffs in so doing which would justify a presumption of their intention to keep Norton's debt in existence.

Norton's claim against the fund in court in *Willoughby* v. *Paulet* would pass by his assignment in 1893 to the plaintiffs, and I cannot see that this should be treated as merged.

I therefore differ with reluctance from the judgment of the other members of this court.

Appeal dismissed.

Solicitors, *Howard Rumney; Dawson, Bennett, & Dawson; Crawshaw & Co.; G. S. & H. Brandon; Mason, Edwards, & Mason; W. Stopher.*

High Court of Justice.

Chan. Div. / Stirling, J. — April 23, 24, 25, 28; May 21.

In re HOBSON.
BALLISON v. HOBSON. (*a*.)

Mortgage of land in Yorkshire by deposit not registered—Subsequent mortgage by deed registered—Priority—Actual fraud—Yorkshire Registries Act, 1884 (47 & 48 *Vict. c.* 5), *ss.* 3, 7, 14.

The expression "actual fraud" used in section 14 *of the Yorkshire Registries Act*, 1884, *means fraud in the ordinary popular acceptation of the term.*

A. acted as solicitor on behalf of B. in arranging that D. should deposit with a bank the deeds relating to certain property in Yorkshire for the purpose of indemnifying B. against an overdraft at the bank. The deposit was made, but not registered. Subsequently A. took from D. a mortgage by deed of the same property, and, having registered such mortgage, claimed priority against the mortgage by deposit to the prejudice of B.

Held, that if A.'s claim to priority were allowed he would be guilty of actual fraud towards B., and that consequently he ought not to obtain such priority.

This was an application made by summons on behalf of W. C. Davies, one of the executors of the will of the late defendant, Evan Thomas, deceased, asking (1) whether, as between the executors of the will of the said Evan Thomas, deceased, the defendants W. P. Horne, F. Miers, J. G. Metcalfe, the National Provincial Bank of England (Limited), and T. E. Jones, the said bank and the said T. E. Jones were respectively or whether either of them was entitled to any and what charge upon the sum of £1,384 deposited in the Leeds branch of the said bank, being the proceeds of the sale of property which belonged to the defendant J. G. Metcalfe and the deceased defendant J. M. Buckley; and (2) if the said bank and the said T. E. Jones were respectively entitled to any such charge, which charge had priority.

The point raised by the summons turned upon the construction of the Yorkshire Registries Act, 1884.

The facts are very fully stated in the judgment of Stirling, J.

Bryn Roberts, for W. C. Davies, the applicant, stated the facts.

Macleod, for the bank, left the matter to the court; the bank having the personal liability of the trustees.

Younger, for J. G. Metcalfe.

(*a*.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

Hastings, Q.C., and *Adams*, for W. P. Horne and F. Miers, the surviving trustees.—Upon the evidence we submit that the bank had a charge upon the property, and Jones knew of it, and so under the law before the Act of 1884 he could not have gained priority by registering. Further, we submit that the Act of 1884 does not help him, for, in the first place, this being a security created by mere deposit of title deeds without any memorandum of deposit is not within that Act; and, secondly, if it is within the Act still the 14th section will not apply, for to allow Jones priority would be to enable him to commit an actual fraud within the proviso at the end of that section.

They referred to *White* v. *Neaylon*, 11 App. Cas. 171, 34 W. R. Dig. 186; *Rolland* v. *Hart*, 19 W. R. 962, L. R. 6 Ch. App. 678; *Blades* v. *Blades*, 1 Eq. Cas. Abr. 358; *Le Neve* v. *Le Neve*, 2 Wh. & Tu. p. 26, and the definition of *dolus malus* by Labes therein referred to.

Hughes, for T. E. Jones.—On the facts we say that Metcalfe and Buckley withdrew from the arrangement, and gave notice to that effect to the bank shortly after they signed the letters of the 12th of June, 1888. These letters were so signed only upon the terms that a sum of £400 should be paid to Mrs. Buckley and Mrs. Metcalfe, which sum was never paid. But even if it is held that the bank did obtain a security by the deposit of the deeds, they are not entitled to priority against us, for the bank has never registered their security. The rule laid down in *Sumpter* v. *Cooper*, 2 B. & Ad. 223, that mortgages by mere deposit of deeds do not require to be registered has been altered by the Act of 1884. Further, we say that Mr. Jones has not been guilty of any fraud which would postpone him to the bank. He disclosed to Mr. Evan Thomas everything concerning the mortgage by Mr. Buckley to himself, and has been guilty of no breach of duty.

Hastings, Q.C., replied.

STIRLING, J.—This is a summons to determine a question of priorities between certain incumbrances on the share of James Mordaunt Buckley, deceased, on a property called the "Leylands," in Leeds.

Nothwithstanding the nature of the questions raised, all parties are desirous that it should be decided on the summons, and on the materials now before me. The order will be prefaced by a submission by all parties that the question should be decided as if an action had been brought and were now being tried.

The action is one for administration of the estate of Frederick Hobson, whose will was proved so far back as 1863. Judgment was given in the action in 1866, and it was thereby declared that the trusts of the will ought to be carried into effect. On the 10th of July, 1883, three gentlemen, Evan Thomas, William Pybus Horne, and Frederick Miers, were appointed trustees, and on the 2nd of August, 1884, the conduct of the proceedings was given to them. Part of the trust property consisted of the *Leeds Times* newspaper, which was carried on by the trustees under trusts in that behalf contained in the testator's will. For the purposes of the newspaper £2,000 had been raised by a mortgage on the premises where the paper was printed and published, and on the 24th of February, 1885, an order was made on the application of the trustees giving them liberty to raise a reserve fund to provide for and indemnify them against liability in respect of the sum of £2,000 by accumulating the sum of £150 annually out of the profits arising from the business, and they were to be at liberty to pay such moneys into court to the credit of "the mortgage redemption account." In 1888 much discussion took place between the trustees and their beneficiaries as to the propriety of reducing the price of the paper to one penny. The beneficiaries were Mrs. Metcalfe, wife of Rev. J. G. Metcalfe, and her children; Mrs. Buckley, wife of Mr. J. Mordaunt Buckley, and her children; and Mrs. Minors and her mortgagee, Mr. Paley; of these Mrs. Metcalfe and Mrs. Buckley and their respective husbands were strongly in favour of the proposed reduction, while Mrs. Minors and her mortgagee would have nothing to do with it. On the 12th of June, 1888, a meeting was held of persons who were favourable to the change. It was attended by Mr. W. P. Horne, one of the trustees, and Mr. Hopps, a solicitor of the firm of Hopps & Bedford, who acted as solicitors of Mr. Horne and also for Mr. and Mrs. Metcalfe. Mr. Evan Thomas was not present at that meeting, but he was upon that occasion and at other meetings represented by Mr. T. E. Jones, his solicitor. Mr. Jones also acted as solicitor for Mr. J. M. Buckley, who himself attended. The Rev. J. G. Metcalfe was also present. Minutes of proceedings were taken by Mr. Jones, and of these minutes the accuracy is not really in dispute. On the same day, the 12th of June, 1888, Mr. Hopps wrote to Messrs. Metcalfe and Buckley respectively identical letters asking them whether they were willing to lodge at the bank their title deeds of the Leylands property in order that the trustees under the will of the testator, F. Hobson, might be guaranteed against loss in continuing the business of the said testator; and on the same day Messrs. Metcalfe and Buckley wrote to Mr. Hopps in reply thereto to the effect that they assented to the deeds being so lodged with the bank.

This being done, an application was made to the court to sanction the alteration, and on the 18th of July, 1888, an order was made in the action, of which the concluding part is that the trustees be at liberty to borrow from their bankers, the Leeds branch of the National Provincial Bank of England (Limited), on the security of the testator's estate and of the guarantee of the defendants J. G. Metcalfe and James Mordaunt Buckley (which guarantee the said defendants, by their counsel, undertook to give to the said bank), a sum not exceeding £1,300 at a rate of interest not exceeding 5 per cent. per annum.

It is observable that nothing is said as to the nature of the guarantee which Messrs. Metcalfe and Buckley are to give. If the order alone be regarded, the guarantee would naturally be taken to be a personal guarantee, but there is nothing inconsistent with the view that it was to be such a guarantee as referred to in the letters of the 12th of June—viz., by deposit of deeds.

On the 9th of August another meeting took place, at which there were present Mr. Horne, Mr. Hopps, Mr. T. E. Jones (again representing Mr. Evan Thomas), Mr. Metcalfe, and Mr. Buckley. There are no minutes produced of this meeting, but Mr. Hopps and Mr. Horne, by their affidavits, state that the minutes of the meeting of the 12th of June were read, confirmed, and signed by the chairman, Mr. W. P. Horne, that the letters of Messrs. Metcalfe and Buckley of the 12th of June were also read, and that he (Hopps) himself reported the arrangements he had made as to depositing the deeds with the bank and opening and drawing on an overdraft account at the bank, and that these arrangements were approved by those present. There is no evidence to the contrary.

On the 1st of September, 1888, the title deeds were deposited with the bank by Mr. Hopps, the overdraft account was opened and was subsequently drawn upon. The paper was continued down to August, 1889, but having proved unsuccessful, the business was then sold by order of the court, and a balance of £1,288 or thereabouts remains due to the bank.

In the meantime, on the 19th of March, 1889, Mr. Jones took a mortgage from Mr. Buckley of his moiety of the property referred to in the letters of the 12th of June to secure a present advance of £200 and further advances. (This mortgage was registered by Mr. Jones in the West Riding Registry at Wakefield on the 21st of March, 1889.) Mr. Buckley has since died in insolvent circumstances, and the question is whether Mr. Jones' mortgage, being registered, takes priority over the security created by deposit of deeds with the bank.

Before dealing with the question of law which arises, I must consider certain issues of fact raised between the parties. First, it is said by Mr. Jones that Messrs. Metcalfe and Buckley, within a few hours after the receipt by Mr. Hopps of the letters of the 12th of June, gave him verbal notice that they withdrew the letters and withdrew from the contemplated arrangement. This is denied by Mr. Hopps, Mr. Metcalfe, and Mr. Horne, and seems to me inconsistent with the letters of Mr. Buckley, dated the 20th of June, 1888, and also of Mr. Jones himself, dated the 13th of December, 1889, and the 6th and 16th of May, 1890, which seem to me to admit the existence of the bank's lien. Next, it was said by Mr. Jones that the letters were given in consideration of a payment by the trustees to the beneficiaries of £400, which was not made. This is also denied, and appears inconsistent with the same letters. Thirdly, Mr. Jones says he, on the 19th of February, 1889, inquired of Mr. Hopps if any security had been given or arranged with the bank, and his reply was "No." This is denied by Mr. Hopps, and there the matter rests; but it seems to me that Mr. Jones' statement in his affidavit is inconsistent with those in his letters to which I have already referred. Lastly, it is said that the arrangement originally contemplated, whatever its nature, was put an end to by the order of July, 1888, and in support of this a letter of Mr. Hopps of the 25th of March, 1889, is referred to. The explanation given by Mr. Metcalfe is that the claim put forward in that letter was founded on a mistaken construction of the order. Whatever may be the explanation, it seems to me that the abandonment of the security is inconsistent with Mr. Jones' letters already referred to, and I hold it not made out. I come, therefore, to the conclusion of fact that the deeds were deposited with the bank by way of security in accordance with the letters of the 12th of June, 1888, and that on the 19th of March, 1889, Mr. Jones was aware of the fact.

As the law stood down to a recent period this finding of fact would have been sufficient to dispose of the case, upon two grounds. First of all, it was held under the Registration Acts of the reign of Anne that the provisions of those Acts did not apply to equitable mortgages created by deposit of deeds unaccompanied by any memorandum. That was decided in *Sumpter* v. *Cooper*. More than that, under the doctrine established by the well-known case of *Le Neve* v. *Le Neve* the security of the bank must have had priority over that of Mr. Jones, who took his security with full notice of the existence of it. It is, however, contended that this state of the law has been altered by the recent Registration Act of 1884, and it is necessary to consider that Act.

It is entitled "an Act to amend and consolidate the law relating to the registration of deeds, and other matters affecting lands and hereditaments within the North, East, and West Ridings of the County of York."

There are some of the definitions contained in the Interpretation Clause, s. 3, to which I may refer. [His lordship read the definitions of "conveyance," "mortgage," "memorandum of charge," and "assurance," and also read section 7.] Now, it was contended that the words "such lien or charge" in the concluding portion of the section meant a lien or charge accompanied by a memorandum such as is referred to in the prior part of the section. It does not seem to me that that is the true construction of the section. I think that the words "such lien or charge" have the same meaning as the words "such lien or charge," in the earlier part of the section —namely, a lien or charge claimed in respect of unpaid purchase money or by reason of any deposits of title deeds. I think the object of that section was to alter the law as laid down in *Sumpter* v. *Cooper*, and to deprive equitable mortgagees of priority unless a memorandum such as is described in the section has been registered. I may then pass on to section 14. It is to be observed that assurance includes any memorandum of charge, and that the term "memorandum of charge" extends to any memorandum or lien or charge which can be registered. Section 14 runs thus: [His lordship read the section.] Now I am far from saying that a question may not arise on the construction of that section, but it seems to me that the Legislature has twice over provided that the priorities given by the Act are not to be altered except in cases of "actual fraud," and I am certainly not disposed in any way to fritter away the language of the Act. I understand that term to mean fraud in the ordinary popular acceptation of the term, and not what has sometimes been called "legal" fraud, or "constructive" fraud, or "fraud in the eye of a court of law or a court of equity." At all events for the purpose of the present case I assume that to be the effect of the Act, and I must give effect to the priority claimed by Mr. Jones unless I can come to the conclusion that his case is brought within the exception.

Now, what is the position of Mr. Jones? At the time he took his security or charge he was the solicitor and agent for Mr. Evan Thomas in all matters relating to these particular trusts. Mr. Thomas never attended any of the meetings relative to the trust affairs, but was on all occasions represented by Mr. Jones; and the mortgage in question was executed by Mr. Buckley at a railway station when he and Mr. Jones were on their way to one of these very meetings. The letter of the 6th of May, 1890, commences with a complaint on the part of Mr. Jones that Mr. Hopps had sent a letter direct to Mr. Evan Thomas instead of himself, "well knowing as you do that I act for and represent Dr. Thomas in this matter."

Further, Dr. Thomas has since shown the extent of the confidence which he reposes in him by appointing him one of his executors, and he has proved the will together with his co-executors.

It appears to me, therefore, that under the circumstances at the time when he took his security, Mr. Jones had taken upon himself the duty of actively protecting the interests of Mr. Evan Thomas in connection with the trust. Had, then, Mr. Evan Thomas any interest in the security? The security was no doubt given to the bank, and the bank were the persons primarily interested in it, but it is a matter of indifference to them. They have got the personal security of the trustees, which is perfectly adequate, and they leave it entirely to the court to say whether the priority exists or no.

Then comes the question, Have the trustees as such an interest in this security? I think they have. The meaning of the whole arrangement was that the trustees should be guaranteed against loss by means of the deposit, and that is expressly stated in Mr. Hopps' letter of the 12th of June, 1888, where he says that the deposit of title deeds was made, not

merely for the security of the bank, but "in order that the trustees" (of whom Mr. Evan Thomas was one) "may be guaranteed against loss in continuing the business of the testator. I think, therefore, that Mr. Evan Thomas had an interest in this mortgage. What, then, would be the duty of an agent who had taken upon himself the duty of actively protecting Mr. Evan Thomas' interests with reference to this mortgage. It would be this. If he discovered that the security in which the principal was interested was not duly perfected, so that some third party might possibly defeat it, he ought to do his best to get it perfected so as to prevent such defeat. That was his duty. Then could he behind the back of his client take advantage of such a defect, and gain a security for himself so as to defeat, *pro tanto* at any rate, the security of his principal. Certainly it would be a breach of duty, and to me it appears that if he did so and were acting in such a way, he certainly would be guilty of actual fraud. He was bound to abstain from taking or using a security over the property charged in favour of the bank to the prejudice of his principal, without making full disclosure and obtaining the sanction of that person, and the burden of proving that such disclosure was made and such sanction was given him lies also on the agent. On that I refer to *Dunne* v. *English*, L. R. 18 Eq. 524. Well then, what passed between Mr. Jones and Mr. Thomas on this subject? We have only the evidence as regards it of Mr. Jones.

There is no other proof than that founded on the affidavits. It appears to me that the statements in the two affidavits of Mr. Jones fall altogether short of what is required to prove knowledge, and to show that knowledge on the part of Mr. Evan Thomas. Mr. Jones nowhere states that he disclosed to Mr. Thomas that his security was to be taken or used in such a way as to prejudice Mr. Thomas. It is perfectly consistent with the statements of Mr. Jones in these affidavits that Mr. Thomas should have given his sanction to the security in the belief that the charge created by the deposit of deeds would not be affected.

No blame whatever can be attached to Mr. Jones so long as he does not avail himself of the security which he has obtained to the prejudice of Mr. Thomas or his estate; but it seems to me that to give effect to the priority which he claims under the registration would be to enable him to commit a fraud. That apparently was the view taken by Mr. Jones himself in the letter of the 6th of May, 1890, to which I have so often referred, and in my opinion it is much to be regretted that in these proceedings he should have put forward such a claim.

In my opinion, therefore, the security of the bank has priority over that of Mr. Jones.

Solicitors, *Jaques & Co.*, for *J. Glynn Jones*, Bangor; *Wild, Moore, & Rixton; Bell, Brodrick, & Gray; Warren, Murton, & Mitten*, for *Tyas & Son*, Barnsley; *Stuart & Hill*, for *T. E. Jones*, Manchester.

Chan. Div.
Romer, J.

March 23.

In re W. Powell & Sons. (*a*)

Company—Winding up—Official receiver—Liquidator—Security for costs—Misfeasance summons—Companies (Winding-up) Act, 1890 (53 & 54 *Vict.* c. 63), *s.* 10.

Where the official receiver and liquidator of a company being wound up compulsorily and only having assets sufficient to pay a small dividend to the debenture-holders takes out a misfeasance summons against officers of the company he is at the mercy of the court as regards costs at the hearing of the summons, and the court has jurisdiction in such a case to order the liquidator personally to pay costs. The court in such a case, in considering whether the liquidator ought or ought not to be ordered to pay the costs personally, will have regard to the fact that an application for an order that he should give security for costs has been made and opposed by the liquidator.

These were summonses taken out by the respondents to a misfeasance summons which had been taken out by the official receiver and liquidator of the above-named company (which was being wound up by the court), asking that the official receiver and liquidator should give security for their costs on the misfeasance summons. It appeared that there was money in court sufficient to pay a small dividend to the debenture-holders of the company. The whole debenture debt amounted to more than £27,000, charged on the present and future property, including uncalled capital. A receiver had been appointed in a debenture-holders' action.

C. E. E. Jenkins and *Younger*, for the summonses, referred to *In re London Metallurgical Co.*, 43 W. R. 476, [1895] 1 Ch. 758; *In re Kingston Cotton Mill Co.*, No. 2, *ante*, p. 363, [1896] 1 Ch. 331; *Salisbury, Jones, and Dods Case*, No. 2, [1895] 1 Ch. 333, 43 W. R. Dig. 37; *In re Seventh East Central Building Society*, 51 L. T. N. S. 109, 32 W. R. Dig. 244; Palmer Company Precedents, ed. 6, vol. 2, p. 499, form 636.

John Henderson, for the official receiver and liquidator, contended that there was no jurisdiction to order the liquidator to give security for costs.

Romer, J.—In my opinion a liquidator who initiates proceedings of this kind is at the mercy of the court as regards being ordered to pay costs at the hearing of the misfeasance summons. The court undoubtedly has jurisdiction to order a liquidator personally to pay costs, and in my opinion the court would do so in any case where it would be just that the liquidator should be ordered to pay the costs. And I think that the court, in considering whether the liquidator ought or ought not to be ordered to pay the costs personally, would have regard to the fact that an application for an order that he should give security for costs had been made and had been opposed, and that the court had refused to order security for costs on the ground that there would be jurisdiction at the trial to order him to pay them. It is on that ground, and on that ground alone, that I refuse in the present case to order the liquidator to give security for costs. The application will, therefore, be refused, but without costs.

Solicitors, *Robinson & Stannard; Cox & Lafone; Dawes & Sons.*

Q. B. Div.
(Day and Wright, JJ.)

March 26.

In re An Arbitration between Haigh and the London and North-Western and Great Western Railway Companies. (*a*.)

Arbitration—Setting aside award—Umpire—Misconduct—Bias.

After the appointment of an umpire in an arbitration

(*a*) Reported by V. de S. Fowke, Esq., Barrister-at-Law.

(*a*.) Reported by Sir Sherston Baker, Bart., Barrister-at-Law.

to determine the value of land compulsorily taken under the Lands Clauses Act, and before the reference, the umpire was retained to act as witness in another claim for one of the parties to the reference; and after the reference, but before the umpire had made his award, he gave evidence for such party as to the value of other land at some distance off taken for the same purposes and under the same Parliamentary powers.

Held, that the fact of the umpire appearing and giving evidence in another case for one of the parties, under the circumstances, did not entitle the other party to the reference to have the award set aside on the ground of misconduct or bias on the part of the umpire.

Application to set aside an award, on the grounds (1) that the umpire who made the award was not a disinterested person with regard to the subject matter of the reference; and (2) that the umpire had misconducted himself in that, subsequently to his appointment and during the pendency of the arbitration and before making his award, he had accepted a retainer from the respondent companies to act as their witness, and that he gave sworn evidence on their behalf in another arbitration in respect of land of a similar character, and in close proximity to the land of the claimant, which land was being acquired by the companies under the same powers and for the same purposes as the claimant's land.

Notice to treat was served on the claimant in January, 1895, in respect of some land of the claimant which the railway companies wanted to purchase compulsorily under the Lands Clauses Act. In May, 1895, arbitrators were appointed, and in June these arbitrators appointed as umpire Mr. Cross; Mr. Cross having been suggested by the company's arbitrator, and accepted by the claimant's arbitrator.

The reference took place on the 3rd and 4th of December, 1895; but before the reference was heard, and after the date of his appointment as umpire, Mr. Cross had been retained by the respondent companies to act as a witness on their behalf in an inquiry as to the value of land which the companies were taking from a Mr. Green for the same purposes and under the same Parliamentary powers. Mr. Green's land was at a distance from Mr. Haigh's land which was estimated in the affidavits at from one and a half to three miles, both being in the city of Liverpool.

Before the arbitration in *Haigh's case* took place, Mr. Cross, the umpire, went and viewed Green's land on behalf of the railway companies; and on the 13th and 14th of December—that is, after the arbitration in *Haigh's case* was heard, but before the umpire had made his award—the umpire gave evidence on behalf of the companies in *Green's case;* and on the 21st of December the umpire made and published his award in *Haigh's case.*

Mr. Haigh, the claimant, was dissatisfied with the award, and he now sought to set it aside on the above grounds.

Hon. J. W. Mansfield (*Bigham, Q.C.*, with him), for the claimant.—No personal charge is here made against the umpire, and no suggestion is made that he has consciously acted improperly or misconducted himself. Our contention is that from the very position in which he placed himself, namely, the position of acting as a witness for one of the parties to the arbitration in another claim, he must have been unconsciously interested and biased in his judgment. At the very time he was conducting this arbitration he was retained as a witness and had consented to act as a witness for one of the parties in the claim made against them in *Green's case.* This employment on behalf of the companies was before he heard this reference; and then when the reference was over, but before he had made his award, he actually gave evidence for the companies with regard to the value of land in the immediate neighbourhood in *Green's case.* It is impossible under such circumstances that he could have been free from bias as to the subject matter of the reference. He referred to *Clout* v. *The Metropolitan Railway Company*, 46 L. T. N. S. 141, 30 W. R. Dig. 8.

H. D. Greene, Q.C., and *C. A. Russell*, for the respondent companies, and *Rowlatt* for the umpire, were not called upon.

DAY, J.—I think there is nothing in this application. I cannot suppose for a moment that the mind of an umpire or arbitrator is really or substantially affected by his giving evidence on behalf of one of the parties in another reference on a similar matter some little distance off. From my experience of expert witnesses and professional umpires and arbitrators, surveyors are constantly umpires in this class of cases, and they are constantly material witnesses in compensation cases. Liverpool is a very large city, and if solicitors want to get a competent umpire in Liverpool they must employ as umpire some person who often acts as professional witness for the same company in the same neighbourhood. It is necessary that you should have some person who is intimately acquainted with the incidents of property of this kind, and it is impossible to avoid employing persons who are frequently employed by railway companies in the neighbourhood with reference to cases of this kind. I think, therefore, that this application must be refused.

WRIGHT, J.—I feel more doubt about the matter myself, but, on the whole, I think the objection on the ground of bias is not sufficiently made out. There is no ground for suggesting that the umpire was interested. He was not in any sense interested, and bias would be the only ground, and all we know as to that is that he was a witness for the railway company as to some land between one and a half and three miles distant. That does not, to my mind, sufficiently show that he was likely to be biased. Rightly, no suggestion is made against him personally, and I agree that there is no such necessary incompatibility between the two positions as to justify us in saying that he cannot act. He is not a judge and a witness in the same matter; if he were, he could not act as judge. He is not a prosecutor and judge in the same matter, and I do not think that there is any decision which has gone so far as to show that this application ought to be granted. It is, however, highly desirable that, so far as possible, persons who act as umpires ought to inform the parties of anything which the parties might wish to know in deciding whether they will or will not assent to that person acting as an umpire.

Rowlatt, for the umpire, asked for costs; and his application was granted, as there was a charge of misconduct against the umpire and he was entitled to come to the court and protect his character.

Motion refused.

Solicitors for the applicant, *Pritchard, Englefield, & Co.*, for *Simpson, North, & Co.*, Liverpool.

Solicitor for the respondents, *C. H. Mason.*

Solicitors for the umpire, *Woodcock, Ryland, & Parker*, for *Holden & Holden*, Bolton.

Q. B. Div.
(Hawkins and Vaughan Williams, JJ.)

Jan. 20, 21

REG. v. MAYOR, ALDERMEN, AND CORPORATION OF PLYMOUTH. (*a*.)

Fisheries Committee—Expenses of—Appointment of fishery officer—"Restrictions or conditions as to expenditure"—Fisheries Act, 1888 (51 & 52 *Vict. c.* 54), *s.* 6 (1).

Section 6 (1) *of the Fisheries Act*, 1888, *provides that the committee of a fishery district created under that Act, "subject to any restrictions or conditions as to expenditure" made by the council or councils by whom they are appointed, may appoint fishery officers.*

Held, that the section refers to restrictions and conditions in existence at the time of the appointment, and that a council is not exempt from contributing to the expenses of such an appointment, under section 10 *of the Act, for the reason that they disapproved of the expenditure subsequently to the appointment.*

Rule *nisi* calling upon the borough of Plymouth to show cause why a writ of *mandamus* should not issue commanding them to pay out of the borough fund to the treasurer of the Committee of the Devon Sea Fisheries District the sum of £112 10s., being the part payable by the borough of the expenses of the committee.

Part of the expenses consisted of money expended, or to be expended, by the committee in connection with the appointment of a fisheries inspector under section 6 of the Fisheries Act, 1888. Under that Act the Board of Trade had power to create a sea fisheries district and to constitute a committee for the regulation of the sea fisheries carried on within the district. The committee was to be a committee of the county councils and borough councils interested, with the addition of members representing the fishing interests of the district. A committee so constituted was to have power to make bye-laws, and, by section 6 (1), subject to any restrictions or conditions as to expenditure made by a council or councils by whom the committee was appointed, to appoint such fishery officers as they might deem expedient for the purpose of enforcing the observance within their district of bye-laws made by the committee. Section 10 provides that "the expenses of a local fisheries committee, so far as payable by a county council, shall, according as is provided by the order providing for the constitution of the local fisheries committee, be general or special expenses within the meaning of the Local Government Act, 1888, and, if special expenses, shall be charged in manner directed by the order, and the expenses of the committee, so far as payable by the council of a borough, shall be paid out of the borough rate or borough fund." In 1892 the Devon Sea Fisheries District was created by an order of the Board of Trade. The committee included the borough of Plymouth, who were to appoint five members and to contribute five eighteenth parts of the expenses of the committee out of the borough fund. The order of the Board of Trade also provided as follows: "Except as provided by section 6 of the Act, no council shall make, vary, or revoke any regulations or standing orders respecting the quorum or proceedings of the committee hereby constituted, or as to the area within which it is to exercise its authority; provided that any council may make a regulation requiring the committee to submit to such council once in each year an estimate of expenses proposed to be incurred by it under the Act, and once in each year a printed abstract of its accounts for the preceding year, and to afford to any person or persons appointed for the purpose by the council access at all reasonable times to the books containing its accounts. Subject to any restrictions or conditions made under section 6 of the Act, the committee shall not be required to report its proceedings to any council, nor shall its acts or proceedings be submitted to any council for approval."

The inspector was appointed in July, 1894. The expenses now claimed by the committee were the estimated expenses for the year ending August, 1895, and they included the salary of the inspector, together with other expenses connected with his appointment. A copy of the estimate was sent to the town clerk of the borough in August, 1894, accompanied by a demand for payment. The borough refused to pay, and at the next sitting of the council a resolution was passed disapproving of the expenditure of money upon the appointment of an inspector.

Lawson Walton, *Q.C.*, and *Bonsey* showed cause.—The borough were not liable to pay expenses which were only estimated expenses. Having disapproved of the appointment, the borough were not liable to contribute to the expenses of it.

Channell, *Q.C.*, and *Duke*, in support of the rule.—It is absurd to suppose that the borough were not liable to pay estimated expenses, for otherwise the committee would be obliged to provide for the current expenses out of their own pockets. Section 6 (1) implies that the disapproval by a council of the appointment of an officer must be made prior to the appointment, and their subsequent expression of disapproval cannot affect the borough's liability to contribute.

Cur. adv. vult.

VAUGHAN WILLIAMS, J., who delivered the judgment of the court, after stating the facts, proceeded:—It is agreed that these expenses are general expenses. That being so, apart from the section in the Fisheries Act which governs the appointment of the inspector, if we turn to the Local Government Act, 1888, we find that section 81 (6) provides how they are to be defrayed. They are to be defrayed by the council or councils by whom the committee is appointed, and there is no provision giving them any veto to control the expenditure. When we look at the order of the Board of Trade, we find that they have taken the same view, namely, that, except in the case of section 6 (1), the committee were not subject to review by the councils who appointed them, except that any council had a right to call upon the committee to submit an estimate of its expenditure for the coming year.

It does not appear that the borough did require any such estimate, nor did they impose any restrictions or conditions with regard to appointments made under section 6 (1). That being so, it would seem that the appointment under section 6 (1) is a valid appointment, subject only to restrictions and conditions as to expenditure made by the borough. Now, if those words "restrictions or conditions as to expenditure" mean restrictions or conditions made at the time of the appointment of the officer, then, there having been none, it would seem that the borough were liable to contribute, for no restrictions made afterwards can affect the appointment. But if, on the other hand, they mean restrictions not made at the time but made afterwards, then, it being the fact that the borough have since made restrictions, it would follow that the appointment would be made subject to those restrictions, and the borough would only have to contribute subject to the restrictions it had laid down. But in my opinion the words mean

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

restrictions and conditions in existence at the time of the appointment; and as there were no such restrictions the exercise by the committee of their powers under the Act was a valid exercise, and the borough must contribute towards the expenses. With regard to future years the appointment will be made subject to any restrictions the borough might think fit to impose.

It was suggested that a hardship was involved, because the borough might have fresh expenditure imposed on it which they would not have had an opportunity of providing against. The answer is, firstly, that in this case the borough had ample notice, namely, since October 1893; and, secondly, that the matter is provided for in the order of the Board of Trade, for it is in the power of any council to call upon the committee to furnish them with an estimate. That would inform the council of the proposed expenditure, and they would then have an opportunity of imposing restrictions if they wished to do so.

I only wish to add that this seems to be the only practical construction of the section. It would be most unfortunate if the words of the Act were such that the borough, having had notice that the appointment was to be made, after the expenditure had been actually incurred, could come in and say that they had made a restriction. The fact of the matter is that, if one looks at the whole scope of the Act, it is obviously the intention of the Legislature that the restrictions should be made in advance. I have not gone at length into the other points, but we have considered each one, and this is the only one about which we had any doubt.

HAWKINS, J., concurred.

Rule absolute.

Solicitors for the borough of Plymouth, *Sharp, Parker, & Co.*, for *J. H. Ellis*, Plymouth.

Solicitors for the committee, *Field, Roscoe, & Co.*, for *H. Ford*, Exeter.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — April 22, 23, 24; May 16.

THE LONDON COUNTY COUNCIL *v.* THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF LAMBETH. (*a*.)

Poor rate — Beneficial occupation — London County Council—Assessment of public park—Annual value—Hypothetical tenant — London Council (General Powers) Act, 1890 (53 & 54 *Vict. c. ccxliii.*), *ss.* 4, 5.

The London County Council are not rateable for the relief of the poor in respect of land and buildings purchased and maintained by them for the use of the public as a park or recreation ground under the London Council (General Powers) Act, 1890, *the occupation of such park not being of any net annual value to them as hypothetical tenants.*

This was an appeal by the London County Council from a decision of the Divisional Court (Pollock, B., and Wright, J., the 8th of August, 1895) [1895] 2 Q. B. 511, whereby it was held that the London County Council were liable to be rated for the relief of the poor in respect of their occupation of lands and buildings which they had purchased and laid out as a public park and recreation ground under the provisions of the London Council (General Powers) Act, 1890.

Case stated by consent and by order of Bruce, J., pursuant to section 11 of 12 & 13 Vict c. 45, upon an appeal by the London County Council to the Court of Quarter Sessions for the County of London against a poor rate.

1. In a poor rate made by the respondents for the parish of Lambeth, on the 7th of April, 1894, the appellants are assessed as occupiers of the premises and hereditaments hereinafter mentioned, in the several amounts shown by the extract from the rate-book as follows:

"No. 1473. Name of occupier: London County Council. Name of owner: ——. Description of property rated: House. No. of house and name or situation of property: Norwood-road. Gross estimated rental: £184. Rateable value: £154. Poor rate at 1s. 9d. in the £: £13 9s. 6d.

"No. 1475. Name of occupier: London County Council. Name of owner: Blackburn, J. Description of property rated: Land. No. of house and name or situation of property: Norwood-road. Gross estimated rental: £180. Rateable value: £171. Poor rate at 1s. 9d. in the £: £14 19s. 3d.

"No. 1483. Name of occupier: London County Council. Name of owner: ——. Description of property rated: Lodge. No. of house and name or situation of property: Norwood-road. Gross estimated rental: £12. Rateable value: £10. Poor rate at 1s. 9d. in the £: 17s. 6d.

"No. 1487. Name of occupier: London County Council. Name of owner: ——. Description of property rated: Cottage. No. of house and name or situation of property: Norwood-road. Gross estimated rental: £30. Rateable value: £24. Poor rate at 1s. 9d. in the £: £2 2s."

2. The appellants, the London County Council, are the governing body of the administrative county of London, and under divers Acts of Parliament hold, maintain, and regulate certain public parks, recreation grounds, and open spaces.

3. Previously to the passing of the London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), the said hereditaments and premises, known collectively as Brockwell Park, were in private ownership, and were included in the valuation list for the time being in force in the said parish and upon which the poor rate mentioned is based, and were assessed to the poor rate of the said parish.

4. The appellants, pursuant to the powers conferred by the said Act of 1890, in the year 1891 acquired the said hereditaments, and the same were conveyed to them by deed dated the 26th of March, 1891, as hereinafter mentioned.

5. From the time the said hereditaments were acquired by the appellants, the appellants have been rated and assessed for the said hereditaments to the poor rates of the said parish made respectively on the 11th of April, 1891, the 26th of September, 1891, the 9th of April, 1892, the 29th of September, 1892, the 8th of April, 1893, and the 7th of October, 1893; but payment of the rates for the said hereditaments was not demanded in respect of the poor rates made on the 11th of April, 1891, the 26th of September, 1892, and the 8th of April, 1893. The house and land were from the 26th of March, 1891, until the 6th of June, 1892, unoccupied and unused.

Sections 4 and 5 of the said London Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), are as follows:

"(4) The council may purchase and take by agreement certain lands in the parish of Lambeth, in the

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

county of London, known as Brockwell Park, as shown on the plan of Brockwell Park, and when the council shall have acquired the same, they shall hold the same and every part thereof as a park, and shall lay out and maintain and preserve the same and every part thereof as a park, for the perpetual use thereof by the public for exercise and recreation, and may from time to time exercise all necessary powers for the maintenance and preservation of the same as a park, provided that the council may, if they think fit, inclose the said lands or any other part thereof with a view to the better or more effectual preservation thereof for public use, and retain or remove, alter, enlarge, or adapt any buildings thereon, for any purpose which they may think conducive to the public benefit.

"(5) The council may erect and maintain in the said park huts and lodges, for the accommodation of keepers, constables, and other persons employed by the council in connection with the maintenance and management of the park, and also such other convenient and ornamental buildings as they may think requisite for refreshment rooms, band stands, conveniences, and other like purposes."

7. By the before-mentioned deed of the 26th of March, 1891, the said hereditaments were conveyed to the appellants to hold the same unto and to the use of them, their successors, and assigns for ever, to the end and intent that the same may be used as and for a public park under the provisions of the said London Council (General Powers) Act, 1890, and they now hold the same under the powers and subject to the provisions in the said Act contained.

8. Brockwell Park occupies about 78 acres, and is inclosed on all sides.

9. The house numbered 1473 in the said rate-book (formerly the mansion house) is a two-storied building which has been divided by the appellants into two parts, completely separated from one another by partition walls, and entered by separate entrances, being the original front and back doors respectively of the old mansion house.

10. Of the part which is entered by the original front door, the ground floor and basement are occupied as refreshment rooms, the same being held for the year ending the 31st of March, 1895, under a licence or agreement, while the upper floor, consisting of several good-sized rooms, is unused. Such last-mentioned rooms might be let to a tenant from year to year for £20 a year, if right of access at all times could be given to him consistently with the provisions of the said Act and the bye-laws hereinafter mentioned.

11. The part which is entered by the original back door, consisting of eight living rooms and a small office, is occupied by the resident superintendent of the park and his family. Such resident superintendent is reasonably necessary for the protection and proper management of the said park for the purposes of the said Act. He is paid by the appellants a salary, in fixing which is taken into account the fact that he has the rooms rent free, water and gas being found by the appellants. Similar accommodation in the way of rooms could not be found for him in the immediate neighbourhood of the said park for a less rent than £40 a year as tenant from year to year.

12. The buildings, yard, and premises formerly used as coachhouse, stables, and outbuildings in connection with the said mansion house, have been partly converted for public use into a gymnasium for children, conveniences for men and women, and a children's shelter, and partly into a cottage for a constable to live in, consisting of four living rooms, a carpenter's shop for the use of men specially employed by the appellants on necessary repairs in the said park, a lock-up store, an office, a tool shed, and a bothy for the men to have their meals in. The said cottage, shop, store, shed, and bothy, as well as the said gymnasium, conveniences, and shelter, are all properly used as aforesaid by the appellants for the purposes of managing the said park under the said Act, and it is considered necessary by the County Council, and is proper for the protection of the said park and its contents that the said constable should reside in the said cottage. Such last-mentioned cottage could not be let except at a merely nominal rent to anyone except in connection with the whole establishment formerly constituting the mansion house.

13. The lodge and cottage numbered 1483 and 1487 in the said rate-book are small cottages, the former containing three rooms and the latter containing five rooms and having a small yard at the back, the only entrance to each being inside the park gates. These cottages are used as residences for two constables, who are allowed by the appellants to occupy them rent free in consideration of the extra duty they undertake of looking after the gates, of which they have the keys, and protecting the park at night. It is considered necessary by the County Council, and is proper for the protection of the said park and its contents, that the said constables should reside in the said cottages. If the said cottages could be let by the County Council, unhampered by the provisions of the said Act and the bye-laws hereinafter mentioned, they would fetch rents sufficient to support the figures in the said rate-book.

14. All the land in the said park, numbered 1475 in the said rate-book, is open to the public at large as a park and recreation ground during the daytime, but at night the gates are locked and the public are not admitted. This is necessary for the protection of the park and to prevent its being turned to improper uses at night.

15. Certain bye-laws have been made and are applicable to the said park, amongst other open spaces, under the 14th section of the said Act, and the constables are by warrant required to enforce the same under the 17th section of the said Act. By No. 1 of such bye-laws (the whole of which may be referred to by either party) the following acts and things (amongst others) are prohibited and declared to be offences—viz.: "(36) Refusing to leave any park, garden, or other enclosed place at or after the time of closing the gates in the evening, if requested to do so by any officer or police constable, or wilfully remaining therein after the gates are closed in the evening, or climbing on or over the gates, fences, or railings." And by No. 2 penalties are provided for a breach of the bye-laws.

16. The grass in the said park is kept down by the appellants, so as to be in a fit state for public use, partly by mowing and partly by grazing. The grazing is done under an agreement or licence with a licensee, by which such licensee is entitled to the grazing of this and several other public open spaces in consideration of a payment. The above is a reasonable and economical course for the appellants to take for the purpose of carrying out their duties under the 4th section of the said Act.

17. Amongst other arrangements reasonable and proper for the recreation of the public, the appellants have laid out and maintain thirty lawn tennis grounds and thirteen cricket pitches in the said park.

18. The necessary expenses of maintaining the park as a whole, with the buildings on it, for the purposes of the said Act far exceed any sums of money which are or could be derived from licences for the supply of refreshments or for grazing rights or otherwise. The actual expenses exceed £2,000 a year.

19. If the hereditaments assessed in the said rate had remained in the same state of use and occupation in which they were prior to the passing of the said Act, the rateable value thereof would have been sufficient to support the figures set out in the said rate.

20. The total purchase money for the said park in 1891 was £117,000, of which £62,000 only was provided by the appellants, the balance being made up of contributions from other public bodies.

21. If the appellants had had a duty to provide an open space for the public in the said locality, and for the purpose of carrying out that duty had had the power and the wish, instead of purchasing the said park, to take it as lessees or tenants and pay a rent for the same, they would have had to pay a rent for the same sufficient to support the figures in the said rate.

22. The respondents contend that the facts as above stated show an occupation of all or some of the said hereditaments by the appellants, and that such occupation was under the circumstances above stated a beneficial occupation; and that even if the occupation of the appellants was in fact not beneficial to them, yet they were properly rated to the relief of the poor in sums justifying the said respective rates.

23. The appellants contend that under the circumstances they are not rateable at all for any portion of the said property; or that if rateable, the rateable value is *nil*.

The questions for the opinion of the court are:—

(1) Whether the appellants are rateable in respect of all or any, and if any which, portion of the said hereditaments.

(2) If the appellants are rateable, whether they are rateable at a nominal amount only in respect of all or any, and if any what, portion of the said hereditaments.

If the court should be of opinion that the appellants are rateable for the whole of the said hereditaments upon the same basis as their predecessors, the late occupiers thereof, then the rate is to stand.

If the court should be of opinion that the last preceding supposition is incorrect, but that nevertheless the appellants are rateable for the said hereditaments taken separately on the basis of there being, notwithstanding the said Act of Parliament, a beneficial occupation of (*a*) the hereditaments formerly comprised in the old mansion house, numbered 1473; (*b*) the land, numbered 1475; (*c*) the lodge, numbered 1483; or (*d*) the cottage, numbered 1487, then the rate is, for the purposes only of this case, to be amended by changing the rateable value of (*a*) from £154 to £77, of (*b*) from £171 to £85, of (*c*) from £10 to £5, and of (*d*) from £24 to £12 respectively, with corresponding reductions in each case of the gross estimated rentals.

If the court should be of opinion that all the said hereditaments, or any portion or portions thereof, are either not rateable or rateable at *nil*, then the rate is to be quashed, or quashed *pro tanto*, as the case may be.

If the court should be of opinion that none of the above contentions or bases are right, the rate is to be amended in accordance with the judgment of the court, whatever it may be.

Bosanquet, Q.C., and *Horace Avory*, for the appellants.

Lawson Walton, Q.C., *Coward*, and *Hole*, for the respondents.

The arguments of counsel sufficiently appear in the above case and in the following written judgments.

Cur. adv. vult.

The following written judgment was read by

A. L. SMITH, L.J.—The main question raised by this special case is what, upon the facts stated, as a matter of law, was the rateable value of Brockwell Park, which had in the year 1891 become one of the public parks of London, when it was rated to the relief of the poor by the overseers of the parish of Lambeth upon the 7th of April, 1894. Was its rateable value then the same as it had been prior to its becoming a public park, or had its rateable value been thus reduced to a nominal or what other sum?

The overseers have assessed the park at its rateable value prior to its having become a public park. Their counsel did not, however, at the bar contend for this, or for anything like it; but he argued that this court should hold that the facts of the special case showed that, as a matter of law, its rateable value was other than nominal, or, as he said, something in excess of *nil*. The material facts, as they appear upon the case, are these. Prior to the year 1890, when the London Council (General Powers) Act (53 & 54 Vict. c. ccxliii.) was passed Brockwell Park belonged to a private owner, and consisted of seventy-eight acres of land, with a mansion house, lodge, and cottage thereon. It was then rated to the relief of the poor at a net annual rateable value of £359; and it is not disputed that this was then its rateable value. By the Act of 1890, s. 4, the Legislature empowered the London County Council, if they thought fit, to purchase Brockwell Park, and it enacted "that when the Council shall have acquired the same they shall . . . . lay out, maintain, and preserve the same and every part thereof as a park for the perpetual use thereof by the public for exercise and recreation." In the year 1891 the London County Council exercised the option so given to them, and subscribed towards its purchase £60,000, the residue of the purchase money, £57,000, being obtained from other sources. The case finds "that the necessary expenses of maintaining the park as a whole, with the buildings on it, for the purposes of the Act far exceed any sums of money which are or could be derived from licences for refreshments or for grazing or otherwise." "The actual expenses exceed £2,000 a year," in other words, when the rate was made in September 1894, the London County Council were necessarily heavy pecuniary annual losers by reason of the obligation imposed upon them by the statute to maintain the park as a park for the perpetual use thereof by the public for exercise and recreation. The London County Council were not empowered to let the park or any part of it, or to use any part of it in any other way than as a public park for the recreation of the public for ever. It never can be abandoned as a public park, but must remain a public park for ever, kept up at the expense of the London County Council. In considering whether a hereditament is a rateable hereditament or not, in my judgment in the first place it must be determined whether its occupation is capable of value in any person's hands whatsoever. If yes, then it is a rateable hereditament; *aliter* if it is not. The counsel who appeared for the London County Council, very properly, in my judgment, admitted that Brockwell Park, though its rent-producing capacity was fettered as above mentioned, was a rateable hereditament, and I therefore need not embark upon the theory of land being struck with sterility in any and everybody's hands; for the question before us is whether, taking the conditions under which the London County Council were by the statute of 1890 bound for ever to occupy the park, there are findings in this case which render the rateable value of that occupation other than nominal.

Now, as regards the law to be applied to the rating to the relief of the poor of a rateable hereditament under the statute of Elizabeth, there are three well-known legal landmarks. First, the Parochial Assessment Act (6 & 7 Will. 4, c. 96), which was passed in the year 1836, by which was enacted the rule whereby the rateable value of the occupancy of a hereditament is to be ascertained; secondly, the case of *Jones* v. *The Mersey Docks and Harbour Board*, 11 H. L. C. 443, at p. 461, in the year 1864 in the House of Lords, which laid down how this rule was to be applied; and thirdly, the case of *Reg.* v. *The School Board for London*, 34 W. R. 583, 17 Q. B. D. 738, in this court in the year 1886, in which it was for the first time held that the occupying owner was to be taken into account as a possible hypothetical tenant when arriving at the rateable value of a hereditament. Lord Blackburn (then Blackburn, J.), in delivering the opinion of the majority of judges in the House of Lords in the case of *Jones* v. *The Mersey Docks and Harbour Board*, thus laid down the rule. He said the Parochial Assessment Act has enacted "that no rate shall be valid unless made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." In order, therefore, that a valid rate may be imposed, it is essential that the occupation should be of value beyond what is required to maintain the property; for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent which, after deducting the annual expenses of the maintenance, would leave no overplus, there is nothing to rate." This rule was adopted by the House, and is the undoubted law on the subject. The Lord Chancellor (Lord Westbury) said: "Having regard to the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, it may be said in answer that occupation to be rateable must be of property yielding or capable of yielding a net annual value, that is to say, a clear rent over and above the probable average cost of the repairs, insurance, and other expenses, if any, necessary to maintain the property in a state to command such rent. It is in this sense that I understand the words 'beneficial occupation,' wherever it is said that to support a rate the occupation must be a beneficial one. For, on principle, it is by no means necessary that the occupation should be beneficial to the occupiers. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings." This rule has been ever since acted upon down to the present time. I will take one instance from among the many by way of example. In the case of *The Mayor of Liverpool* (*Appellants*) v. *The Overseers of Wavertree*, 2 Ex. D. 55*n*, Blackburn, J., in delivering judgment, said: "The whole question turns on the rule given by the Parochial Assessment Act, which says that the occupier is rateable at what a tenant from year to year will give as the rent, who takes the land subject to the same restrictions as those under which the appellants hold it. Now the tenant would only give such a rent as the restrictions imposed by statute would enable him to earn; and the rateable value is to be based upon that rent." This is the rule, and it is settled and plain; it is in its application to different sets of facts that difficulty has arisen, as will be seen from the many cases in the law reports upon the subject. From the year 1836 down to the year 1886 the hypothetical tenant was assumed to be a person other than the occupying owner of the hereditament sought to be rated; and had the law remained so until now, I cannot doubt that the present contention of the respondents would have been hopelessly untenable, for it is plain enough, and indeed it is admitted by their counsel, that no hypothetical tenant (leaving out of consideration the occupying owner, the London County Council, as a possible hypothetical tenant) would in April, 1894, have given a farthing of rent, to use Lord Blackburn's expression in *The Mayor of Lincoln* v. *Holmes Common*, 15 W. R. 786, L. R. 2 Q. B. 482, for Brockwell Park, subject to the restrictions and prohibitions imposed upon the occupancy of the park by the Legislature in 1890. In the year 1886, however, matters changed, and the case of *Regina* v. *The School Board for London* came up for determination in this court.

The question was whether the School Board, who were occupying owners of the premises sought to be rated, were to be excluded when inquiring what rent a hypothetical tenant would have been willing to give for the school premises; and it was held that the School Board had the duty imposed upon it by the Legislature to provide school premises for educational purposes, and might, if they had not purchased the premises sought to be rated, have been induced or forced to become tenants of them, and, as they had power to rent premises, they were not to be excluded when considering the possible hypothetical tenant. Then came the case of *Owen's College* v. *Overseers of Chorlton-upon-Medlock*, 55 L. T. N. S. 737, before the late Stephen, J., and me in the Divisional Court, when we held, following the case of *Regina* v. *School Board for London* that, in considering what rent the hypothetical tenant would be likely to give, the occupying owner—*i.e.*, Owen's College—was to be taken into consideration. I find from the *Law Times* report of this case that it was admitted before us that a solvent tenant would have given such a rent as tenant from year to year as would support a rateable value of either £1,000 or £1,300; the respondent's contention being that the rateable value of the college should be assessed upon the calculation of 4 per cent. upon the cost price of erecting the buildings, which brought out the rateable value of £3,285, which was what the college appealed against. This last argument we discarded, and I think rightly so; and we followed *Regina* v. *The School Board for London*, and included the occupying owner as a possible tenant, and upheld the rate at £1,300. Upon appeal this court held (35 W. R. 226, 18 Q. B. D. 403) that, although the trustees of the college had a duty imposed upon them by law of maintaining a college for educational purposes, yet, inasmuch as it was by law incapacitated from renting the premises sought to be rated, it was to be excluded from consideration as a possible hypothetical tenant.

In the year 1889, in the case of *The Mayor, &c., of Burton-upon-Trent* v. *The Assessment Committee of Burton-upon-Trent*, 38 W. R. 181, 24 Q. B. D. 197, at page 207, the principle laid down in the case of *Reg.* v. *School Board for London* was acted upon in this court, it being held that the Mayor and Corporation of Burton-upon-Trent, who were occupying owners, had a duty imposed upon them to dispose of the sewage, and were competent to have become tenants for that purpose of the premises sought to be rated. They were therefore held to be in the category of possible hypothetical tenants; and this case was distinguished from the case of *Owen's College* v. *Overseers of Chorlton-upon-Medlock* upon the ground that the

Mayor and Corporation were competent possible hypothetical tenants, whereas in *Owen's College case* the college was not. So matters, so far as material, rested until the year 1893, when these three last-mentioned cases came under review in the House of Lords in the case of *The London County Council* v. *Churchwardens of Erith Parish*, 42 W. R. 330, [1893] A. C. 562, at pages 590 and 596. It was there held that the cases of *Reg.* v. *School Board for London*, and of the *Mayor and Corporation of Burton-upon-Trent*, in which it had been held that the occupying owner was to be taken into account as a possible hypothetical tenant, were rightly decided; but that the case of Owen's College, in which he was excluded, was not rightly decided. Lord Herschell, C. ([1893], A. C. 562, at page 596), gives his reasons for this conclusion as follows: "An owner who is in occupation of premises can, of course, never reasonably be expected to take them as tenant from year to year—he cannot become tenant to himself. Yet it has been held that the rent which, if the property were in other hands, he would be willing to pay may be taken into account when inquiring what is its annual value—that is, at what sum it might reasonably be expected to let from year to year. If the hypothesis be admissible that the owner might himself be amongst the possible tenants, although as a matter of fact he could not be so, it seems to me no more violent hypothesis to conceive him as amongst the possible tenants, even although he may be subject to certain legal restrictions which would prevent him becoming so." This opinion of Lord Herschell, C., was approved of by the House. There can be at the present day no doubt whatever that the London County Council, as occupying owners of Brockwell Park, are to be taken into consideration as possible hypothetical tenants; and this brings me to the point, which in my judgment is the real point, whether the facts stated in the special case show, as a matter of law, that the London County Council would, as hypothetical tenants, have been willing upon the 7th of April, 1894, to have given a rent in excess of what any other hypothetical tenant would have given, which it is not contended would have been in excess of a nominal rent.

The London County Council owed no duty whatever to anyone to provide a park for the public at Brockwell or anywhere else, though their doing so was, no doubt, prompted by philanthropic purposes for the benefit of the public, whose representatives they were; but benefit to the public is not a value which can be taken into consideration when ascertaining what rent a hypothetical tenant would give for a hereditament.

The question is, What value is the hereditament to the hypothetical tenant? Blackburn, J., in *Jones* v. *The Mersey Docks and Harbour Board*, 11 H. L. C. 443, at p. 478, pointed this out. He said: "The rate is to be withheld" (this must be a misprint for either "imposed" or "upheld") "not in respect of the value of the benefit conferred on the public, or on that portion of it which uses the dock, but is to be imposed on the occupier of the docks in respect of the value to them" (*i.e.*, the dock company) "derived from the payments taken for that use." In the case of *Hare* v. *The Overseers of Putney*, 29 W. R. 721, 7 Q. B. D. 223, in this court, this statement of the law, as it appears to me, was adopted. In that case the Metropolitan Board of Works, pursuant to statute, purchased Putney Bridge from its owners, took off the tolls, and threw it open to the public toll free. The occupation of the bridge thereafter never was of value to the Metropolitan Board of Works, though it undoubtedly was of the greatest value to the public whose representatives the Metropolitan Board of Works were, and it was held that this fact did not support the rate made upon the Metropolitan Board of Works. There is no finding in this case that the London County Council would give a farthing of rent for Brockwell Park. All that is found is this (paragraph 21): "If the appellants had had a duty to provide an open space for the public in the said locality, and for the purpose of carrying out that duty had had the power and wish, instead of purchasing the said park, to take it as lessees and tenants and pay a rent for the same, they would have had to pay a rent for the same sufficient to support the figures of the rate." On the other hand, it is found that the London County Council must necessarily be annual heavy pecuniary losers by reason of being bound by statute to keep up the park for ever for the recreation of the public. Then how, as a matter of law, is it to be said that the London County Council would be willing to give as hypothetical tenants more than a nominal rent? In all the cases cited in which an occupying owner has been brought within the category of hypothetical tenant as being willing to give more rent than any other hypothetical tenant, there has been not only the duties imposed upon such owner of providing what the Legislature has required shall be provided by him, but (except in the case of *Reg.* v. *School Board for London*) there has been a specific finding that if he had not been occupying owner he would have given a rent sufficient to support the rate. In *Reg.* v. *School Board for London* there was the duty to provide a school house, and the sole point decided by this court (and the judgments are explicit as to this) was that the occupying owner was to be considered as a possible hypothetical tenant, nothing more. In the *Owen's College case* there was the duty to provide premises for educational purposes, and in that case, as before stated, the argument proceeded upon the admission that the college as hypothetical tenant would give a rent sufficient to uphold a rateable value of either £1,000 or £1,300, although the college could not be worked at a profit. There was a similar duty in the case of *Mayor and Corporation of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent*, namely, a duty to provide a sewage farm to deal with the sewage, and in that there was also the finding that, although the farm and pumping station as part of the sewage system could not be worked at a profit, if the farm and pumping station belonged to a private owner, the appellants would hire them at a rent sufficiently high to maintain the rate; and lastly, in the *Erith case*, in the House of Lords, Lord Herschell, at p. 579, commences his speech—and it is the foundation of his opinion—by pointing out that it was found in the special case, paragraph 10, that the London County Council, if they had not been occupying owners of the outfall works and pumping station sought to be rated, would have been willing to pay as yearly tenants a rent for the same sufficient to support the rate. This same finding will be found in all the three cases which were then argued together in the House of Lords. Now, a great deal has been said in this court, both in this case and in the *Hull Docks Company* v. *Guardians, &c., of Sculcoates Union*, 42 W. R. 595, [1894] 2 Q. B. 69, as to what the House of Lords decided in the *Erith case*, and I desire to state what in my judgment the House of Lords laid down therein. It is this. First, it reaffirmed what had been affirmed in the year 1864 by the House of Lords in *Jones* v. *The Mersey Docks and Harbour Board*, namely, that to render a hereditament rateable its occupation must be of value to someone, and that it was not essential to rateability that a particular occupier of the land should be able to

make a pecuniary profit out of it; secondly, it held that the occupying owner was to be taken into account as a possible hypothetical tenant when ascertaining what rent a hypothetical tenant would give for the premises about to be rated, even although the occupying owner was prohibited by statute from renting the premises; thirdly, it left the rule as to the method of ascertaining the rateable value precisely where it was before. And as regards the case of an occupying owner being taken as a hypothetical tenant, Lord Herschell, at page 593, says: "The whole of the circumstances and conditions under which the owner has become occupier must be taken into consideration, and no higher rent must be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises." The question as to what rent the hypothetical tenant, whether occupying owner or not, would be willing to give as tenant from year to year, over and above the expenditure to command the rent, is necessarily one of fact.

The argument that the House of Lords has determined in the *Erith case* that an occupying owner must in every case be willing to give more than a nominal rent is in my judgment wholly untenable. The House of Lords decided no such thing, and the subsequent case of *Sculcoates Union* in the House of Lords, 43 W. R. 623, [1895] A. C. 136, shows that this is so. To state it shortly, it decided that, it having been found as a fact that had the London County Council not been occupying owners of the works sought to be rated they would have been willing to pay a yearly rent for the same sufficient to support the rate, applying the ordinary well-known rule, this rent was the basis upon which to ascertain the rateable value of the works, even although the London County Council were by law prohibited from renting the premises; and that it was *nihil ad rem* to show in answer to such a finding that no profit could be made out of the occupying of the premises by the London County Council. Now, as before stated, there is no finding in this case that the London County Council would have been willing to have paid any rent other than nominal, or indeed any rent at all; and I must point out that this is very remarkable and worthy of notice, seeing what the special findings in the *Erith case* and other cases argued therewith, and in the case of *Mayor, &c., of Burton-upon-Trent* v. *Assessment Committee of Burton-upon-Trent Union*, had been, and which must have been before the advisers of the respondents when this special case was settled. It is obvious that the respondents have been unable to obtain any such finding, and have been obliged to content themselves with the finding that if the London County Council had had a duty to provide an open space for the public in the said locality (which they had not), they would have had to pay a rent for the same sufficient to support the figures in the rate, a very different finding indeed from that upon which the prior cases were adjudicated. There being no such finding, how can this court, as a matter of law, hold that the London County Council would have been willing to give anything in excess of a nominal rent for the occupying of the park, when upon the facts found they must for ever be large annual pecuniary losers by having to keep up the park? The point taken in argument, that because the London County Council had given towards the purchase of the park £60,000 that shows, as a matter of law, that they would have been willing to give more than a nominal rent for the park, is in my judgment unsound. Take, for instance, the case, now unfortunately in some counties of England by no means of uncommon occurrence, of an occupying owner having in years gone by purchased an agricultural farm which of late years can only be worked at a dead out-of-pocket loss, and for which no tenant can be found to give any rent at all over and above the expenditure necessary to command the rent. Is it to be said, as a matter of law, that the occupying owner, because he had sunk his money in the farm, would give more than a nominal rent for that farm at the present time? Again, how can it be said, as a matter of law, that either from philanthropic motives or in order to ingratiate themselves with their constituents the London County Council would have given more than a nominal rent for Brockwell Park? Even if this could legitimately be considered, it appears to me impossible so to hold, and yet this is what we are in reality asked to do upon this special case by the respondents. I cannot come to the conclusion, upon the facts stated, that the London County Council would have been willing, as a matter of law, on the 7th of September, 1894, to have given other than a nominal rent; and I therefore disagree with the Divisional Court, which held that the rateable value of Brockwell Park, upon the facts stated must have been, as a matter of law, something in excess of *nil*; and I would point out that it is only with a question of law arising out of facts that either the Divisional Court or this court has jurisdiction to deal. I may perhaps add that, upon the facts as stated, I am not at all surprised that the respondents have been unable to obtain a finding as in the *Erith case* and the other cases above mentioned.

A subsidiary point was taken by the respondents that certain parts of the park—for instance, that part of the old mansion-house which is used for refreshments for the public, and the other part of the old mansion which was not occupied at all, and also the lodge and cottage—were subject matters for separate assessments distinct from the park itself, and had a rateable value of their own. The Divisional Court held that this was not so, and I agree with them. The obligation imposed upon the London County Council by the Act of 1890 was to lay out, maintain, and preserve Brockwell Park, and every part of it, as a park for the perpetual use thereof by the public for exercise and recreation. As before stated, the London County Council could let off no part of it. The Legislature enacted that if the London County Council purchased Brockwell Park they should take it as a whole, and for ever maintain it as a whole, and that the whole should be used for a public purpose for ever. This being so, in my judgment it must be rated as a whole, as one entity, and in one assessment; and consequently this small point will not avail the respondents.

This appeal must therefore, for the reasons above, be allowed, with costs.

RIGBY, L.J.—Ever since the passing of the Statute of Elizabeth the measure of rateability of an occupier in respect of property has been the value of the property for occupation. This may be said to be the fundamental principle of the Act. The Parochial Assessment Act, which differs in no material respect from the Valuation (Metropolis) Act, 1869, points out with precision how the proper figure is to be ascertained. The assessment is to be on the net annual value. But net annual value is explained to be the excess (if any) over expenditure necessary to command the rent, of the rent which might reasonably be expected to be obtained from year to year from a tenant subject to usual tenant's rates and taxes, and commutation rent-charge, if any. The inquiries therefore always are, first, what rent might reasonably

be expected to be obtained; secondly, what average expenditure would be required to command that rent; and if the sum ascertained in answer to the first inquiry is either nothing at all or not in excess of the amount of expenditure shown by the answer to the second inquiry, the property has no rateable value. The rent which might reasonably be expected is to be ascertained by taking into consideration every person to whom the property can have an occupation value, including the owner himself if the property would have to him a special occupation value. Of course, from the nature of the case, the owner cannot be tenant; but for the purpose of ascertaining the net annual value or rent it is clear on the decided cases that he must be treated as a possible tenant for the purpose of calculation only. What I have called the fundamental principle of the Act is clearly pointed out, and made the foundation of the judgment in the *Mersey Dock case*. In that case also it is laid down that it is not value in the sense of advantage to the public which has to be taken into account, but value to the occupier. In the *London School Board case*, the *Owen's College case*, the *Burton case*, and the *Erith case*, and other cases dealt with by the House of Lords at the same time with the *Erith case*, there was no doubt that the school buildings, the college buildings, and the sewage works were of annual value to the occupying owner. In each case the owners, if they had not already acquired the property in respect of which they were sought to be rated, would have had to acquire other property at a great expense, and the net annual value to them of the property actually acquired was not less than the rent (less proper outgoings) which it would have been worth their while to pay for the property if they had not been owners. In each case, also, the property, by reason of its special adaptability for the purposes of the occupying owner, was obviously of greater value to the occupying owner than to anyone else, and the question really was whether that greater value was to be taken into account in fixing the hypothetical rent which, according to the Parochial Assessment Act, was to govern the measure of rateability. No such question arises in the present case. It is admitted that if the land in question were or could be of any net annual value to the London County Council or to anyone else as occupiers, that value must be taken into account. But it is denied that the land is of any net annual value for occupation either to the London County Council or to anyone else. In the existing state of the statute law as to this particular property that is clearly made out, since no conceivable income which could be obtained from the property so long as it remains devoted to the public use as a park can exceed the necessary outgoings for its maintenance which the Act of Parliament imposes. It cannot even be said that the possession of the park relieves the County Council from expenditure which it would have otherwise to incur, since they are under no duty to provide a park for the public use, and no power, even if they had the wish, to do so. The advantage to the public of having the land kept as a park cannot be taken into account. It has, however, been argued that, although by statute the land is devoted in perpetuity as a park for the recreation of the public, it ought for the purpose of ascertaining its annual value to be treated as though it were not so devoted; and it is said truly that on this assumption it would have an undoubted and considerable annual value to an occupier. Another way of stating the argument is that, in ascertaining the value of land for rating purposes, regard should be had only to unproductiveness arising from natural causes, and not from legal restrictions. This argument appears equally opposed to principle and authority. It is the real net annual value which is always to be the foundation of the assessment. The real net annual value to an occupying owner has, as above appears, to be arrived at by supposing a tenancy, which cannot at law exist, for the purpose of fixing the hypothetical rent which by statute is made the measure of net annual value. But the supposition of a tenancy is only for the purpose of calculation, and it is the real net annual value to the occupying owner which is arrived at. The argument now being dealt with attributes to the property a fictitious annual value, having no relation whatever to its real annual value. There is nothing in the Statute of Elizabeth, or in any decided case, to justify this. Authority as well as principle is opposed to it. The *Putney Bridge case*, for instance, seems to be very closely in point. But it is not necessary to go through earlier authorities, since in the *Erith case*, which is supposed I know not why to lend some plausibility to the argument, Lord Herschell (in a judgment adopted by all the noble and learned lords) says, at page 591: "Now, if land is 'struck with sterility in any and everybody's hands,' whether by law or by its inherent condition, so that its occupation is and would be of no value to anyone, I should quite agree that it cannot be rated to the poor"; and other words to a similar effect are contained elsewhere in the judgment. It has been suggested that part of the property might be separately rated, but the answer to this is that no part can be separated in use from the rest without breach of the statutory provisions, and therefore the whole must be taken together for the purpose of assessment.

A. L. SMITH, L.J.—The Master of the Rolls desires me to say that he agrees with the judgments which have been delivered by myself and my brother Rigby.

Appeal allowed, with costs.

Solicitors, *W. A. Blaxland; W. Honey.*

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — June 3.

PUGH v. LONDON, BRIGHTON, AND SOUTH COAST RAILWAY CO. (*a.*)

Insurance—Accident—"Incapacitated from employment by reason of accident"—Nervous shock through fright.

By a policy of insurance the defendants undertook to pay to the plaintiff, who was a signalman in their employment, the sum of £1 a week "in case of his being incapacitated from employment by reason of accident sustained in discharge of his duty in the company's service," the insurance to be "absolute for all accidents however caused to the insured in the fair and ordinary discharge of his duty." While the plaintiff was on duty in his signal-box he saw an express train approaching with sparks and dust flying from it, one of the carriages having broken down. The plaintiff waved a flag to stop the train, and was so excited and terrified that an accident would happen to the train that he received a nervous shock to his system and became incapacitated from employment.

Held, that this was an "accident sustained" by the plaintiff in the discharge of his duty within the meaning of the policy, and that the plaintiff was entitled to recover.

Application by the defendants for judgment or a

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

new trial in an action, tried before Cave, J., and a special jury, upon a policy of insurance against accident.

The plaintiff was a signalman in the employment of the defendants, and by the policy the defendants agreed, subject to the conditions endorsed thereon, to pay to the plaintiff's representatives the sum of £200 in case of his death from accident occurring in the discharge of his duty in the company's service, and to pay to the plaintiff the weekly allowance specified in the endorsement thereon "in case of his being incapacitated from employment by reason of accident sustained in discharge of his duty in the company's service."

The weekly allowance, in case of permanent disability proved by medical certificate, was to be £1 a week until the amount paid equalled what would have been payable in case of death, and £1 a week in case of temporary disablement for a period not exceeding fifty-two weeks.

By one of the conditions endorsed on the policy, "the insurance is absolute for all accidents however caused to the insured in the fair and ordinary discharge of his duty."

It appeared that while the plaintiff was on duty in his signal-box he saw an express train approaching at considerable speed, and dust and sparks flying from it, the wheel of the Pullman car bogie having broken, and the carriage having a tilt and projecting beyond the rest of the train.

The plaintiff thereupon waved a red flag to stop the train, and the train was brought to a standstill.

The plaintiff was so excited and so terrified that an accident would happen to the train that he received a nervous shock to his system, and was incapacitated from any employment.

He thereupon brought this action to recover £52, being the weekly allowance of £1 for fifty-two weeks, contending that he had sustained an "accident" within the meaning of the policy.

The jury found a verdict for the plaintiff, and judgment was given accordingly.

Bucknill, Q.C., and *Hammond Chambers*, for the defendants.—There was no "accident sustained" by the plaintiff within the meaning of the policy. There was only an accident to the train. The mere sight of something which he did not expect to see is not an "accident" within the meaning of the policy. There must be impact or something equivalent to impact. A mere shock to the nerves would be an injury, but not an accident, to the plaintiff. *Victorian Railways Commissioners* v. *Coultas*, 13 App. Cas. 222, 36 W. R. Dig. 64; *Sneesby* v. *Lancashire and Yorkshire Railway Co.*, 24 W. R. 99, 1 Q. B. D. 42, were referred to.

Spencer Bower, for the plaintiff, was stopped.

Hammond Chambers replied.

Lord ESHER, M.R.—In this case the liability of the defendants depends, not upon negligence, but upon contract. The question is whether the defendants are not contractually liable. It is therefore unnecessary to say anything about the case of *Victorian Railways Commissioners* v. *Coultas*. We must first see what are the facts to which we have to apply the contract. The plaintiff was a signalman in the employment of the defendants, and at the time of the occurrence in question he was on duty in his signal-box. While he was there he saw a train approaching at great speed, accompanied by a volume of dust and sparks, which showed that there was something wrong with it. Can anyone doubt that that train was in a dangerous condition? He was bound to act promptly. If he allowed the train to proceed, a fearful accident might happen. The responsibility thrown upon the plaintiff was very great, as the safety of the train depended upon his action. If a man is called upon to act under these circumstances, a condition of great excitement will be produced. The immediate result was a shock to his nerves. He was from that time incapacitated from any employment. He was incapacitated by nervous prostration which prevented him from physically doing work. That is a physical disease to the nerves caused by fright arising from the state of the train and the feeling that upon his action the lives of the passengers depended. It was an accidental fright which so prostrated his nervous system, that is, the physical condition of his body, that it incapacitated him from employment. The case therefore came within the policy, and the application must be dismissed.

KAY, L.J.—I am of the same opinion. It cannot be denied that what occurred to the plaintiff occurred in the discharge of his duty. He saw the express train approaching, and sparks and dust issuing from part of it which showed that a calamity might ensue. He was in his signal-box, and was called upon to act. He had to determine what to do in a moment, and he waved his red flag to stop the train. He acted in the discharge of an imperative duty to prevent an accident to the train, which seemed to be imminent. He succeeded in stopping the train, but received such a shock to his nervous system through fear of the disaster which he thought might happen that he has been incapacitated from employment ever since. The only question argued was whether that incapacity was brought about by reason of accident sustained by the plaintiff in the discharge of his duty, or, to take the words in the condition indorsed on the policy, by an accident caused to the plaintiff in the fair and ordinary discharge of his duty. The argument was brought down to this. It was admitted that if the train had struck the plaintiff, or the boiler of the engine had exploded, and the impact of the air had struck him so as to produce physical injury, in either case there would be an accident within the policy. But it was said that because the plaintiff was not touched by the train or injured by the impact of the air caused by the engine, but was only injured by the shock to his nerves caused by fear of an accident, and the responsibility thrown upon him, there was no liability. I confess that I am unable to follow that argument. It seems to me as much an accident as if he had been struck by the train. Supposing the plaintiff had been in the four-foot way, and he saw a train coming suddenly upon him, and in escaping out of its way he received such a shock to his nervous system that he became incapacitated from work or died, would not that come within the policy? In my opinion the plaintiff is entitled to recover.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *H. Keeble.*

Solicitors for the defendants, *Rose & Co.*

From Q. B. Div. (Lord Halsbury, C., and Lopes and Rigby, L.JJ.) Jan. 23, 24.

CREMER *v.* LOWLES.

Re HAGGERSTON ELECTION PETITION. (*a*.)

Parliament — Election petition — Corrupt and illegal practices—Particulars of charges—Offences committed after the date of petition.

In an election petition alleging certain specific offences and "other corrupt and illegal practices before, during, and after the election," the petitioner cannot, unless the petition be duly amended, include in his particulars, or give evidence of, offences alleged to have been committed subsequent to the date of the presentation of the petition.

Appeal from chambers.

This was an appeal by the petitioner from an order made by Lawrance, J., at chambers, striking out certain particulars of charges contained in an election petition.

The petitioner and the respondent were the candidates at a Parliamentary election for the Haggerston Division of the Borough of Shoreditch, which took place on the 16th of July, 1895; the respondent being elected. On the 7th of August the petitioner presented a petition against the respondent's return, alleging that he, by himself or his agents, had been guilty of bribery, treating, undue influence, and other specified offences, and further alleging in another paragraph that he had committed "other corrupt and illegal practices before, during, and after the said election."

On the 14th of August the respondent took out a summons for particulars of the specific charges and of the other charges, and Day, J., on the 16th, made an order that the petitioner should give particulars of the specific charges ten days before the day fixed for the hearing of the petition, and that he should give particulars of the general charges within seven days from the date of the order. On the 19th the respondent filed a return of his election expenses. On the 23rd the petitioner delivered his particulars of the general charges. These particulars included allegations that the respondent had been guilty of illegal practices in connection with the return and declarations in respect of his election expenses.

On the 22nd of October the respondent took out a summons for further and better particulars of the general charges, and on the 25th Pollock, B., made an order for the delivery of such further and better particulars ten days before the day fixed for the hearing of the election petition.

On the 15th of January, 1896, the petitioner delivered full particulars. On the 22nd the respondent applied at chambers to strike out certain of these particulars, namely, particulars 105-158, which related to the alleged illegal practices in connection with the return of his election expenses, and particulars 101 and 103, which related to matters which occurred before the petition was presented. Lawrance, J., made an order that these particulars should be struck out on the ground that the petition did not cover them. The petitioner now appealed.

Willis, Q.C., and *B. S. Foster*, for the appellant.

Jelf, Q.C., and *Lewis Coward*, for the respondent.

Lord HALSBURY, C.—I am of opinion that this appeal should be dismissed. This case divides itself into two parts, one a question of law as regards particulars 105-158 and the other as regards particulars 101 and 103. As to the latter part we hesitate either to alter, to affirm, or to overrule the decision of the judge, as we are of opinion that the point was not really argued in chambers. We have jurisdiction to entertain the appeal on that point, but think that it would be more satisfactory to send the matter back to the learned judge for further argument on that point. Our judgment has therefore no reference to that part of the case.

The question we have to determine arises on the objection that the illegal practices alleged in connection with the return of the election expenses are not covered by the petition. The language of the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), upon which statute the petitioner relies, is "corrupt practices before, during, or after the election," and he especially relies on the word "after." The point of departure to be looked at is the election or return, twenty-one days from which is the time within which a petition must be presented.

The charges of which particulars may be ordered are charges made by the petition, and they must be charged in respect of offences already committed at the date of the petition. It is impossible that charges founded on offences alleged to have been committed since the presentation of the petition can be held to be charges contained in the petition.

The very language made use of in the petition is of the past tense where it says the respondent "has been" guilty of certain offences, and therefore it cannot possibly include offences not then committed. It is clear that the argument of the petitioner is untenable when one looks at the provision in the statute as to the limit of twenty-one days for the presentation of the petition; for if his contention were right, and the trial of the petition did not take place for some months after its presentation, a member might be unseated for an offence committed months after the election. I am therefore of opinion that the respondent cannot be proceeded against by this petition in respect of charges which did not arise until after the date of the petition. It is said that, in that case, offences committed after the presentation of the petition will go unpunished; but that is not correct. By section 40 of 46 & 47 Vict. c. 51, a member may be charged with such an offence either by amendment of the petition made within the time limited for amendment, or by a fresh petition filed within the prescribed time after the offence was committed. I am therefore of opinion that this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. As to the question of the objection by the respondents that the particulars 105-158 relate to matters which are not covered by the charges in the petition, but to matters which in fact occurred after the date of the petition, I think that the very statement of the objection is of itself sufficient to show that those particulars were rightly struck out. A petition must be in respect of charges then existent, and the petitioner is only entitled to give particulars of those offences alleged in the petition. If such particulars as were given in this case were allowed, the petition would become prophetic. I do not think the contention of the petitioner gives sufficient effect to the words "before, during, and after the election"; it rather treats the word "election" as though it were "petition." Offences may have occurred between the date of the election and the date of the petition, and it is quite right that such matters should be included in the petition. Offences, however, which are alleged to have been committed after the date of the petition are on quite a different footing. There is no hardship in our decision, for the petitioner might have

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

made these offences the subject of an amended or new petition, had he done so within the time limit prescribed for those steps.

RIGBY, L.J.—I am of the same opinion. As to the particulars 105-158, by no conceivable process of reasoning can things which have occurred after the date of the petition be made to fall within an allegation as to things which have previously occurred. I think that that consideration really at once decides the whole matter. In his petition the petitioner must confine himself to things which have occurred before, during, and after the election, and particulars can only be given of matters which had occurred at the date of the petition; he cannot give particulars of something which had not occured at that date. It has been contended on the part of the petitioner that the respondent waived this objection by taking out a summons for further and better particulars. No waiver, however, nor agreement even, could possibly make particulars of things which had not happened at the date of the petition into particulars of things which had happened at such date. The appeal therefore fails, and must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *H. P. & J. H. Cobb.*

Solicitors for the respondent, *Rollit & Sons.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) May 1.

In re HEMP, YARN, AND CORDAGE CO. (LIMITED). HINDLEY'S CASE. (*a.*)

Company—Winding up—Underwriting contract—Contributories — Register of members — Expiration of agent's authority to apply for shares—Ratification of application by subsequent conduct of principal.

An underwriting letter containing an offer by the underwriter, in consideration of a premium, to take up such shares in a company as should not be taken up by the public in answer to an invitation for public subscription, and also the statement that "this engagement is binding on me for two months from this date," was addressed to the promoters of the company. The capital was offered to the public a few days after the date of the underwriting letter, but the underwriting letter was not accepted until a date at which the subscription list had been closed, the invitation to the public proving an almost total failure. The promoters applied for shares in the underwriter's name, and the shares were allotted to him and his name was placed on the register of members of the company, where it remained for more than three years, he acting all that time as a shareholder.

Held, that, whether or not the application for shares was properly made on behalf of the underwriter and accepted in due time, he had by his conduct ratified what had been done, and was liable to pay calls made in the winding up of the company.

Decision of Vaughan Williams, J., *reversed.*

Appeal from a decision of Vaughan Williams, J. (reported *ante*, p. 397, where the facts are fully stated).

Buckley, Q.C., and *W. F. Hamilton*, for the appellant, were stopped.

Astbury, Q.C., and *E. C. Macnaghten*, for the respondent.—The letter was only an offer, and should have been accepted within a reasonable time. It was not so accepted, and therefore there was no authority to allot shares to the respondent: *In re United Ports and General Insurance Co., Beck's case*, 22 W. R. 460, L. R. 9 Ch. App. 392.

They also cited *Waterhouse* v. *Jamieson*, L. R. 2 Sc. & Div. 29, 18 W. R. H. L. Dig. 8, and *Oakes* v. *Turquand*, L. R. 2 H. L. 325, 16 W. R. H. L. Dig. 15.

[LOPES, L.J., referred to *In re Licensed Victuallers' Mutual Trading Association, Ex parte Audain*, 37 W. R. 674, 42 Ch. D. 1.]

W. F. Hamilton in reply.—The contract to take shares, even if made without Hindley's authority, was ratified by him.

He cited *In re Henry Bentley & Co. and the Yorkshire Breweries, Ex parte Harrison*, 69 L. T. N. S. 204, and *Bolton Partners* v. *Lambert*, 37 W. R. 434, 41 Ch. D. 295.

Astbury, Q.C., replied on the further cases cited.

LINDLEY, L.J., stated the facts, read the letter, and continued:—That was an offer, and an offer only. Although it begins "I agree" and talks about the engagement being binding, there was nothing binding upon anybody until it was accepted. Mr. Hindley says that, when you look at this letter, which he signed, upon the true construction of it, it involves the necessity of acceptance by the corporation within a reasonable time after its date, and he says that it was in fact accepted by the corporation on the 1st of July, 1892, which was an unreasonably long time after they had received his offer, and the directors knew that this was the case. He wants us to say upon that that there was no authority to put his name on the register, and that as there never was any agreement at all his name has been there improperly ever since. He says that, the transaction having been void altogether, the mere fact that he received the certificate and acted as a shareholder goes for nothing. Vaughan Williams, J., held that Mr. Hindley was right, and that the document really means that this is not to come into force unless the offer is accepted within a reasonable time, and as it was accepted after the 22nd of June, which was the time for sending in applications for shares, and as Mr. Hindley did not know that, there never was any agreement by him to take shares. We have received some evidence which was not before the learned judge. I mean that on the 23rd of January, 1893, Mr. Hindley applied for and received certificates that he was a member of the company in respect of those shares, and that in May, 1894, he signed some proxy papers; so that we have thus evidence, in addition to that which was before Vaughan Williams, J., that this gentleman, knowing that an allotment of shares had been made to him, and that he had been placed on the register, allowed his name to remain there, and acted as a shareholder from July, 1892, down nearly to the end of the existence of this company. On the true construction of the agreement I do not propose to say much. It is worded in such a way that the true construction is open to a great deal of doubt. I have already stated the construction which has been adopted by Vaughan Williams, J., as the true construction. Mr. Buckley asks us to say that the words, "this engagement shall be binding on me for two months," mean "this offer is open for two months for acceptance or rejection," and that the clause means in substance that this proposal or offer shall be binding for two months; in other words, the clause applies to the time for accepting the whole offer, and not to the engagement or agreement which will become binding when the whole offer is accepted. I thought at first that Mr. Buckley's contention was right, but I do not feel confident of that at all. I am not prepared to say that Vaughan Williams, J.,

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

is wrong; and, indeed, when all the consequences are pointed out I am disposed to think that Vaughan Williams, J., is right, and that what is meant is this: the limit of two months will be part of the agreement which will be constituted by acceptance. It is a very doubtful question, and I rather understand that my learned brothers do not agree with me upon it. But I will assume that the learned judge is right there. It appears to me it does not follow by a long way that Mr. Hindley's name ought to be struck off the list of contributories. It would stand thus. He signed an authority to put him on the register, and that authority was so worded that he might have been put on properly or improperly, whether properly or improperly depending on an event not specified to him. When he first knew that his name was on the register he did not take any steps to have it removed. He knew that he was there in pursuance of an authority which might have been exercised improperly. He knows that, and does not take the slightest care to inquire how it was done; not a bit. He remains on the register from 1892 till now, and now he says there was no authority to put him on. I cannot conceive that that is sound on any principle of law or equity or fair play. To put it at the highest, even if he says that he has become a shareholder by some trick or some unfair use of his authority, how can a man be allowed to complain of that when the company is being wound up? It seems to me inconsistent with the whole reasoning in *Oakes* v. *Turquand*, and other cases which have followed that, and entirely contrary to the principles on which those cases have been decided. With respect to the next case which Mr. Astbury pressed on us—*Beck's case*—the *ratio decidendi* was this. After the agreement for the amalgamation of the two companies was entered into, Beck applied for shares half paid up, and the general manager wrote that he should have shares on which a different amount was paid up. He was accordingly put on the register, a thing which there was no authority from him to do, and then it was argued that because after that he had written asking for the certificates he had ratified what had been done. But it was held there that he was in time to take steps to get his name off the register, because when the unfortunate company was wound up he was not a shareholder.

Assuming, therefore, that Vaughan Williams, J.'s, construction of this document is right, it appears to me that the learned judge has gone wrong in the conclusions he has drawn from the facts as found by him. This is not an application to take Hintley's name off the list; it is an application to enforce payment of calls. I think this is as plain a case for keeping this gentleman's name on the list as ever came before the courts. Whatever is the true construction of the documents, I do not find the slightest difficulty at all in saying I think the decision of the learned judge is erroneous. No doubt their form might be improved. They are framed in such a way as is calculated to produce disputes. The appeal must be allowed.

LOPES, L.J.—I am of the same opinion. The learned judge in the court below has held that Mr. Hindley is not a shareholder, and has directed that he should be struck off the list of contributories. I am unable to agree with the decision of the learned judge. Hindley signed an underwriting letter in the form which has been read by Lindley, L.J.; and no doubt a good deal depends on the true construction of that letter. I am far from saying that it is perfectly clear. I am far from saying that it may not bear the construction which was put upon it by Vaughan Williams, J., and which, I think, was rather favoured by Lindley, L.J. If I had to consider the meaning of that document, I think I should not put that construction upon it. It has been argued, and most ingeniously, that "this engagement" means: "This offer when consummated by acceptance, which must be within a reasonable time, shall be binding on me for two months." I cannot read that into the agreement. I think it means this: "This offer shall be binding on me for two months and no longer; this offer is to be open for two months." I venture to think that it is rather to force the words to put another construction upon it.

If that is the true construction of this letter this case is at an end, and Mr. Hindley must be a shareholder. But, even assuming that the true construction is what Vaughan Williams, J., thought it was, I entirely agree with what has been said by Lindley, L.J., as to what has happened since. It seems to me impossible, having regard to the conduct of this matter, to the time which has elapsed, his acting as shareholder, his voting by proxy, and for what I know other things which have happened—it seems to me impossible to come to any other conclusion than that Mr. Hindley is properly on the list of contributories. I think, therefore, that the decision of the learned judge below is wrong, and that the appeal must be allowed.

KAY, L.J., stated the nature of the application, and continued:—It seems to me that Mr. Hindley is very ill-advised if he attempts to defend this application for calls made in the winding up of the company by saying, "I am not a shareholder." If he said, "I have been induced to take shares by fraud, or by some trick or improper dealing on the part of people whom I constituted my agents. Those agents exceeded their authority." All that might be a very good ground, before the winding up began, for taking his name off the list of contributories. But as long as *Oakes* v. *Turquand* is law none of those grounds is a reason, after the winding up begins, for removing the name of a contributory. Mr. Hindley signed an underwriting agreement. I confess I have a very clear opinion of my own what that document means. It begins as though it were an agreement, but I think it is a mere offer by the signer of that letter. [His lordship read part of the letter, and continued:—] What "engagement" was there when he signed that letter? The engagement was the offer he made on certain terms to underwrite the shares which the public did not take, that is, as things turned out, to take most of the shares of the company; and the offer contains an authority to the persons to whom it was written, and who, I suppose, were promoters of the company, to apply for shares in his name.

But it seems to me not to matter a farthing whether it means that or what the learned judge understood it to mean. Construe the words in this way: "If this offer shall be accepted within a reasonable time, then the agreement which is completed by that acceptance shall be in force against me for a period of two months." I will only say that it seems to me quite impossible to put that meaning on those words. It would be an extraordinary alteration, it seems to me, of very simple words. But suppose that construction were right, suppose the meaning which the learned judge put on the words was the true meaning, then there is no time whatever fixed for acceptance. Therefore, here is an authority to agents to apply for shares in the name of this Mr. Hindley, and for the directors of the company, with whom he was not contracting, to accept that application and put him on the register as a shareholder, and there is no limit of time for

making the application. The result of the construction adopted by the learned judge is that the only limit is a reasonable time. I try to put the document against the view I am inclined to take in the strongest way I can. It is said by the respondent's counsel that the prospectus then about to be issued means that shares will be offered on the 20th, 21st, and 22nd of June, 1892, and that no shares will be offered after that date; and therefore it is said that the reasonable time within which this offer must be accepted must be before the 22nd of June, because when the 22nd of June had arrived it would be known whether the public had or had not subscribed for the shares offered for subscription. The risk intended to be run would then have been run, and the case was likened to a bet upon a race, which if the race had actually taken place would be completely off. But the suggested analogy is not an analogy at all. The shares are to be offered to the public between the 20th and the 22nd of June, which would be in a few days after Hindley made his offer. He does not say on the face of it, "You shall accept or reject the offer before the 22nd of June." There is no limit of time at all, unless I am right in saying that the limit is two months. No communication was made to him by way of answer or acceptance till the 1st of July, some time after the public had been invited to take shares, and had not responded except by taking a very few indeed. Mr. Hindley says he then for the first time got an intimation that he was to be on the list of shareholders. He accepted that, made no inquiry, applied for a certificate, sent in a proxy to vote on several occasions, waited four years, and now, having obtained inspection, he says, "I find endorsed on the offer a statement that it was accepted on the 1st of July. I say there was no acceptance till the 1st of July." There, I think, Mr. Hamilton's argument is a good one. Hindley knew on the 1st of July that there was no communication of any acceptance till that date, and he might have gathered that there was no previous acceptance. He made no inquiry. He did not say, "The risk has been run, I know what the public are going to do, and it is now too late." Hindley accepted the shares, paid money upon them, and acted as a shareholder for four years; and then he sent, I have no doubt some extremely clever solicitor to investigate the matter, and the solicitor says, "Now I think I have found a way to get you out of this difficulty, and bring this fact before the courts as a defence." In my judgment this defence is absolutely preposterous, although the learned judge has come to a different conclusion. With the utmost deference to the learned judge, I say that in such circumstances a shareholder is not entitled to be removed from the list of contributories, and indeed any other decision opens up prospects of considerable alarm.

I think, with great deference, that the decision of the learned judge was entirely wrong, and ought to be reversed, with costs here and below.

Appeal allowed.

Solicitors, *Chester & Son; Nunn & Popham.*

High Court of Justice.

Chan. Div. } April 16, 18; May 6;
Chitty, J. } June 10, 24.

In re ELLIOT.
KELLY *v.* ELLIOT. (*a.*)

Will—Construction—Absolute gift—Legacies out of proceeds of sale—Repugnancy.

T. E., by his will, appointed the plaintiff, M. A. K., his sole executrix, and gave her all his tea plantations in Assam and all other his property, and continued: "On any sale by the said M. A. K. of the said tea plantations I will and direct her to pay my brother, J. E., the sum of £1,000 out of the proceeds of such sale. Also the further sum of £500 out of the proceeds of such sale to I. B," who was the testator's sister.

Held, that no obligation was imposed on the plaintiff to sell the plantations, and that the direction to pay the sums of £1,000 and £500 was repugnant and void.

Summons.

The above-named testator, who died in England in June, 1893, by his will, made in April, 1893, gave all his plantations in Assam and all other his property, estate, and interest, whatsoever and wheresoever, to the plaintiff absolutely, subject to the payment of his debts, funeral and testamentary expenses, and, after appointing her executrix, continued: "On any sale" by her "of the tea plantations, I will and direct her to pay my brother John Elliot the sum of £1,000 out of the proceeds of such sale, also the further sum of £500 out of the proceeds of such sale to" the testator's sister.

The plantations, according to the law of Assam, were personal estate and vested in the legal personal representative, and at the death of the testator they constituted nearly the whole of his estate.

The questions were whether there was any implied trust or direction to sell the plantations and to pay out of the proceeds the sums of £1,000 and £500 to the testator's brother and sister, and, if not, as to the validity of the direction to pay.

Byrne, Q.C., and *Kirby*, for the plaintiff.

H. Terrell, for the testator's brother and sister.

The cases cited were *Bird* v. *Johnson*, 2 W. R. 692; *In re Macleay*, 23 W. R. 718, L. R. 20 Eq. 186; *In re Rosher*, *Rosher* v. *Rosher*, 32 W. R. 821, 26 Ch. D. 801; *King* v. *Burchell*, Amb. 379.

CHITTY, J.—The will contains no express trust or direction to sell the Assam tea plantations. The first and more important question is whether on the true construction of the will there is any implied trust or direction to sell; or, in other words, whether any obligation is imposed on the plaintiff to sell the plantations, and to pay out of the proceeds the sums of £1,000 and £500 to the testator's brother and sister. The plantations, according to the law of Assam, are personal estate, and vest in the legal personal representative. When the testator made his will and at his death the plantation constituted nearly the whole of his estate. His debts and funeral expenses amounted to rather less than £2,500. Among the debts was a sum of £718 owing to the agents who managed the plantations, and for which the agents had a lien on the produce. Another debt was a sum of £1,500 owing to the testator's brother, John Elliot; this debt, however, had no relation to the sums amounting to £1,500 mentioned in his will. The debts other than the £718 have all been paid by the plaintiff, as executrix. For

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

the purpose of paying them she has raised money by mortgage of the plantations. She has also raised money in like manner for her own purposes. Neither side has thought fit to adduce any evidence as to the value of the plantations.

By his will the testator gave the plantations and all other his estate to the plaintiff. Thus far the plaintiff is universal legatee, and, subject to payment of the testator's debts and his funeral and testamentary expenses, she is absolutely entitled to the plantations for her own benefit. The testator then proceeded to appoint her executrix, and continued thus: [His lordship here read the clause set out above.] Taking the words as they stand, they do not import any obligation to sell; they leave it to the plaintiff to sell or not to sell as she may think fit. The words are peculiar. The sale referred to is a sale by her, and apparently a sale by any person claiming under her is not within the clause. On a just construction of the testator's language I can find no sufficient ground for holding that the term "sale" means anything but a sale in the ordinary sense of the term. Consistently with the language used, she could mortgage the plantations, let them, settle them, and give them by instrument *inter vivos* or by will, free from any claim on the part of the testator's brother or sister. I think he meant neither more nor less than just what he said: if she thought fit to sell, she was to pay the two sums to his brother and sister.

To hold otherwise would, in my opinion, be acting on conjecture only, and would be making a will for the testator, and a will which he did not intend to make. Had he intended to give these sums to his brother and sister in any event, it would have been so simple for him to give the legacies to them and the residue of his property to the plaintiff. A testator of the humblest capacity knows how to give a pecuniary legacy. Further, if he meant to impose on the plaintiff the obligation of selling, within what time did he mean that she should sell? There is no indication of any sort that she is to sell at the expiration of a year or at any other time during her life. No interest is given on the sums which are to be paid out of the proceeds. This shows that he meant her to sell, if at all, when she thought fit. The result, in my opinion, is that no obligation is imposed on the plaintiff to sell, and that the testator's intention was simply that the sums should be paid, and should only be paid, out of the proceeds if and when she thought fit to make a sale.

The other question is whether the clause, as thus interpreted, is valid. The question is one of comparatively little importance, because it seems quite clear that the plaintiff will not sell the plantations if on a sale she has to pay the £1,500. But the question having been raised it is right to decide it. It appears to me that the testator has attempted to create a new kind of estate unknown to the law. The owner of property has, as an incident of his ownership, the right to sell and to receive the whole of the proceeds for his own benefit. But this testator says that if the owner sells, a part only of the proceeds shall belong to her, and the residue shall go to other persons. This direction is, I think, repugnant and void. My opinion is based on the broad general principle of law. The case does not fall within any of the exceptions which have been allowed—such, for instance, as those discussed and admitted by Sir G. Jessel in *Re Macleay*.

Solicitors, *Churchill; Lumley & Lumley.*

Chan. Div. / Chitty, J. — April 21, 22, 23; May 21.

LLOYDS BANK v. BULLOCK. (a.)

Mortgage—Priority—Fraud—Trust for sale—Conveyance obtained by fraud—Receipt in body of deed—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 54, 55, 2 (*viii.*).

Real property worth about £700, which belonged to H., who died in October, 1892, *was at that time subject to a legal mortgage made by him to a building society. H. devised the equity of redemption to N. upon trust for sale. C., the solicitor who acted for the society, and also for H., and for N. after H.'s death, fraudulently represented to the society that notice had been given to pay off the mortgage, and procured the statutory receipt for the mortgage money to be indorsed upon the deed pursuant to section 42 of the Act of* 1874. *The receipt was dated December*, 1892. *C. obtained the deed thus indorsed, but neither C. nor the society ever received the money. About the 29th of December*, 1892, *C. deposited with the plaintiffs, as security for £650 advanced to him, all the title deeds except the mortgage to the society, which was not disclosed by the deposited deeds. They included a conveyance of the property to C., which C. on the 29th of December*, 1892, *obtained from N. This purported to be in pursuance of a contract for sale by N. to C., but the consideration money was never in fact paid.*

Held, that the society had not parted with the legal estate, which still remained in them as security, and in respect of that legal security the society had priority over the plaintiffs.

Held, also, that the plaintiffs were entitled to rely on the receipt for the consideration money in the body of the conveyance of the 29th of December, 1892, *in accordance with sections 54 and 55 of the Conveyancing Act*, 1881, *and therefore had priority in equity over N. and his cestuis que trustent.*

Shropshire Union Railways and Canal Co. *v.* Reg., 23 *W. R.* 709, *L. R.* 7 *H. L.* 496, *distinguished.*

Action.

The facts and arguments sufficiently appear from the judgment.

Farwell, Q.C., Younger, and *C. F. Lloyd*, for the plaintiffs, as against the defendant building society relied on estoppel, and as against the trustee for sale and his *cestuis que trustent* on the plaintiffs' superior equity, and cited *Rice* v. *Rice*, 2 W. R. 139, 2 Drew. 73; *Hunter* v. *Walters*, 20 W. R. 218, L. R. 7 Ch. App. 75; *Bickerton* v. *Walker*, 34 W. R. 141, 31 Ch. D. 151; and *National Provincial Bank* v. *Jackson*, 34 W. R, 597, 33 Ch. D. 1.

Bryne, Q.C., and *H. Terrell*, for the defendant building society, denied that there was any estoppel.

Alexander, Q.C., and *Upjohn*, for the defendant Newbrook and a defendant beneficiary, denied the plaintiffs' priority to them in equity, and cited *Foster* v. *Mackinnon*, 17 W. R. 1105, L. R. 4 C. P. 704; *Cory* v. *Eyre*, 1 De J. & S. 149, 12 W. R. Ch. Dig. 61; *Bradley* v. *Riches*, 26 W. R. 910, 9 Ch. D. 189; *Newton* v. *Newton*, 17 W. R. 331, L. R. 4 Ch. App. 143; *Carritt* v. *Real and Personal Advance Co.*, 37 W. R. 677, 42 Ch. D. 263; *Humber* v. *Richards*, 39 W. R. 186, 45 Ch. D. 589; and *Shropshire Union Railways and Canal Co.* v. *Reg.*, 23 W. R. 709, L. R. 7 H. L. 496.

Farwell, in reply, cited *Perry-Herrick* v. *Atwood*, 6 W. R. 204, 2 De G. & J. 21; *Brocklesby* v. *Temper-*

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

ance Building Society, 43 W. R. 606, [1895] A. C. 173; *Worthington* v. *German*, 16 W. R. 187; *Thoroughgood's case*, 2 Rep. 9a; and *Edwards* v. *Brown*, 1 Cr. & J. 307.

CHITTY, J.—The case arises out of the frauds of William Edward Cartwright, a solicitor of Newcastle-under-Lyme, and the question is which of the persons affected by his frauds are to suffer. The persons affected are, first, the plaintiffs, Lloyds Bank; secondly, the defendants, a building society; and thirdly, the defendant Newbrook, trustee under the will of Hood, former owner of the property, and the persons beneficially interested under the trusts of that will. One of these beneficiaries was added as a defendant at the trial. The transactions took place in December, 1892. At that time Cartwright was in good repute and esteemed to be a man of wealth. In August, 1893, he was adjudicated bankrupt, and he was subsequently convicted of fraud, and is now undergoing sentence.

At Hood's death, which occurred in October, 1892, the property was subject to a mortgage made by him to the building society, by virtue of which the legal estate in fee passed to them. The property was worth about £700. He devised his equity of redemption to the defendant Newbrook, upon trust for sale. Cartwright was the solicitor for the building society, and also for Hood, and after his death for Newbrook as trustee.

Having falsely and fraudulently represented to the society that notice to pay off the mortgage had been given, Cartwright procured the necessary statutory receipt in the prescribed form to be endorsed upon the mortgage deed, pursuant to the 42nd section of the Act of 1874 (37 & 38 Vict. c. 42). The receipt was dated December, 1892, the day of the month being left in blank to be filled in when the deed and receipt were exchanged for the money due. The statutory receipt was unquestionably executed merely as an escrow to be delivered over by Cartwright on redemption. Cartwright obtained possession of the deed thus endorsed, and had authority to receive the money on redemption; but he had no authority to part with the deed except upon payment of the money. The amount due was £172 11s. 9d. The society never received the money either from Cartwright or anyone else. The person entitled to redeem was Newbrook, as trustee of Hood's will. He did not pay the money or any part of it. Cartwright never received the money from any person. In fact, he never parted with the deed until after his bankruptcy, when his son handed the deed to Newbrook.

Between Newbrook and the building society there is no question. Counsel for Newbrook and the beneficiaries admit, and rightly, that the society has priority over Newbrook and the beneficiaries under Hood's will.

The plaintiffs, however, claim priority over the society. Their claim is merely equitable. On the 29th of December, 1892, or a day or so later, Cartwright obtained an advance of £650 from the plaintiffs, and, having possession of the title deeds, deposited with the plaintiffs, as a security for an advance of £650, all the title deeds, except the deed of mortgage to the society, and signed a memorandum of deposit of the usual kind containing an undertaking to execute a mortgage. Among the deeds thus deposited was a deed of conveyance which Cartwright on the 29th of December obtained from Newbrook. The deeds thus deposited apparently showed a good title in Cartwright. The mortgage to the society was not disclosed by the deeds deposited. In fact the bank had no notice of that mortgage or the endorsed receipt; they did not advance their money on the faith of the receipt, and they were not aware of its existence until after the bankruptcy of Cartwright. In these circumstances the plaintiffs claim priority over the society on the ground, first, of estoppel; and, secondly, of admissions made by the society. It is plain that no case of estoppel arises. [In regard to the admissions, his lordship held that the society having made them in error were entitled to recall them and to show the true facts.] The result, as between the plaintiffs and the society, is this—the society have not parted with the legal estate; it still remains vested in them as security, and in respect of this security the society have priority over the plaintiffs. They are entitled to have that mortgage deed delivered over to them.

I have now to consider the questions which arise between the plaintiffs on the one hand and the defendant Newbrook and the beneficiaries on the other. It is contended for the latter that the conveyance of the 29th of December, 1892, is not the deed of Newbrook and that it is utterly void, the facts being sufficient to support a plea of *non est factum*. The deed was signed, sealed, and delivered by Newbrook at Cartwright's office on the day of its date, and the execution was attested by one of Cartwright's clerks. Newbrook was a letter carrier about twenty-two years of age, able to read, but wholly unversed in business of this kind.

When Newbrook executed the parchment he knew that it related to the property, and to a sale of the property by him to Cartwright for £700. He placed implicit confidence in Cartwright. He did not read the deed. With an exception not material to the question now under consideration, the deed is in the form of an ordinary conveyance by a trustee in execution of a trust for sale. It witnesses that, for effectuating the sale and in consideration of £700 paid by Cartwright to Newbrook at or before the execution of the deed, the receipt whereof Newbrook thereby acknowledged, Newbrook conveyed the property to Cartwright in fee simple. The exception above referred to is that Newbrook conveys as beneficial owner. The purchase money was never in fact paid. The deed was left by Newbrook in Cartwright's hands. On these facts I hold that the deed was not a mere nullity or void, though it may have been voidable as between Newbrook and Cartwright. This part of the case is covered by the decisions of the Court of Appeal in *Hunter* v. *Walters* and *National Provincial Bank* v. *Jackson*.

There remains the question, Which have the better equity, the plaintiff or Newbrook and his *cestuis que trustent*? The plaintiffs took their equitable security on the faith of Newbrook's conveyance. They had no notice that the purchase money had not been paid, nor had they any ground for suspecting that Cartwright, when he deposited that conveyance, had committed or was committing any fraud on Newbrook or the beneficiaries. The plaintiffs were entitled to rely on the receipt given by Newbrook in the body of the deed. The necessity for an indorsed receipt has been abolished by the Conveyancing Act, 1881, ss. 54 and 55. By section 54, sub-section 1, a receipt for consideration money in the body of the deed is a sufficient discharge for the same to the person paying the same without any further receipt being indorsed on the deed. By section 55, sub-section 1, a receipt for consideration money in the body of the deed is, in favour of a subsequent purchaser not having notice that the money has not in fact been paid, sufficient evidence of the payment. "Purchaser" includes an equitable mortgagee (section 2, viii.). These enactments bring the case within the principle on which *Rice* v. *Rice*, *Hunter* v.

Walters, and *Bickerton* v. *Walker* were decided. It was argued for the persons entitled to the purchase money under the trust for sale that they stand in a different position from their trustee; that the plaintiffs claim through a breach of trust on his part; and that their equity, which is prior in point of time, is not displaced. In support of this argument the decision of the House of Lords in *The Shropshire Union Railways and Canal* v. *Reg.* was relied on. But that case is distinguishable; as between himself and the equitable owner the trustees there had no authority whatever to deal with the trust property. Here the testator, the author of the trust, has confided to Newbrook authority to sell the property and to give a receipt for the purchase money. Newbrook was acting within the scope of his authority. The essential part of the breach of trust was the giving of the receipt without in fact receiving the purchase money. The circumstances appear to me to bring the case within the range of the authority of *Perry-Herrick* v. *Atwood* recently approved of by the House of Lords in *Brocklesby* v. *The Temperance Building Society*. For the purpose now under consideration I am unable to see any material distinction between agency and trust. Further, Lord Romilly's decision in *Worthington* v. *German*, substantially covers the present case, and is in favour of the plaintiffs. A judgment for the beneficiaries in the circumstances of this case would be disastrous to titles; it would compel purchasers where the legal estate is outstanding in a mortgagee to inquire whether purchase money under a trust for sale had in fact been paid, notwithstanding that the trustee had acknowledged the recipt; and it would cast this burden on them in the teeth of the 55th section of the Conveyancing Act, which relieves them from making any such inquiry. For these reasons I hold that the plaintiffs have priority over the defendant Newbrook and his *cestuis que trustent*.

Solicitors for the plaintiffs, *Thorowgood, Tabor, & Hardcastle*, for *Cooper & Co.*, Newcastle, Staffs.

Solicitors for the defendant building society, *Pitman & Sons*, for *F. W. Bayley*, Newcastle, Staffs.

Solicitors for the defendant Newbrook, *J. W. Sykes*, for *T. B. Sproston*, Newcastle, Staffs.

Chan. Div. Stirling, J. March 18; May 16.

Re DE HOGHTON.

DE HOGHTON *v.* DE HOGHTON (No. 2). (*a*.)

Power—Power of jointuring—Jointure, Meaning of—Power to appoint portions—Benefit to appointor.

A jointure is a provision for a wife after the death of her husband, and, except under special circumstances, the court will not give effect to an appointment under a power of jointuring which is to take effect during the lifetime of the husband.

Jamieson *v.* Trevelyan, 10 *Ex.* 269, 3 *W. R. Dig.* 220, *commented on.*

The court will look closely into any exercise of a power of appointment by which the appointor benefits, but the fact of the appointor benefiting thereby does not necessarily invalidate the appointment.

Henty *v.* Wrey, 30 *W. R.* 850, 21 *Ch. D.* 332, *followed.*

Summons.

This case raised two questions. First, as to the meaning of the word jointure, and, secondly, whether a revocable appointment under a power in favour of infant children could be upheld, though the donee of the power, as guardian of the children, took a benefit under the appointment.

The facts were as follow. The testator, Sir Henry De Hoghton, by his will dated the 9th of February, 1875, devised his estates to trustees for a term of 500 years, and subject thereto in strict settlement upon his brothers with remainders over. The trusts of the term were, shortly, to pay annuities to the person who, but for the term, would have been tenant for life under the will and to accumulate the residue for twenty-one years from the date of the testator's death and invest.

The testator died on the 2nd of December, 1876, and consequently the trusts of the term were still in force. Among the testator's brothers was the present baronet, Sir James De Hoghton, who succeeded on the 12th of April, 1893, and on the expiration of the term, on the 2nd of December, 1897, becomes tenant for life under the will. The will also contained a power for any person thereby made tenant for life of the devised estates, either before or after he should become entitled to the rents and profits, to appoint to any wife he might marry a yearly rent-charge not exceeding £1,000 either for her life or for any less period. The exercise of this power was to supersede *pro tanto* the trust for accumulation. The rent-charge was not expressed to be by way of jointure, but the testator subsequently alluded to the power as a power of jointuring. A further power was also given to each tenant for life to charge portions for his younger children up to £10,000 when there were more than three children, and also to charge the premises with the payment of any annual sum not exceeding 4 per cent. per annum on the sum charged, such annual sum to be applied towards the education and maintenance of the children, to commence at such period and be payable at such times as might be appointed. The exercise of this power also was to supersede *pro tanto* the trust for accumulation.

Sir James De Hoghton, on his marriage in 1878, charged the estates, in the event, which happened, of his having more than three children, with a jointure of £1,000, and portions of £10,000 payable after his death, and also with the payment after his death of an annual sum, not exceeding 4 per cent. on the expectant portions, for the maintenance and education of his children.

By a supplementary deed, dated the 26th of July, 1895, Sir James De Hoghton purported, in pursuance of the powers of appointment given him by the will, to appoint to his wife during their joint lives a yearly rent-charge of £1,000 payable quarterly, the first instalment to be paid within three calendar months from the date of those presents. He then went on to direct that the estates devised by the will should be charged with an annual sum for the maintenance of the children of 4 per cent. on their expectant portions. This appointment contained a power of revocation.

The present summons was taken out by Sir James De Hoghton, and asked for liberty to make payments in accordance with the terms of the deed.

Graham Hastings, Q.C., and *Ingle Joyce*, in support of the application.—The testator's intention was to enable an appointment to be made during the term. This is simply a power to appoint a rent-charge, and the words "by way of jointure" are omitted. Even if they were not, a jointure need not necessarily commence on the death of the husband: *Jamieson* v. *Trevelyan*, 10 Ex. 229, 3 W. R. Dig. 220. As regards the interest on the portions, the power is in such terms that it can be exercised at once.

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

They also referred to the Statute of Uses, s. 4; *Zouch* v. *Woolston*, 2 Burrows 1,136; *Hervey* v. *Hervey*, 1 Atkyns 561; and Davidson's Precedents, vol. 4, p. 347.

Buckley, Q.C., and *Rowden, contra.*—The fact that the testator has provided annuity for Sir James De Hoghton during the term is against his intending the power of jointuring to take effect immediately. The definition of jointure in Bacon's Abridgment, vol. 2, p. 144, shows that it is a provision to commence on the husband's death, and *Jamieson* v. *Trevelyan* only shows that the meaning can be controlled by the context. As to the question of interest on the portions, the court will not, in the case of a direct devise to a child, allow maintenance in the lifetime of a parent: *Hughes* v. *Hughes*, 1 Bro. C. C. 387; *Andrews* v. *Partington*, 3 Bro. C. C. 60.

They also referred to Simpson on Infants, p. 392.

Graham Hastings, Q.C., replied.

Methold, for the infant children of Sir James De Hoghton, referred to *Ashton's case*, 2 Dyer 228*a*, in support of the application.

Cur. adv. vult.

May 16.—STIRLING, J., after stating the facts and reading the clauses in the will referring to the power to appoint a rent-charge to the wife said:—The question is whether the appointments under the deed of the 26th of July, 1895, are valid and effect ought to be given to them. The first appointment, that is the appointment of the jointure rent-charge to the present Lady De Hoghton, turns on the construction of the power in the will. That power is in the common form and, with one exception, in the exact form given in Davidson's Precedents. [His lordship then read the power to jointure rent-charge from Davidson, vol. 3, pp. 219, 1054, and continued:—] It only differs from that form by omitting the words "by way of jointure." But subsequently in the will the expression occurs, "the power of jointure may be exercised." It seems to me, therefore, that the power is a power of jointure.

The question is, What effect ought to be given to the word "jointure"? What is jointure? Both popularly and by legal writers it is understood to mean a provision for a wife after the death of her husband. I will refer to some of these writers. [His lordship then read definitions of jointure from Coke, p. 36*b*; Blackstone, vol. 2, p. 137; Bacon's Abridgment, vol. 2, p. 744; Burton's Compendium, p. 125; and Sugden on Powers, p. 484). I take it, therefore, that the *primâ facie* meaning of jointure is a provision for a wife after the death of her husband. It is not, however, necessarily confined to a provision for a wife to commence on the death of her husband; and, in fact, in *Jamieson* v. *Trevelyan*, which was relied on on behalf of the application, a power of jointure was held to take effect during the lifetime of the husband. But that case was a remarkable one. [His lordship then stated the facts of that case from the headnote, and continued:—] Now in the course of the argument in that case, when it was urged that the jointure was to commence on the death of the husband, Pollock, B., says, at page 277: "That construction of the testator's intention is, to say the least of it, a highly improbable one—I may say an impossible one. A person wishing to provide for his son gives him an annuity of £300, with the power of settling it upon his wife, annexing a condition that, in case he should make such an appointment, the new annuity should be in substitution for that given to the son, which annuity is wholly to cease and determine. It would be but a poor substitution for the annuity of which the son is in present enjoyment, if the effect of the arrangement were to deprive him of his annuity. The question, then, is whether, in the face of such an improbable construction, the word jointure necessarily means a provision for a woman after her husband's death." And Alderson, B., says, at page 278: "The term 'jointure' may mean an estate to the wife to commence either before or after the death of her husband. The testator gave his son an annuity; but according to the plaintiff's argument the son, by the power given him, would have less. If the testator had given his son the power to appoint to his wife an estate of £500 a year, payable to her on his death, in substitution of that which he had of £300 a year, payable *in præsenti*, the argument would be more plausible."

I have quoted these passages from the argument instead of reading the judgments, because these passages appear to me to give the substance of the judgments in that case. The ground for the conclusion in that case appears to me to have been the peculiar language of the will, and Lord St. Leonards, in his book on Powers, in a note to the passage I have read, says: "But the power of substituting a wife as annuitant for her husband who had a present interest for life enables the gift of an immediate interest to the wife, although the power expresses it to be by way of jointure (*Jamieson* v. *Trevelyan*), a case too clear for argument." Evidently Lord St. Leonards was of opinion that a jointure meant a provision for a wife to commence on the death of her husband. The question is whether there is anything in the language of this will to give it another meaning. I think that there is not. I think the testator would have been much surprised if he had been told that any such construction could be put on the language of the will. He has provided annuities for the persons who are tenants for life under the will subject to the trust for accumulation, and I do not think that he had any intention of enabling them to supplement these annuities by the exercise of the power to appoint a rent-charge in favour of a wife. I think, therefore, that this exercise of the power, so far as relates to the jointure, cannot be given effect to. The second question relates to the interest on the portions of the children. The power, in this instance, is in the widest possible terms. [His lordship then read the power, and continued:—] The question of the validity of the appointment under the deed of the 26th of July, 1895, depends, first, on its being within the language of the power; secondly, on whether effect ought to be given to it, it being an appointment by the donee of the power in favour of himself, as guardian of his children. I do not overlook the fact that the deed of 1895 is revocable, and that, in all probability, it will be revoked on the determination in 1897 of the trust for accumulation. In coming to the conclusion I have arrived at, I am guided by the decision of the Court of Appeal in *Henty* v. *Wrey*. That was not a question of interest, but there the question arose on a power to appoint portions; the principle, however, appears to me to be the same. There the appointment was made without regard to the ordinary practice. That does not apply directly in the present case, but the result seems to me to be the same. [His lordship then read the judgment of Lindley, L.J., in *Henty* v. *Wrey* on page 359 of 21 Ch. D.: "The results at which I have arrived . . . without additional evidence the court cannot do so"—and continued:—] I think this principle applies to the present case. First, then, as regards the language of the power, the language seems to me to be unambiguous, and the exercise, in my opinion, falls within the terms of the

power. Secondly, as regards the fact that Sir James De Hoghton is being benefited, I think the last principle laid down by Lindley, L.J., applies, and without evidence I cannot regard this exercise of the power as necessarily invalid. It is true that the court will scrutinize such an appointment as the present very closely, but I am informed that Sir James De Hoghton is prepared to supply evidence that the appointment is for the benefit of the children. I am of opinion that this evidence ought to be supplied, and when this is done I think this part of the summons may be acceded to.

Order accordingly.

Solicitors, *Rowcliffes, Rawle, & Co.; Park, Nelson, & Co.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wright, J.) April 21.

THE COMMISSIONERS OF POLICE *v.* CARTMAN. (*a.*)

Licensing Acts—Sale of drink to drunken person—Sale by barman contrary to orders—Conviction of publican—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 13.

A publican gave general instructions to his barmen not to sell drink to drunken persons. A barman, in the absence of the publican, sold drink to a drunken person.

Held, that, the act of the barman being within the scope of his employment, the publican was liable to be convicted under section 13 *of the Licensing Act*, 1872, *for selling intoxicating liquor to a drunken person.*

Case stated by a metropolitan police magistrate (Mr. Vaughan) sitting at Bow-street.

The respondent, the landlord of the "Coach and Horses" public-house, 323 and 325, Strand, was summoned for that, being a licensed person, he did on the 14th of October, 1895, unlawfully sell intoxicating liquor to a drunken person, contrary to section 13 of the Licensing Act, 1872.

It appeared by the evidence that at 11.45 on the night of the 14th of October a man named Evans, who was undoubtedly drunk, entered the public-house with two women, that a police constable called the attention of the door-porter to the fact that the man was drunk; that the porter went and spoke to the barman, who drew and placed one glass of beer before the drunken man, who took it and paid for it; that the porter took it from his hand and placed it before the barman, who replaced it before Evans, who again took it and drank it up. The police constable then said to the barman, "You could see that he was drunk"; to which the barman replied, "If you saw that he was drunk, why did you not put him out?" The landlord, who was not present, was sent for by the constable, and on making his appearance he inquired of the porter why he had admitted the drunken man, upon which he replied, as the fact was, that he had spoken to the barman twice.

The defendant was called, and stated that at the time of the occurrence he was a considerable distance away, and out of sight of the bar, and that he had given precise instructions to the door-porter and to the barmen to refuse drink to drunken or semi-drunken persons.

Upon this state of facts the magistrate was of opinion that, as the landlord was not present, and was ignorant of the act of his barman, and as there had been no delegation of authority to the barman to supply drink to a drunken person, but on the contrary he had been prohibited from doing so, and as the door-porter, who was equally in charge of the premises with the barman, had exercised his authority in endeavouring to prevent the supply of drink to Evans, he was not guilty of the offence, and he dismissed the summons.

The question which the magistrate submitted to the court was whether he was absolutely bound to convict on the authority of the cases of *Cundy* v. *Le Cocq*, 32 W. R. 769, 13 Q. B. D. 207, and *Bond* v. *Evans*, 36 W. R. 767, 21 Q. B. D. 249, or whether he was at liberty to take into consideration the above circumstances, as the circumstances were considered in *Somerset* v. *Hart*, 32 W. R. 594, 12 Q. B. D. 360.

Section 13 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), provides: "If any licensed person permits drunkenness . . . or sells any intoxicating liquor to a drunken person, he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds."

Danckwerts, for the appellants.—The magistrate ought to have convicted the respondent. The act of the barman in selling the drink was an act done by the barman within the scope of his employment and within the scope of his authority. The master is therefore liable for such act in the same way as if he had done it himself. Section 13 contains an absolute prohibition against selling drink to a drunken person, and the case of *Candy* v. *Le Cocq*, 32 W. R. 769, 13 Q. B. D. 207, shows that it is immaterial whether the person who sold the drink knew or did not know that the person to whom it was sold was drunk. The prohibition of the section is therefore absolute.

He referred to *Bond* v. *Evans*; *Reg.* v. *Stephens*, 14 W. R. 859, L. R. 1 Q. B. 702; *Sherras* v. *De Rutzen*, 43 W. R. 526, [1895] 1 Q. B. 918; and *Crabtree* v. *Hole*, 43 J. P. 799.

He was then stopped.

S. Lynch, for the respondent.—The magistrate was right in the view he took of the section. The barman sold contrary to the express orders given to him by his master, and he was therefore not acting within the scope of his authority. The fact of the sale by the barman merely raises a *primâ facie* case against the master which he can rebut, and the magistrate has held that he has rebutted the presumption. The case of *Newman* v. *Jones*, 17 Q. B. D. 132, 34 W. R. Dig. 105, shows that, as the drink was sold contrary to the orders of the master, the master was not liable. So in *Somerset* v. *Hart* it was held that a master is not liable for gaming in his licensed premises where he had no knowledge of the same.

LORD RUSSELL OF KILLOWEN, C.J.—The question here is whether or not the learned magistrate was bound to convict the respondent of selling intoxicating liquor to a drunken person contrary to the 13th section of the Licensing Act of 1872. In considering that question we have to observe what the object of this Act is, and to consider how far its object would be defeated if the construction which the magistrate was inclined to put upon it were to be given to it. The object of the Act is, in the interests of public order, to prevent the sale of intoxicating liquor to drunken persons. The persons from whom alone the drunken persons can get the liquor are licensed persons. From the very way in which the business is carried on the licensed persons must carry it on through others. In some cases the licensee himself may be in the actual control and conduct of the business, but in most cases it is not so. They depute their business beyond a very general supervision to other persons. Are they to be liable for the acts of those other persons? They are, subject to this qualification,

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

that such acts must be within the scope of the servant's employment, and the scope of the authority receives limitation from the scope of the employment. It seems to me that within the scope of the employment authority is given to the employee. Does it make any difference for the purpose of this section that by private instructions the licensee says to the servant, "Do not sell to drunken persons." I do not think it does. I think if that effect were to be given to it, this statute would be entirely defeated. Take the common case of a sporting publican who goes to race meetings all over the country, and leaves behind him a barman or manager in charge of the business, is it to be said that there is no remedy if drink is sold by the person so charged with the duty of managing the place to any number of drunken persons? It is clear that there is no machinery by which the person actually selling the drink can be convicted of the offence. A penalty can be imposed on the licensee only. It is impossible to give to this section the narrow construction contended for by the respondent.

Looking to the whole scope and object of the Act, it seems to me that, wholly apart from authority, which I think is absolute upon the point, it was intended that the responsibility should be put directly upon the licensee for acts there mentioned which are done within the scope of the authority of the employee. Some of the authorities which have been referred to on behalf of the respondent have no bearing upon the point—namely, the cases as to gaming. No one could contend that a barman has, as part of his implied authority, any sanction from the master to carry on gaming. I have only to add that I do not think there is any real hardship in this case, because if the magistrate be convinced that the publican honestly endeavoured to comply with the law, and if he has been made liable only by the acts of his servant, he can take that into account by imposing a small fine, and he can also abstain from directing that the conviction shall be recorded against the publican. But it would be a matter of very evil consequence if we felt ourselves obliged to hold that the respondent in such a case as this should be held not to be guilty of the offence charged. I think the case must go back to the learned magistrate.

WRIGHT, J.—I am entirely of the same opinion as to the construction of the section.

Appeal allowed; case remitted to magistrate.

Solicitors for the appellants, *Wontner & Sons.*

Solicitor for the respondent, *G. P. R. Burgess.*

House of Lords.

From C. A. (England). March 26.

REDDAWAY *v.* BANHAM. (*a.*)

Trade name—Accurate and true description of goods—Right to use same name—Name calculated to mislead.

The respondents sold their goods under a name which was an accurate and true description of them, but the name used was that by which the goods of another manufacturer had been known to the trade, and the result of doing this was to cause purchasers to believe that they were buying the goods of the appellants.

Held, that the respondents could be restrained from so selling their goods, and an injunction was accordingly granted.

Decision of the Court of Appeal (43 *W. R.* 294, [1895] 1 *Q. B.* 286) *reversed.*

This was an appeal from the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.) reported 43 W. R. 294, [1895] 1 Q. B. 286. The following statement of facts is taken from Lord Herschell's judgment.

The appellant Frank Reddaway has been for many years a manufacturer of machine belting. In October, 1892, the company, the other appellant, was incorporated; and the business has since been carried on by it.

In the year 1877 the appellant Reddaway commenced making belting from yarn which consisted principally of wool or hair, and sold it under the name of "woollen belting." About the year 1879 he commenced calling the belting which he manufactured "camel-hair belting," for the purpose of distinguishing it from the belting of other manufacturers. A large proportion of the appellant's trade has been with India, the colonies, and foreign countries. The belting consigned to these countries was stamped with a camel, or with the word "camel," or "camel hair," and sometimes with both.

The yarn of which the appellant's belting chiefly consists is, for the most part, made of camel hair. I gather from the evidence that, although the wool or hair of which the yarn was made was commonly called "camel hair," it was not generally known (at all events until recently) that it really consisted of the hair of the camel.

The respondent Banham was formerly in the employment of the appellant Reddaway. He ceased to be so employed in the year 1889, and commenced manufacturing belting on his own account. He made belting from yarn of the same description as that used by the appellants, which he sold and advertised as Arabian belting.

The respondent company was formed in 1891, and in April or May of that year commenced calling their belting "camel-hair belting," those words, and those words only, being in most cases stamped on the belting. Many other manufacturers had made, for many years past, belting the principal ingredient of which was camel-hair yarn, and which they have sold and described by such names as yak, buffalo, llama, crocodile, &c.

The appellants having learned that the respondents were selling belting described as "camel-hair belting," and with those words stamped upon it, brought the present action, which was tried at Manchester before Collins, J., and a special jury. The questions left by the learned judge to the jury, with their answers thereto, were as follow: 1. Does "camel-hair belting" mean belting made by the plaintiffs as distinguished from belting made by other manufacturers? Answer, Yes. 2. Or does it mean belting of a particular kind without reference to any particular maker? Answer, No. 3. Do the defendants so describe their belting as to be likely to mislead purchasers, and to lead them to buy the defendants' belting, and for the belting of the plaintiffs? Answer, Yes. 4. Did the defendants endeavour to pass off their goods, as for the goods of the plaintiffs, so as to be likely to deceive purchasers? Answer, Yes.

The learned judge considered the three first questions only to be necessary; but added the fourth question at the instance of the counsel for the plaintiffs.

Upon the findings of the jury Collins, J., entered judgment for the plaintiffs, with costs; and he

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

granted an injunction restraining the defendants from continuing to use the words "camel hair" in such a manner as to lead purchasers into the belief that they are purchasing belting of the plaintiffs' manufacture, and from thereby passing off their belting as and for the belting of the plaintiffs' manufacture.

On appeal, the judgment of Collins, J., was reversed, and judgment entered for the defendants. In the opinion of the Court of Appeal, inasmuch as the words "camel-hair belting" were descriptive of the article sold, the words "camel hair" indicating the material of which it was made, the defendants were entitled to use the same language with reference to the belting which they sold; and the plaintiffs could have no right to restrain them from doing so, even though, as the jury had found, the words "camel-hair belting" would be understood to mean belting manufactured by the plaintiffs, and purchasers of the belting would be deceived into the belief that they were obtaining goods of the plaintiffs' manufacture.

J. Fletcher Moulton, *Q.C.*, and *H. H. Asquith*, *Q.C.* (*J. C. Graham* with them), for the appellants.

They cited or referred to *Montgomery* v. *Thompson*, [1891] A. C. 217, 39 W. R. Dig. 235; *Turton* v. *Turton*, 38 W. R. 22, 42 Ch. D. 128; *Reddaway* v. *Bentham Hemp Co.*, [1892] 2 Q. B. 639, 41 W. R. Dig. 253; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, 21 W. R. Dig. 118; *Leather Cloth Co.* v. *American Cloth Co.*, 13 W. R. 873, 11 H. L. Cas. 523; *Massam* v. *Thorley's Cattle Food Co.*, 28 W. R. 966, 14 Ch. D. 748; *Singer Manufacturing Co.* v. *Loog*, 29 W. R. 699, 18 Ch. D. 395; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Cheavin* v. *Walker*, 5 Ch. D. 850, 25 W. R. Dig. 294.

Bigham, *Q.C.*, and *J. K. F. Cleave* (*R. A. McCall*, *Q.C.*, with them), for the respondents.—The *Stone Ale case*, *Montgomery* v. *Thompson*, and the *Glenfield Starch case*, *Wotherspoon* v. *Currie*, are distinguishable, as also are *Croft* v. *Day*, 7 Beav. 84; and *Young* v. *Macrae*, 9 Jur. N. S. 322, 11 W. R. Ch. Dig. 111. *Burgess* v. *Burgess* and *In re Leonard and Ellis's Trade-Mark*, 32 W. R. 530, 26 Ch. D. 288, are in the respondents' favour.

No reply was called for, and the House took time for consideration.

Lord HALSBURY, C.—I believe in this case that the question turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your lordships have been engaged, that it is sometimes difficult, when examining former decisions, to disentangle what is decided as fact and what is laid down as a principle of law. For myself, I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else.

How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like a mere description of the articles sold comes to be nearer to or far from a representation of the goods of the rival manufacturer, the greater becomes the difficulty of proof; but if the proof establishes the fact the legal consequence appears to follow.

In this case the words "camel-hair belting" suggest such a difficulty of proof. If I had been sitting as a juryman in this case, I confess (but for a circumstance I am about to mention) I should have had great difficulty in acquiescing in the contention that a person was making his goods pass as the goods of somebody else by simply describing the subject of sale by these words. The article here is partly made or substantially made of camel hair, and it is belting. To me or to other persons not familiar with the trade this undoubtedly does seem simply a description of the article sold, and not a representation of its being made by a particular manufacturer. But then I should not know—what persons engaged in the trade would know—how far particular words, even though descriptive of the article sold, may have acquired a kind of technical signification which would give to them in the trade as completely the character of being made by a particular manufacturer as if they were stamped with his trade-mark.

The circumstance to which I referred is to be found in the letter of the 12th of June, 1891. The writer, who doubtless knew what he was doing, specially desires that the thing which he is ordering should bear no other stamp than "camel-hair belting," and if he gets that he adds, "I think I can take this order from Reddaway's."

I think, with this letter before them, the jury were perfectly right, and that my *primâ facie* impression of the words being only descriptive of the article sold would have been wrong. The result is, in my mind, that the proof is satisfactory, and that one man's goods are being sold as if they were the goods of the other.

Reliance appears to have been placed in the Court of Appeal on what was supposed to be decided in *Burgess* v. *Burgess* by Knight-Bruce, L.J., and Sir George Turner, and I think it is necessary to examine the decision in *Burgess* v. *Burgess* to see what it really did decide, and the facts upon which that decision was based.

Kindersley, V.C., had by an injunction restrained the defendant from continuing to use the words "late of 107, Strand," where he had been employed by his father, and from continuing on the sides of his shop door a plate with the words "Burgess's Fish Sauce Warehouse, late of 107, Strand."

The defendant Burgess had for many years been in the employment of his father in the trade of an Italian and fish sauce warehouseman, and had shortly before the application for the injunction set up in King William-street a similar business, placing the words which the Vice-Chancellor restrained the use of on his shop door and the sides of his house.

An appeal was brought against the refusal of the Vice-Chancellor to go further, and to prohibit the use of the words "Burgess's essence of anchovies" in any bill-head, invoice, or advertisement.

The refusal of Knight-Bruce, L.J., to interfere with what the Vice-Chancellor had determined is stated by himself to be grounded on the fact that the defendant carried on business under his own name, and "sells his essence of anchovies as Burgess's essence of anchovies, which in truth it is." "The whole ground of complaint," says Knight-Bruce, L.J., "is the great celebrity which during many years has been possessed by the elder Mr. Burgess's essence of anchovies." Again, be it observed, treating the words "essence of anchovies" as describing a known article not peculiar to any one manufacturer. "That," continued the learned judge, "does not give him such exclusive right, such a monopoly, such a privilege, as to prevent any man from making essence of anchovies, and selling it under his own name."

And Turner, L.J., I think, most accurately says: "It is a question of evidence in each case whether there is false representation or not. Looking at the labels before us, I think it is clear that, since the

order made by the Vice-Chancellor, there has been no representation made on the part of the defendant that the goods which he is selling are the goods manufactured by the plaintiff."

I only have to add to that, that even then the learned judges did not conclude the question, for, dealing with an interlocutory injunction as they were, they left the plaintiff, if he thought proper, to try his action at law, and make out, if he could, that there was the false representation which, if made, would give a ground of action. But it is most important to observe the hypothesis of fact upon which that judgment proceeds; and if the facts such as have been established in this case could have been made out, I cannot understand that there is any principle of law laid down which would have prevented an injunction, although the defendant's name was "Burgess," and although the article was described by a descriptive name which, however, had not as matter of fact in that case, in the view of the judges, the technical signification of being only made by Burgess, the father.

It seems to me, therefore, that there is nothing in that decision, or indeed in any other, which interferes with the propriety of an injunction where the proposition of fact with which I have started can be established; and it is to be observed that, whatever the form of the injunction, if the principle of it is duly observed, it is only such a form as prevents the mischief pointed to.

It would be impossible, for instance, to say that a trader could not describe his goods truly by enumerating the particulars of what they consisted, unless such description was calculated to deceive, and made his goods pass as the goods of another.

What in each case or in each trade will produce the effect intended to be prohibited is a matter which must depend upon the circumstances of each trade and the peculiarities of each trade.

It would be very rash *a priori* to say how far a thing might or might not be described without being familiar with the technology of the trade.

For these reasons I move that the judgment of the Court of Appeal be reversed, and that the respondents do pay to the appellants the costs both here and below.

Lord HERSCHELL, after stating the facts as above, said:—The Master of the Rolls expressed the view that a manufacturer might obtain the right to prevent a person using a name which would be understood as his, and the use of which would thus interfere with his trade; but that, though this was a fundamental proposition, you could not restrain a man from telling the simple truth, and this was all the defendants had done when they called their belting "camel-hair belting."

It must be taken, if the findings of the jury are to stand, on which I shall have a word or two to say presently, that the description by the defendants of their belting as "camel-hair belting" would deceive purchasers into the belief that they were getting something which they were not getting—namely, belting made by Reddaway. If they would be thus deceived by the defendants' statement, there must surely be some fallacy in saying that they have told the simple truth. I will state presently where I think the fallacy lurks. Before I do so, however, it is right that I should say that there appears to me abundant evidence to support the findings of the jury.

For many years belting made of camel-hair yarn had been known in the markets of the world. It had been sold under a variety of names. But there was ample evidence to justify the finding that, amongst those who were the purchasers of such goods, the words "camel hair" were not applied to belting made of that material in general; that, in short, it did not mean in the market belting made of a particular material, but belting made by a particular manufacturer. It is impossible, I think, to read the correspondence which passed between the defendants and those who were ordering goods of, or procuring orders for, them without seeing that this was the case. Moreover, it is impossible to doubt that the defendants were well aware of the fact.

They begin by calling their belting "Arabian," and state that they are prepared to guarantee it "to be better than the belting commonly called camel-hair belting." They are told by one of their correspondents that if he has a sample similar to one he forwards (which was made by Reddaway), "stamped camel-hair belting, nothing more," he thinks he can take this order from Reddaway's. They do their best to comply with their correspondent's wish, and send belting so stamped. Another correspondent asks for 500 feet, which is to be quite equal to Reddaway's "camel-hair belting," and which must be in every respect identical to the sample of that make. It was to be stamped "Warranted best camel-hair belting." In that or another case, it is not quite clear which, the defendants stated to the firm whom they employed to manufacture the belting that no manufacturer's name must appear on it, or it would be useless. I see no reason to be otherwise than completely satisfied with the answers which the jury gave. On this assumption I proceed to inquire whether the plaintiffs have made out any right to relief.

I cannot help saying that, if the defendants are entitled to lead purchasers to believe that they are getting the plaintiffs' manufacture when they are not, and thus to cheat them of some of their legitimate trade, I should regret to find that the law was powerless to enforce the most elementary principles of commercial morality. I do not think your lordships are driven to any such conclusion.

The principle which is applicable to this class of cases was, in my judgment, well laid down by Lord Kingsdown in *Leather Cloth Co.* v. *American Cloth Co.* It had been previously enunciated in much the same way by Lord Langdale in the case of *Croft* v. *Day*. Lord Kingsdown's words were as follow: "The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore (in the language of Lord Langdale, in the case of *Perry* v. *Truefitt*, 6 Beav. 66), 'be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.'" It is, in my opinion, this fundamental rule which governs all cases, whatever be the particular mode adopted by any man for putting off his goods as those of a rival trader, whether it is done by the use of a mark which has become his trade-mark, or in any other way. The word "property" has been sometimes applied to what has been termed a trade-mark at common law. I doubt myself whether it is accurate to speak of there being property in such a trade-mark, though, no doubt, some of the rights which are incident to property may attach to it. Where the trade-mark is a word or device never in use before, and meaningless except as indicating by whom the goods in connection with which it is used were made, there could be no conceivable legitimate use of it by another person. His only object in employing it in connection with goods of his manufacture must be to deceive. In circumstances such as these the mere

proof that the trade-mark of one manufacturer had been thus appropriated by another would be enough to bring the case within the rule as laid down by Lord Kingsdown, and to entitle the person aggrieved to an injunction to restrain its use. In the case of a trade-mark thus identified with a particular manufactory the rights of the person whose trade-mark it was would not, it may be, differ substantially from those which would exist if it were, strictly speaking, his property. But there are other cases which equally come within the rule that a man may not pass off his goods as those of his rival, which are not of this simple character—cases where the mere use of the particular mark or device which had been employed by another manufacturer would not of itself necessarily indicate that the person who employed it was thereby inducing purchasers to believe that the goods he was selling were the goods of another manufacturer.

The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B. In a case of this description, the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this, I think he would, on well-established principles, be entitled to an injunction.

In my opinion, the doctrine on which the judgment of the Court of Appeal was based—that where a manufacturer has used as his trade-mark a descriptive word he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trade-mark—is not supported by authority, and cannot be defended on principle. I am unable to see why a man should be allowed in this way more than in any other to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival. The authority relied on was the case of *Burgess* v. *Burgess*. When the judgments in that case are examined, it seems to me clear that no such point was decided. Turner, L.J., commences by saying: "No man can have any right to represent his goods as the goods of another person; but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another."

He then points out that where a person is selling goods under a particular name, and a person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. He adds: "It is a question of evidence in each case whether there is a false representation or not." This, I think, clearly recognizes that a man may so use even his own name in connection with the sale of goods as to make a false representation. In *Massam* v. *Thorley's Cattle Food Co.*, James, L.J., said: "*Burgess* v. *Burgess* has been very much misunderstood if it has been understood to decide that anybody can always use his own name as a description of an article, whatever may be the consequences of it, or whatever may be the result of it." After quoting from the judgment of Turner, L.J., the passages to which I have just alluded, he said: "That I take to be an accurate statement of the law, and to have been adopted by the House of Lords in *Wotherspoon* v. *Currie*, in which the House of Lords differed from the view which I had taken." The decision in *Wotherspoon* v. *Currie* is an important one, and is, in my judgment, inconsistent with the *ratio decidendi* of the Court of Appeal in the present case. The name "Glenfield" had become associated with the starch manufactured by the plaintiff, and the defendant, although he established his manufactory at Glenfield, was restrained from using that word in connection with his goods in such a way as to deceive. Where the name of a place precedes the name of an article sold, it *primâ facie* means that this is its place of production or manufacture. It is descriptive, as it strikes me, in just the same sense as "camel hair" is descriptive of the material of which the plaintiffs' belting is made. Lord Westbury pointed out that the term "Glenfield" had acquired in the trade a secondary signification different from its primary one—that in connection with the word "starch" it had come to mean starch which was the manufacture of the plaintiff. In the case of *Massam* v. *Thorley's Cattle Food Co.*, just referred to, James, L.J., said: "The defendant was actually manufacturing starch at Glenfield, having gone thither for the purpose of enabling him to say that he was manufacturing it at Glenfield. The House of Lords said the mere fact that he was really carrying on his manufacture at Glenfield, and was not therefore telling a lie, did not exempt him from the consequence of the fact that his proceedings were intended and calculated to produce on the mind of the purchasers the belief that his article was the article of the plaintiffs."

I think this view of the decision of the House of Lords was correct, and that it is at variance with the view taken by the Court of Appeal, that the defendants could not be liable to an action because in using the words "camel hair" in connection with his belting they were simply telling the truth. I rather demur, however, to the statement of James, L.J., that the defendant in *Wotherspoon* v. *Currie* was not telling a lie in calling his starch "Glenfield starch," as I do to the view that the defendants in this case were telling the simple truth when they sold their belting as camel-hair belting. I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it, in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true. A man who uses language which will convey to persons reading or hearing it a particular idea which is false, and who knows and intends this to be the case, is not surely to be absolved from a charge of falsehood because in another sense which will not be conveyed, and is not intended to be conveyed, it is true. In the present case the jury have found, and in my opinion there was ample evidence to justify it, that the words "camel hair" had in the trade acquired a secondary signification in connection with belting; that they did not convey to persons dealing in belting the idea that it was made of camel's hair, but that it was belting manufactured by the plaintiffs. They have found that the effect of using the words in the manner in which they were used by the defendants would be to lead purchasers to believe that they were obtaining

goods manufactured by the plaintiffs, and thus both to deceive them and to injure the plaintiffs. On authority, as well as on principle, I think the plaintiffs are on these facts entitled to relief.

The case of *Massam* v. *Thorley's Cattle Food Co.*, in the judgment of James, L.J., from which I have already made quotations, is an authority in favour of the plaintiffs' contention. It was argued for the respondents that in that case there was fraud, inasmuch as Thorley, whose name formed part of the designation of the company, had only a small, indeed it may be said a nominal, interest in it. I do not think this was the foundation of the judgment; the reasoning of James, L.J., would have been equally forcible if Thorley's interest had been the principal one. The company had quite as much right to call themselves by the name they adopted as by any other. What they were restrained from doing was endeavouring to pass off their goods as the goods of another manufacturer. This was the wrongful act which brought them within the reach of the law, and not the particular means by which they carried out their design. Besides the cases which I have referred to, there are other authorities which support the appellants' case. I need only mention one—the case of *Montgomery* v. *Thompson* in your lordships' House. It was said in the court below that the judgment there proceeded on the ground that the defendant had acted fraudulently. But the only fraud consisted in doing acts designed to cause persons to purchase his goods as and for the plaintiffs'. The acts commented on were only the means devised to accomplish that end. On the findings of the jury, I think precisely the same kind of fraud is present in the case under appeal. I ought, perhaps, to notice the case of *Turton* v. *Turton*, which was said to be an authority in the respondents' favour. That case was, I think, an entirely different one. There was no proof that the defendants were passing off their goods as those of the plaintiffs; the utmost that was shown was that similarity (there was not identity) in the name of the firms might lead incautious persons to make mistakes. Reliance was placed for the respondents upon the decision of Wood, V.C., in *Young* v. *Macrae*, and in the Court of Appeal Rigby, L.J., regarded it as adverse to the plaintiffs' contention. When carefully examined I do not think it is so. Where a patentee attaches a particular name to the production he patents, that name becomes common property as descriptive of the patented article. It possesses, indeed, no other name. That name would necessarily be applied to it by all persons desiring to purchase the article. It is not descriptive of the production of a particular manufacturer, but of the article itself, by whomsoever it is manufactured. Indeed, there is no presumption that the patentee will manufacture it, even during the term of the patent; more often than not patented articles are manufactured by other persons by the licence of the patentee.

What right, it was asked, can an individual have to restrain another from using a common English word because he has chosen to employ it as his trade-mark? I answer, He has no such right; but he has a right to insist that it shall not be used without explanation or qualification if such a use would be an instrument of fraud. Who suffer injury by such a conclusion, or would be the worse if the defendant is thus restrained? It has been shown that the public have not needed the words "camel hair" to describe a particular kind of belting—that the words have never been used in the trade in that sense. What James, L.J., said in *Thorley's case* is applicable to the present. He observed: "Thorley's food for cattle had never become an article of commerce as distinguished from the particular manufactory from which it had proceeded."

It is not proposed, in the present case, to prohibit the use of the words "camel hair" altogether. The injunction granted by Collins, J., had not that effect. In the case just referred to the counsel for the plaintiff, at the conclusion of the judgment, asked whether the substance of their lordships' judgment was not that the defendants were not to use the name Thorley in connection with their cattle food. James, L.J., replied, "We cannot prohibit them using the name, if they use it in a way not calculated to mislead the public." I say the same about the use of the words "camel hair" in the present case.

For these reasons, I think the judgment of the Court of Appeal should be reversed.

Lord MACNAGHTEN.—In this case your lordships are not asked, at least by the appellants, to lay down any new law. The appellants are content to rely on the old and familiar doctrines of the court, which have been repeated over and over again.

"I have often endeavoured," said James, L.J., in *Singer Manufacturing Co.* v. *Loog*, a well-known trade-mark case in which there was no claim to a registered mark—"I have often endeavoured to express what I am going to express now (and probably I have said it in the same words, because it is very difficult to find other words in which to express it)—that is, that no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign, or symbol, device, or other means whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie, or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade-mark or trade designation, I am of opinion that there is no such thing as a monopoly, or a property, in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods; always subject to this, that he must not, as I said, make directly or through the medium of another person a false representation that his goods are the goods of another person. That I take to be the law."

I have cited this passage because it seems to me to state clearly the principle on which Mr. Reddaway and his associates are entitled to relief against Mr. Banham and the company of which he is managing director. The substance of Mr. Reddaway's complaint, as I understand it, is that Mr. Banham is putting his goods on the market under a designation which enables purchasers from him to tell a lie or to make a false representation to their customers. It is immaterial that the designation in question, taken by itself, would convey to a person not conversant with the trade, information which cannot be called untrue, if by means of that designation Mr. Banham does make, not indeed directly, but through the medium of other persons, a false representation that his goods are the goods of Reddaway.

Reddaway and Banham—I use those names for shortness—are both manufacturers of hair belting, a kind of belting which is much used for driving machinery. This article has a large sale at home and abroad. In countries where the heat is great and the air very dry it is preferable to leather. Hair belting, whoever the maker of it may be, is generally composed, more or less, of stuff imported into England and sold in the English market as "camel hair." Until recently nobody seems to have imagined that

the camel hair of commerce was true to name. It was believed to be a mixture of hair—hair of sheep and goats, and various eastern animals—in which the hair of the camel might be found, but which did not even pretend to be really camel's hair. Indeed, so little importance was attached to its nominal connection with the camel that, until it acquired some celebrity through Reddaway's manufacture, the yarn made from it used to be sold in the market simply as brown worsted.

It seems to have been the fashion for manufacturers of hair belting to distinguish their goods by the name of some chosen animal, hairy or hairless. There was, for example, buffalo belting, yak belting, and crocodile belting. Reddaway, unfortunately for him, as it has turned out, selected the camel as his emblem. He called his belting "camel-hair belting." Owing to the excellence of his manufacture, his belting became widely known all over the world. It was advertised as camel-hair belting. It was ordered, sold, and invoiced as such; and so camel-hair belting came to mean Reddaway's belting, and nothing else. It was admitted at the trial that for about fourteen years no belting had been made or sold under the description of camel hair or camel-hair belting except by Reddaway, and certain persons whom he had promptly challenged and stopped. Indeed, so long as the expression "camel-hair belting" was taken to be a fanciful designation Reddaway had no difficulty in holding the field against any interloper who hoped to find more profit and less trouble in trading on another man's reputation than on his own merits.

Banham was for two years in the employment of Reddaway at his works. In 1889 he set up for himself, and began to make hair belting. Like others in the trade, he used more or less the camel hair of commerce. At first he called his belting "Arabian belting." Then he began cautiously and tentatively to offer his goods as camel-hair belting. After 1891, when he turned his business into a limited company, his proceedings were marked with less caution; at last they attracted Reddaway's attention, and then the present action was brought.

The action was undoubtedly launched on the footing that the expression "camel-hair belting" was a fanciful term. But in the course of the trial it was proved, partly by the evidence of experts and partly by an exhibit collected from a living animal in the Zoological Gardens at Manchester, that the camel hair of commerce, of which many bundles were produced, was really and truly for the most part composed of genuine camel's hair. This evidence seems to have come as a revelation to Reddaway and his advisers. However, they accepted the situation, and forbore to contest the point further. And so it was established that Reddaway's trade designation, instead of being, as everybody supposed, a fanciful term, was nothing more or less than a substantially accurate description of the material of which his belting was composed. Now the Court of Appeal treat this discovery as the end of the whole matter. They hold that on this one fact being established Banham became entitled to put his goods on the market as camel-hair belting without any qualification whatever. Anybody and everybody who may want to get a footing in the connection which Reddaway has formed is now free, if the Court of Appeal is right, to use Reddaway's password. The appellants concede—they cannot, indeed, any longer dispute—that everybody who makes belting of camel hair is entitled to describe his belting as camel-hair belting, provided he does so fairly. But they contend, and I think with reason, that neither Banham nor anybody else is entitled to steal Reddaway's trade under colour of imparting accurate, and possibly interesting, information. Practically the only difference which the unexpected turn in the evidence has made is this: the case now comes under the second branch of the proposition laid down by James, L.J.; if camel-hair belting had kept its place as a fanciful term, it would have fallen under the first.

The learned counsel for the respondents maintained that the expression "camel-hair belting" used by Banham was "the simple truth." Their proposition was that "where a man is simply telling the truth as to the way in which his goods are made, or as to the materials of which they are composed, he cannot be held liable for mistakes which the public may make." That seems to me to be rather begging the question. Can it be said that the description "camel-hair belting" as used by Banham is the simple truth? I will not call it an abuse of language to say so, but certainly it is not altogether a happy expression. The whole merit of that description, its one virtue for Banham's purposes, lies in its duplicity. It means two things. At Banham's works, where it cannot mean Reddaway's belting, it may be construed to mean belting made of camel's hair; abroad, to the German manufacturer, to the Bombay mill-owner, to the up-country native, it must mean Reddaway's belting; it can mean nothing else. I venture to think that a statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it; it is not sterling coin, it has no right to the genuine stamp and impress of truth.

I have now dealt with the only peculiarity in the case. For the rest, the action is one of a very ordinary type.

In a trial which lasted three days, after a summing-up which seems to me to be admirably concise and clear, a special jury of the county of Lancaster found that camel-hair belting means belting made by Reddaway, and that it does not mean belting of a particular kind without reference to any particular maker. They also found that the defendants—that is, Banham and the company with which he is connected—describe their belting so as to be likely to mislead purchasers, and to lead them to buy the defendants' belting as and for the belting of the plaintiffs.

There was another finding, not perhaps necessary for the decision, on which I desire to say a few words. It is stated in the judgment of the Master of the Rolls that the learned counsel for the plaintiffs at the trial did not appear to have asked the judge to leave to the jury the question whether the defendants had done anything fraudulently. "Indeed," his lordship adds, "no such question seems to have been raised by the pleadings." If your lordships turn to the pleadings, you will observe that the question was raised directly. It is quite true that the word "fraud" is not to be found in the statement of claim. But the whole gist of the action was that the defendants were endeavouring to palm off their goods as the goods of the plaintiffs by selling them under a designation which would enable purchasers from them in this country to deceive customers abroad. That is, as it seems to me, a charge of dishonesty, and I must say I think the charge was established. It was proved by admissions wrung from Mr. Banham on cross-examination, and by the correspondence which was put in evidence. When a manufacturer's goods are a drug on the market so long as they bear his own name or indicate the true origin, and yet are readily saleable if marked with nothing but some common English words which are taken to mean the work of another and a different maker, and when that manufacturer holds himself

out as ready and willing so to mark his goods, and does so mark them at the "instigation," as he says, of a purchaser, a Lancashire jury may perhaps be trusted to see the real object in view. The jury found, and in my opinion rightly found, that the defendants endeavoured to pass off their goods as and for the goods of the plaintiffs.

Cases of this sort must depend upon their particular circumstances. The facts of one case are little or no guide to the determination of another. I do not therefore propose to trouble your lordships with any reference to authorities except those relied on in the judgment of the Court of Appeal. The judgment of Turner, L.J., in *Burgess* v. *Burgess*, though eclipsed, as it has been said, in public favour by the brilliancy and point of his colleague's language, is an accurate and masterly summary of the law. But it seems to me to be an authority in favour of Reddaway, and not in favour of Banham. I am quite at a loss to know why *Turton* v. *Turton* has been reported. The plaintiff's case there was extravagant and absurd. With regard to the case of *Young* v. *Macrae*, which is referred to at some length, it must be remembered that it was a judgment on an interlocutory application, and that the Vice-Chancellor reserved the question for the hearing, with an intimation that it would then deserve serious consideration. It does not seem to me to have any bearing upon the present case, and I only notice it to observe that whenever it is quoted the Vice-Chancellor's comments upon his own decision ought not to be lost sight of. "I had to consider this question," said the Vice-Chancellor on a later occasion, "in the case of Young's paraffin oil; and in that case, if the evidence had shown that the plaintiff had been first to apply the name 'paraffin' to the oil, I should have granted an injunction; but there I had it proved that the name 'paraffin oil' had long been known as the scientific name of the article, and that the defendant could not well have called it anything else." Lastly, the case of *Montgomery* v. *Thompson* was cited, but only for the purpose of putting it aside; I am sure I do not know why. That was a gross case, no doubt. But fraud is infinite in variety: sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the court. In principle and in substance I can see no difference between the present case and *Montgomery* v. *Thompson*.

In the result, I am of opinion that the appeal must be allowed with costs. But as regards the form of the injunction, speaking for myself, I should be disposed to say that in all cases where the defendant is to be restrained from using unfairly words or marks which he is at liberty to use provided only they are used fairly, it would be better that the injunction should go in the form approved by this House in *Johnston* v. *Orr-Ewing*, 30 W. R. 417, 7 App. Cas. 219.

Lord MORRIS.—I have felt some difficulty in concurring as I do in the judgment proposed to be given in favour of the appellants by your lordships, for it establishes, and in my opinion for the first time, the proposition that a trader is not permitted to merely tell truthfully and accurately the material of which his goods are made. I find myself coerced, however, to a conclusion against the respondents by the finding of the jury, which amounts to this—that camel-hair belting had become so identified with the name of the appellants Reddaway as that camel-hair belting had in the market obtained the meaning of Reddaway's belting; and there was sufficient evidence given at the trial to support that finding of the jury. That finding establishes as a fact that the use of the words "camel-hair belting" *simpliciter* deceives purchasers; and it becomes necessary for the respondents to remove that false impression so made on the public. That something, to my mind, is obviously done when the respondents put prominently and in a conspicuous place on the article the statement that it was camel-hair belting manufactured by themselves. Having done so, they would, as it appears to me, fully apprise purchasers that it was not Reddaway's make by stating that it was their own. A representation deceiving the public is and must be the foundation of the appellants' right to recover; they are not entitled to any monopoly of the name "camel-hair belting" irrespective of its deceiving the public, and everyone has a right to describe truly his article by that name, provided he distinguishes it from the appellants' make. In this case the respondents did not so distinguish it, because they omitted to state that it was their own make. Consequently I concur in the motion which has been made.

Order appealed from reversed, with costs here and below; declared that judgment ought to be entered for the plaintiffs in the Queen's Bench Division "for an injunction restraining the defendants and each of them from using the words "camel hair" as descriptive of or in connection with belting manufactured by them or either of them, or belting (not being of the plaintiffs' manufacture) sold or offered for sale by them or either of them without clearly distinguishing such belting from the belting of the plaintiffs; with this declaration judgment of Collins, J., *in all other respects restored; cause remitted to the Queen's Bench Division.*

Solicitors for appellants, *W. J. & E. H. Tremellen*, for *A. MacDonald Blair*, Manchester.

Solicitors for respondents, *Mayhew, Browne, & Griffithes; Chester & Co.*, for *Chew, Sons, & Helditch*, Manchester.

High Court of Justice.

Chan. Div.
Chitty, J.

June 17.

In re ALLEN.
ADCOCK v. EVANS. (*a.*)

Administration—Right of retainer—Debt under covenant—Surety—Specialty and simple contract creditors.

By an indenture of mortgage A., the mortgagor, covenanted with B., a surety, to duly pay all moneys secured by the mortgage, and to keep indemnified property mortgaged by B. against all such moneys, and in case B. should pay any money for redemption forthwith to repay such money with interest. A. died, and B. was appointed A.'s administratrix. The day named in the mortgage for repayment of the principal was past, but no part thereof was paid. On an application by specialty creditors of A. under an indenture of lease for payment of their debt,

Held, on the authority of Lethbridge *v.* Mytton, 2 *B. & Ad.* 772, *and* Loosemore *v.* Radford, 9 *M. & W.* 657, *that if B. had not been administratrix B. could have sued on the first branch of the above covenant for the whole of the moneys secured by the mortgage and recovered the same as damages at law, and therefore that B. was entitled to retain to that extent as against the applicants.*

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Ferguson *v.* Gibson, *L. R.* 14 *Eq.* 379, 21 *W. R. Dig.* 6, *distinguished.*

Summons.

This was a summons for payment out of the estate of the above-named intestate of three quarters' rent due from the intestate under an indenture of lease dated in 1886, or for administration.

The defendant, who was administratrix, claimed a right of retainer to an amount exceeding the whole amount of the estate.

By an indenture of mortgage, dated in 1893, the intestate covenanted for the repayment to R., with interest, six months after the date thereof, of £800 advanced to the intestate by R.; and certain leasehold premises then held for the intestate for life, with remainder to the defendant absolutely, under a voluntary settlement made by the intestate in 1877, were, by the direction of the intestate and of the defendant, demised to R. for the residue of the term for which the same were held, as security for payment of the £800 and interest; and the intestate covenanted with the defendant to duly pay all moneys by the same indenture covenanted to be paid, and to keep indemnified the estate and intestate of the defendant in the said leasehold premises against all such moneys; and in case the defendant should at any time thereafter pay any moneys for the redemption of the said leasehold premises, forthwith to repay such money, with interest.

The intestate died in November, 1893, without having paid any part of the £800, which was still unpaid, but the defendant had kept down the interest since the death of the intestate.

The question was whether, under these circumstances, the defendant was entitled to retain a sum of about £400 in her hands as administratrix in respect of the £800 due on the above mortgage.

Eastwick, for the summons.—The defendant is not a specialty creditor, and cannot retain against the applicants, whose debt is a specialty debt.

Kirby, for the defendant.—The intestate covenanted with the defendant to pay all moneys secured by the mortgage, and there has been a breach of that covenant. If she were not administratrix, she could recover judgment at law for the full £800 on the covenant. The covenant distinguishes this case from *Ferguson* v. *Gibson*, L. R. 14 Eq. 379 (see p. 386), 21 W. R. Dig. 6. The cases at law of *Lethbridge* v. *Mytton*, 2 B. & Ad. 772, and *Loosemore* v. *Radford*, 9 M. & W. 657, show that she can recover the full amount as damages.

He also cited *Re Compton, Norton* v. *Compton*, 33 W. R. 160, 30 Ch. D. 15, and Mayne on Damages, 5th ed., p. 321.

Eastwick replied.

CHITTY, J.—The legal personal representative can retain only against a creditor of equal degree, and cannot retain for a simple contract debt against a specialty creditor. That is settled law.

Here the administratrix has a covenant from the intestate to duly pay all moneys covenanted to be paid by the mortgage. The intestate covenanted by the mortgage to pay the sum secured on a certain day which is now passed, and there has been a breach of that covenant. The administratrix could sue for the amount, if she were not paid, except for her double character. She is creditor and debtor too. What damages would she be entitled to recover? The cases at law show that the measure of damages would be the whole amount of the debt. [His lordship then read the intestate's covenant with the administratrix from the mortgage deed, and continued:—] There are three distinct covenants here in point of law, and, suing on the first covenant, the administratrix could recover, as I have stated, except for her double character. She is therefore a specialty creditor on the covenant at law for the whole debt, and it follows that she is entitled to retain to that extent.

Summons dismissed.

Solicitors for the applicants, *Ullithorne, Currey, & Currey*, for *Jessopp & Sons*, Bedford.

Solicitors for the defendant, *Heath, Parker, & Brett.*

Chan. Div. North, J. June 30.

Ex parte RECTOR OF NEWTON HEATH. (*a.*)

Lands Clauses Act, 1845, *s.* 69—*Reinvestment of purchase money—Rebuilding rectory.*

In 1890 *a rector rebuilt the rectory at a time when considerable repairs would otherwise have been necessary. In* 1893 *some of the glebe was acquired by the Manchester Ship Canal Co., and the purchase money paid into court. Part of the expenses of rebuilding the rectory was still unpaid; on a petition by the rector,*

Held, that the sum remaining due could not be paid out of the fund in court.

Petition.

The rector of Newton Heath called in the diocesan surveyor in 1890. Having regard to the extensive repairs then required, the surveyor recommended that the rectory should be rebuilt. This was done at a cost of £1,388 15s. 6d. This money was raised by borrowing £600 from Queen Anne's Bounty, £100 was obtained from the Diocesan Building Society, £349 11s. 9d. was obtained by subscriptions, and £339 3s. 9d. still remained due.

In 1893 part of the glebe was taken by the Manchester Ship Canal Co., under its compulsory powers, and the purchase money was paid into court.

The rector now asked that the £339 3s. 9d., still due for rebuilding the rectory, might be paid out of the fund in court.

Rawlins, Q.C., and *Milne*, for the petitioner.—The case is very like *Ex parte Rector of Claypole*, L. R. 16, Eq. 574. *Williams* v. *Aylesbury and Buckingham Railway Co.*, L. R. 9 Ch. App. 684, 23 W. R. Dig. 118, was a case in which the money had been paid. In *Ex parte Rector of Bradfield St. Claire*, 32 L. T. N. S. 248, the expenditure of the purchase money of glebe upon the erection of a new rectory was allowed. In *Ex parte Rector of Grimoldby*, 24 W. R. 723, 2 Ch. D. 225, expenditure upon repairs of the rectory house and the restoration of the chancel was authorized. In *Ex parte Rector of Gamston*, 24 W. R. 359, 1 Ch. D. 477, past outlay in erecting a farmhouse upon the glebe was made good to the rector out of the proceeds of sale of a portion of the glebe. In *Ex parte Rector of Holywell-cum-Needingworth*, 27 W. R. 707, past outlay on buildings forming a permanent improvement was allowed.

Dennis, for the Governors of Queen Anne's Bounty.—Our security will be diminished if this application is acceded to; the fund in court as well as the rectory is now charged. The rector has escaped liability for repairs by rebuilding, and he has obtained more favourable terms than he could have obtained in any other way.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Clare, for the Manchester Ship Canal Co.

Rawlins replied.

NORTH, J.—I do not see my way to allow this expenditure. The rector, who was appointed a few years before, called in the diocesan surveyor in 1890. He proceeded to make a careful survey, and raised the question that it would be better to rebuild the rectory than to repair it. This was done, and the cost was just under £1,390. The rector borrowed £600 of this from Queen Anne's Bounty, which is repayable by instalments. He also obtained £100 from the Diocesan Building Society, and subscriptions, and paid all but about £340.

In 1893 the Manchester Ship Canal took part of the glebe and paid the money into court, and the rector now asks that this £340 may be paid out of this money. I should have been glad to do it if I could; but there is no principle upon which I can allow such a payment. Several cases have been cited. In *Ex parte Rector of Claypole* improvements and additions to the parsonage house were allowed. But the case is distinguishable, for the money now asked for is not for improvements or additions. In *Ex parte Rector of Bradfield St. Claire* there was no parsonage house belonging to the rectory. The case before Hall, V.C. (*Ex parte Rector of Claypole*), is very shortly reported; but in both that case and *Ex parte Rector of Holywell* new buildings were erected where no buildings previously existed. What was done here was to build a new house, instead of incurring the considerable expense of repairs which would otherwise have been necessary. The rector has been saved from doing these repairs. *Williams* v. *Aylesbury and Buckingham Railway Co.* shows that if the rector had actually paid the money, the court would have no jurisdiction to order the sum to be paid back to him out of the fund in court. But here, although the money has not been paid, the expenditure has been incurred, and the result would be the rector would be put to no expense for the repairs for which he was liable in 1891 except the repayment of the instalments to Queen Anne's Bounty. I am sorry that I cannot assist him in the matter.

Solicitors, *Robins, Billings, & Co.*; *Official Solicitors of Queen Anne's Bounty.*

Chan. Div. North, J. — March 26, 27.

In re COOK'S MORTGAGE. LAWLEDGE *v.* TYNDALL. (*a.*)

Tenant in common—Improvements.

On a sale by a paramount mortgagee one-half the expenditure in improvements made by a person who was tenant in common in fee of one moiety and tenant for life of the other moiety, was allowed out of the proceeds of sale, but it was provided that the sum so allowed should not exceed one-half the amount actually expended.

By an indenture, dated the 3rd of May, 1878, certain land situate at Balsall Heath, King's Norton, in the county of Worcester, was vested (subject to a mortgage for £300 vested in C. C. Cope and E. M. Lawledge) as to one undivided moiety in Rebecca Cook in fee, and as to the other undivided moiety in trustees upon trust to pay the income to Rebecca Cook for life, and after her death upon trust to pay the income to Rebecca Payne (then Rebecca Nicholls) for life, with remainder upon trust for all the children of Rebecca Payne who should attain the age of twenty-one years.

In September, 1883, Rebecca Cook and Rebecca Payne mortgaged their interest under the indenture of the 3rd of May, 1878, to C. C. Cope and E. M. Lawledge to secure the repayment of £700 and interest. The £700 so advanced was expended in converting certain houses upon the property into shops.

In December, 1883, Rebecca Nicholls married John Payne, and in December, 1888, Rebecca Cook died intestate, leaving Sarah Ann Morse her heiress at law.

E. M. Lawledge survived C. C. Cope, and under the power in the original mortgage for £300 sold the property for £2,030. He now took out this summons to determine how the balance of the purchase money, after the payment of duty and the amount due to him as mortgagee, should be dealt with.

Briscoe, for the mortgagee.

Yate Lee, for the trustees of the indenture of the 3rd of May, 1878, and Rebecca Payne.—The value of the property was certainly increased by the improvements, but their present value is not more than £500. There is no jurisdiction to deduct anything from the share of a tenant in common who may have obtained the benefit of expenditure upon improvements, except in the case of a partition suit.

C. E. E. Jenkins, for the widower and child of Sarah Ann Morse, who had died intestate, cited *In re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 462; *Leigh* v. *Dickeson*, 33 W. R. 538, 15 Q. B. D. 60, and claimed an allowance of half the present value of the improvements not exceeding the amount actually expended.

NORTH, J., thought that the principle of the decision in *In re Jones* applied, and that the persons entitled to Rebecca Cook's moiety were entitled to one-half the present value of the improvements, provided that such sum did not amount to more than one-half of £700.

Solicitors, *Shaen, Roscoe, & Co.*; *Royle & Co.*, for *Tyndall & Co.*, Birmingham.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Q. B. Div. (Lord Russell of Killowen, C.J., and Wills, J.) — May 11; June 18.

REG. *v.* THE RURAL DISTRICT COUNCIL OF TYNEMOUTH. (*a.*)

Local government—Sewer—New buildings and streets—Expenses of sewerage—Refusal of local authority to approve plans—Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 34—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 158, 277.

The owner of land in a rural district in which section 157 *of the Public Health Act*, 1875, *was in force desired to erect upon his land considerable blocks of houses comprising several streets. The bye-laws of the District Council, made under section* 157, *required that the building owner should deposit plans showing*, inter alia, "*the intended line of drainage of the buildings*," *and should also deposit* "*a description in writing of the intended mode of drainage*"; *the bye-laws did not relate to the provisions for the sewerage of new streets. The owner deposited plans of the proposed new streets and houses, showing in the case of each house a separate drain ending in the soil of a proposed new street, with*

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

no cesspool or other receptacle for drainage, and evidently contemplating the existence of a sewer down the proposed street into which the separate drains should empty. The District Council refused to approve the plans, upon the ground only that the owner declined to agree with them for the construction at his expense of the necessary main sewers and sewage outfall works.

Held, that the District Council were not entitled to refuse to approve the plans upon that ground.

Rule *nisi* for a *mandamus* requiring the Rural District Council of Tynemouth to approve certain building plans submitted to them by the Marquis of Hastings.

The facts and arguments and the enactments bearing upon the case are fully stated in the judgments.

Lawson Walton, Q.C., and *Willes Chitty*, for the District Council.

Robson, Q.C., and *Alexander Glen*, for the applicant.

Cur. adv. vult.

June 18.—Lord RUSSELL OF KILLOWEN, C.J.—I have had the opportunity of reading the written judgment of my brother Wills in this case, with which I agree, and I will only indicate very shortly the grounds of my judgment.

A rule *nisi* has been obtained for a *mandamus* requiring the Rural District Council of Tynemouth to approve certain building plans submitted to them by the Marquis of Hastings. The question is whether the applicant is entitled to have the rule made absolute. I have come to the conclusion that he is so entitled. Lord Hastings is the owner of considerable land within the rural district, and he contemplated building upon a portion of it a number of houses forming several streets. He submitted his plans to the District Council, appending to them this note: "N.B.—It is proposed that the street and outfall sewers should be made by the Rural District Council (and not by the landowner) under the powers vested in and the duties imposed on them by the Public Health Act, the Public Health Acts Amendment Act, 1890, and the Private Streets Works Act, 1892." The Council had the plans before them, and no objection was taken to them as far as the buildings were concerned. But they disapproved the plans, and indicated their disapproval by the following memorandum indorsed on them: "Disapproved of until it is shown into what sewer or other means of drainage the house drains are to communicate and empty, and for want of a proper and sufficient mode of drainage and sewerage. The Council object to the proposal that they should make the street and outfall sewers except under agreement with and at the expense of the landowner or the depositor of these plans. Otherwise than this the Council require same to be made by such landowner or depositor."

It will thus be seen that the real bone of contention is not the propriety of the proposed plan of building as such, but the question whether the applicant or the local authority is to be liable in the future to make a line of sewers down the proposed streets and also the outfall sewer with which the street sewers are to communicate. The local authority have made bye-laws, but I fail to see that any of them deal with this question or require the building owner to show on his plans what is to be the ultimate mode of dealing with the sewerage.

The plans submitted by the applicant show that he contemplated that there should be a sewer down the middle of each street into which the house drains should discharge, and it is not suggested that there is anything in the levels shown on the plans which would make that impracticable. The question is, Can the local authority, who have no objection to the building plans as such, decline to approve them unless the owner undertakes to carry out the sewerage at his own expense, including the necessary sewage outfall works? The correspondence shows that he was willing to undertake the cost so far as sewerage on his own property was concerned, but he declined to execute the outfall works.

It seems to me that the requisition of the local authority was entirely unreasonable; for, although the local authority have statutory powers under which they can take land for sewage works, a private owner can only execute such works within his own property, he cannot go outside without obtaining authority from Parliament. The local authority contend that an owner cannot, by turning his land into a village or a town, throw upon them the burden of providing the necessary sewerage. The owner says that he cannot be required to construct sewers and outfall works, but drains only; and that the local authority can, by having his property formed into a special drainage district under section 277 of the Public Health Act, 1875, throw the sewerage expenses upon that property exclusively. Or they may, before taking the new streets over, by obtaining urban powers under section 150 of the same Act, require them to be properly sewered by the owners or occupiers under that section. It was argued before us that it is unreasonable to require a local authority to provide a system of sewerage for the benefit of the property of a particular owner. That argument, in my opinion, contains a fallacy; the local authority is not required to carry out a large scheme of sewerage at once, and as soon as the building scheme assumes large proportions the local authority may proceed in one of the ways I have mentioned, and so throw the cost upon the owner. It is impossible to support the view of the local authority that because the owner has not shown on his building plans an elaborate system of sewerage, and has not undertaken to carry it out at his own expense, they are entitled to disapprove those plans. That is not a proper ground for refusing to approve the plans. I therefore think that the District Council was wrong, and that this rule ought to be made absolute.

WILLS, J.—The facts of this case are extremely simple; not so the enactments upon which our decision turns.

The applicant is the owner of property in the district of a rural sanitary authority. He desires to put up certain considerable blocks of houses, comprising several streets, in a place which at present is a part of the open country. The defendants are the rural sanitary authority in question.

The applicant has submitted to the defendants plans showing the proposed new streets and containing the details of construction of his proposed buildings, from which it appears that he proposes to construct each house with a separate drain, ending at present, in each case, in the soil of a proposed new street, with no cesspool or other receptacle for drainage. The defendants refuse to approve his plans unless he will agree with them for the construction at his expense of the necessary main sewers—the existence of which his plans contemplate—with the necessary outfall and other works. No other objection has been taken to the plans, nor do they contravene either any bye-law or any provision of the Sanitary Acts.

The applicant asks the court to grant a *mandamus* to the defendants requiring them to approve the plans.

It is necessary to set out by ascertaining—if that be possible—what the enactments and bye-laws are which bear upon the subject.

The only enlargement that has been effected of the powers of the defendants as a rural sanitary authority is one conferred upon them by order of the Local Government Board, made under the powers of the Public Health Act, 1872 (35 & 36 Vict. c. 79), s. 23, and dated the 28th of December, 1874.

The order invested the defendants "with all the powers, rights, duties, capacities, liabilities, and obligations of an urban sanitary authority with reference to making and enforcing bye-laws and otherwise in respect to the following matters, viz.:—

1. "In respect to the various matters mentioned in section 32 of the Local Government Act, 1858, so far as the powers under that section are not already conferred upon the said sanitary authority in pursuance of section 8 of the Public Health Act, 1872 (35 & 36 Vict. c. 79), and section 5 of the Sanitary Act, 1868 (31 & 32 Vict. c. 115)."

2. "In respect to the various matters mentioned in section 34 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), and in section 44 of the Sanitary Laws Amendment Act, 1874 (37 & 38 Vict. c. 89)."

A word or two of explanation is necessary. The powers of the Acts of 1848 and 1858 were conferred by Order in Council either upon existing municipal and other corporations or upon boards of health constituted by Order in Council in particular localities. The Act of 1872 divided the whole country into districts, urban and rural, under the jurisdiction of urban and rural sanitary authorities—the urban authorities being the corporations of corporate towns and cities, improvement commissioners under local Acts, and existing local boards; the rural sanitary authorities being (with some qualifications) the boards of guardians of unions, and the rural sanitary districts being (also with some qualifications) the unions.

The powers of urban sanitary authorities were much more extensive than those of the rural authorities, and comprised all the powers vested in local boards under the Acts of 1848 and 1858 (see section 7 of the Act of 1872). Those of rural sanitary authorities were more limited, being confined to powers under the Sewage Utilization Acts, the Nuisances Removal Acts, the Common Lodging-house Acts, the Diseases Prevention Act, and the Bakehouse Regulation Act (see section 8 of the Act of 1872). But by section 23, the Local Government Board could, by order under seal, invest the rural authority with any of the powers of an urban authority specified in the order.

The order I am now discussing says, in a very roundabout fashion, in the first place, that the defendants shall have the powers of a local board under section 32 of the Act of 1858.

None of these, however, touch the present case, except in one matter presently to be noticed which may have a slight bearing upon it.

The second branch of the order confers upon the defendants the powers of a local board under section 34 of the Act of 1858, and under section 44 of the Act of 1874. The latter, again, do not concern this case, and so far as this case is concerned the defendants had under the order of 1874 only the powers of section 34 of the Act of 1858—for none of the ordinary powers of a rural sanitary authority under any of the Acts passed before the date of the order of the Local Government Board of December, 1874, enabled them to do anything under which the present question could have arisen, or which has anything to do with this case.

Under the applied powers of section 32 of the Act of 1858 the defendants acquired power to make bye-laws for the cleansing of privies, ashpits, and cesspools, and under the Sanitary Laws Amendment Act, 1874 (37 & 38 Vict. c. 89), s. 21, they become bound to make proper provision for such cleansing. It is an illustration of the tentative character of our sanitary legislation that I have not been able to find any provision applying to rural authorities only in any of the Acts under which their powers arose, up to this time, which contains any reference to water-closets.

The part of section 34 of the Local Government Act of 1858 which is material to the present case is that which—as the section is applied—empowers the defendants to make bye-laws "with respect to the drainage of buildings, to water-closets, privies, ashpits, and cesspools, in connection with buildings,' and also to "provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, and as to their power to remove, alter, or pull down any work begun or done in contravention of such bye-laws."

The next Act was the Public Health Act, 1875, by which every Act that has been referred to up to this point was repealed, with the single exception of the Bakehouse Regulation Act. The repeal, however, was not to affect anything duly done under any of the repealed Acts (section 343), and by section 313 of the Act of 1875 it is provided that where, in any order made by the Local Government Board and in force at the time of the passing of the Act of 1875, any provision of any of the Sanitary Acts (which term includes those mentioned in the order of 1874) repealed by this Act are mentioned or referred to, such order shall be read as if the provisions of the Act of 1875, applicable to purposes the same as or similar to those of the repealed provision, were therein mentioned or referred to, and were substituted for them.

Section 157 contains these substituted provisions, and with two trivial exceptions they are *totidem verbis* with those of section 34 of the Act of 1858, the only differences being that "urban sanitary authority" is substituted for "local board" in the description of the body which can make the bye-laws, and that "earth-closets" are added in the list of matters, as to which bye-laws may be made. All local boards became in 1872 urban sanitary authorities, so that practically there is no difference between the two Acts in what is material to the present question.

The bye-laws under which the controversy arises came into force in January, 1888. No provision appears in any of the Acts between 1875 and 1888 which affects the present dispute.

It is not necessary to go into the details of the bye-laws. It is sufficient to say that they contain no rules for determining whether the drainage in any particular case shall be by the construction of or by connection with a sewer or by a cesspool. They contain provisions for securing that the building shall have such a level as will enable it to be "effectually drained," and to have "the requisite communication with any sewer into which such drain may lawfully empty." They contain all necessary provisions where the drainage is to be by cesspool, and all necessary provisions if it is to be by connection with an existing sewer, but none which in terms provide for a case like the present. They contain provisions that the building owner shall deposit plans both of new streets and of new houses, showing *inter alia* "the form and dimensions of every water-closet, earth-closet, privy, ashpit, cesspool, well, and all other appurtenances," and "the intended line of

drainage of the buildings and the intended size, depth, and inclination of each drain," and he is also to deposit "a description in writing of the intended mode of drainage."

There is no provision in the bye-laws for the approval of the plans by the defendants, or that any penalty shall be incurred by a person who proceeds to build before he has got such approval. If in building he has contravened any bye-law, he may be made to pull down the work erected in contravention thereof—that is all (see bye-law 99).

By the Public Health Act, 1875, s. 158, where plans are required by bye-laws made by an urban sanitary authority to be laid before that authority "the urban authority shall, within one month after the same has been delivered, signify in writing their approval or disapproval; and if the work is commenced after such notice of disapproval or before the expiration of such month without such approval, and is in any respect not in conformity with any bye-law of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down" at the expense of the offender.

No provision is made in the Act or in any subsequent Act for the case of plans required by the bye-laws of a rural sanitary authority to be deposited. Nothing can be more unsatisfactory than the phraseology used; and legislation which requires that which is sometimes called a benevolent, but which is really a slovenly, interpretation is greatly to be deprecated. But one is bound I suppose to attribute some intention to legislation of this kind, and it can hardly have been meant to leave out in the cold the cases in which, in the year 1875, the deposit of plans had been required by bye-laws of rural authorities invested under the Act of 1872 with urban powers. There must have been such cases, probably many of them, and I suppose, therefore, that I am justified in saying that for the purposes of section 158 a rural authority so invested is an urban authority, and in that fashion holding that section 158 applies to the present case. If so, and if, as appears to be admitted by the defendants in this case, the applicant has contravened no bye-law, I see no reason why he should not proceed to build. If he contravenes no bye-law in the course of his building, nothing can be done to him that I can see. Indeed, section 158 appears to be framed on the supposition that no consequences will follow from building without waiting for approval or disapproval if no bye-law be contravened. It is true that the section deals in terms only with the power to pull down without an order, but the limitation on that power would be of no value whatever if an order for demolition could be obtained though no bye-law or other enactment were contravened and the section is a very clear intimation of the view of the Legislature. I do not suppose that in face of the provisions of this section the Local Government Board would sanction a bye-law which made the mere building without approval, or even in spite of disapproval, an offence. Such a bye-law would, in my opinion, be, to say the very least, of questionable validity in face of section 158. The whole train of reasoning in the judgment in *R.* v. *The Corporation of Newcastle-upon-Tyne*, 60 L. T. N. S. 963, strongly supports this view.

At all events, in the present case there is no such bye-law, and nothing, so far as I can see, to hinder the applicant from building in spite of disapproval, so long as nothing contrary to any enactment is done. In both *R.* v. *Preston*, 3 Times L. R. 665, and *R.* v. *Newcastle-upon-Tyne*, just cited, it seems to have been assumed that serious consequences would follow from building without approval of the plans. Section 158, however, appears to me to have been framed with a careful regard to the rights of property. It contains provisions of great value, as it ensures that the local authority shall have notice of what is going on or likely to be done; and where bye-laws have been made providing, as they often do, that the building may be pulled down if not in conformity with the deposited and approved plans, which is quite consistent with section 158, a most important security against objectionable construction is attained.

Still, it is a matter of risk for the owner to go on building without approval, and approval ought not to be withheld upon untenable grounds. In the two cases just cited the objections taken by the local authority were in the one case that the proposed building would interfere with a projected street, and in the other that the sort of building proposed was not in keeping with a residential neighbourhood. In each case the court granted a *mandamus* to approve the plans. In the present case the only objection taken is scarcely more tenable. It is that the plans cannot be approved until the applicant has made provision at his own expense for sewers in the proposed streets and for an outfall sewer. This is to impose upon him a burden which, to the extent to which such works may be necessary, falls by law upon the local authority, whether rural or urban (section 15 of the Act of 1875), and certainly no encouragement ought to be given to put the screw upon the applicant in order to free the respondents at his expense from the performance of a duty cast by law upon them. If there is no other objection, certainly approval ought not to be withheld upon this ground.

The defendants by their counsel object that to approve the plans may commit them irrevocably to very expensive works, which, it seems, are not needed for the rest of the district, but are really wanted for the improvement of the applicant's property, part of which he is proposing to turn into a building estate. They say, and in this they are right, that there is nothing in the mere approval by them of plans showing a large group of streets and buildings to compel the applicant to build the whole or any substantial part of the proposed houses, and that, although the applicant here is the Marquis of Hastings and presumably rich enough to support the large outlay contemplated, he might be a speculative builder without any means other than the general resource of the speculative builder, money expected to be borrowed but very often indeed failing to be raised; that it will be time enough to consider how the drainage is to be dealt with when there is some indication that the scheme will really be carried out; and that by approving the plans they will be committing themselves prematurely to the construction of a definite set of expensive works.

These considerations are not without weight. The bye-laws require that the plans shall show the intended size, depth, and inclination of each drain; and if they do so—which in the present case I doubt, though no such objection has been taken—and the plans are approved, the local authority must make the street sewers so as to accommodate the accepted drains, and the outfall so as to accommodate the street sewers. It would be impossible to sanction depths and levels for drains, which would fix those of the street sewers, without careful consideration of the possible or probable future needs of the rest of the neighbourhood; and the burden on a rural community might be intolerable if, in the end, but a portion of the proposed building scheme should be carried out, after the local authority was practically committed to a system which might have been very different if the original plans had been confined to the houses afterwards in fact erected. The legislation has certainly

not directly met such a case; sections 21 and 22 of the Act of 1875 contain the only provisions for connecting houses with sewers and cesspools applicable to rural authorities; section 25 contains further enactments for urban districts with which by section 276 the Local Government Board may by order invest a rural authority; but all these powers together are very imperfect.

The local authority, however, is not without protection, and I am inclined to think in this case adequate protection. Under section 277 they can obtain from the Local Government Board an order constituting the area proposed to be built upon, or any proper modification of it, a special drainage area; in which case the whole of the cost of the new drainage will be thrown upon the area. On the other hand the new area will then be exempt from the drainage rates of the district generally. With this the applicant would be content, and it seems just enough; but the defendants wish to keep the applicant as a contributor in respect of the area in question to the rest of the drainage, and to force him to pay for the discharge of their duties, which is not just or right.

The defendants have a further protection. Should it be worth their while when the new streets to be laid out are completed to take them over, they can compel the applicant or purchasers from him to pay for all the cost of putting the streets into good order to begin with, including the construction of sewers, by getting an order from the Local Government Board under section 276 giving them urban powers in respect of the new streets.

I wish in nothing that I have said to lay down any definite rule as to what matters may be properly taken into consideration by the local authority as grounds for withholding approval of plans. If they contravene bye-laws, though such bye-laws do not relate to mere details of construction, the ground may in my opinion be a good one. If they contravene, or the building when erected would contravene, an Act of Parliament, such a ground may very well be perfectly valid; and I am not at all prepared to say that general considerations of a character analogous to some I have been discussing may not afford valid grounds for withholding approval altogether or temporarily. Each case must be dealt with upon its own merits and according to its own circumstances.

Seeing, therefore, that the defendants have refused their approval of the plans on the ground that the applicant has not provided for what it will be their duty, and not his, to provide for, and on no other ground, I think the *mandamus* to approve the plans must be granted.

Rule absolute.

Solicitors for the District Council, *Williamson, Hill, & Co.*, for *A. Whitehorn*, North Shields.

Solicitors for applicant, *Flux & Leadbitter*, for *Leadbitter & Harvey*, Newcastle-upon-Tyne.

Q. B. Div.
(Cave and Wills, JJ.)

June 5.

REG. *v.* YORKSHIRE WEST RIDING COUNTY COUNCIL. (*a*.)

Theatre — Public entertainment — Licence to perform stage plays—Licence granted conditionally on undertaking not to apply for excise licence—Discretion of licensing committee—Theatres Act, 1843 (6 & 7 *Vict. c.* 68).

On an application for a theatre licence the licensing committee granted it on condition that the applicant did not apply for an excise licence, they being of opinion that there were sufficient public-houses in the immediate neighbourhood.

Held, that the licensing committee had properly exercised their discretion, and that they were justified in taking into consideration the fact that an excise licence might be applied for, and, in view of the facts of the case, in imposing a condition on the granting of the theatre licence.

In this case a rule *nisi* for a *mandamus* had been obtained, calling upon the County Council of the West Riding of Yorkshire to show cause why they, as the licensing authority for the public performance of stage plays for the said riding, should not hear and determine an application by one William Ritchie for a licence for the public performance of stage plays in the Princess Theatre, at Hoyland Nether, near Barnsley.

The theatre was erected in 1893, and the then proprietor applied for a theatre licence, and a licence was given him upon his giving an undertaking that he would not apply to the Excise authorities for a licence for the sale of intoxicating liquors, this condition being imposed because there was a public-house within twenty yards of the door of the theatre.

In this way the licence was granted three times.

In 1895 the present applicant became the proprietor, and he asked for a new licence. He was asked whether he would renew the undertaking given by his predecessor, and he replied he would not; thereupon the Licensing Committee refused the licence.

The applicant then offered to give the undertaking, if he could do so without prejudice to an appeal.

The Licensing Committee, under those circumstances, granted the licence, and the applicant then obtained a rule *nisi*.

The question raised in this case was whether it was within the competence of the Licensing Committee to impose such a condition as they had here done. It was stated that where there was a theatre licence an excise licence could be obtained without a justices' licence.

Asquith, Q.C. (*Roskill* with him), showed cause against the rule.—6 & 7 Vict. c. 68 provides for the granting of theatre licences by justices. Then by the Local Government Act, 1888, s. 7, such licensing authority was transferred to the county council. 5 & 6 Will. 4, c. 39, provides that if a man has a theatre licence he may get an excise licence without also getting a justices' licence. The discretion of the licensing authorities is absolute: *Ex parte Harrington*, 4 Times L. R. 435. The committee had not exceeded their authority, and had a right to impose conditions: *Reg.* v. *Silvester*, 31 L. J. M. C. 93, 10 W. R. C. L. Dig. 2.

Macmorran, Q.C. (*F. Low* with him), in support of the rule.—The Licensing Committee have no such discretion as they claim, and cannot impose such a condition. What they have done is an usurpation of authority which the Legislature never intended them to have.

CAVE, J.—I am of opinion that this rule must be discharged. It is a little difficult to see, and therefore difficult to lay down, and I do not desire to lay down, what are the rules by which the discretion of the committee is to be guided in this case. It is enough to say that some discretion, at all events, is reposed in the committee; and when it is reposed

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

in the committee it is they who are to exercise the discretion, and not the Court of Queen's Bench. Unless the court can see clearly that they have not exercised their discretion properly, or have allowed considerations which ought not at all to influence them to decide the case, I do not think it is for the court to interfere in the matter.

In this case, however, I can see nothing that can reasonably be taken exception to in the action of the Licensing Committee. It is possible that an objection might have been raised if they had passed a general rule that in no circumstances should a theatre be licensed unless the licensee would undertake not to apply for an excise licence. But that has not been done. In this case it has been left to the committee to have regard to the circumstances of each particular case which comes before them. They had here to consider a variety of circumstances. The necessity of having liquor sold may vary very much, according to the position of the place itself or of the theatre. It is a matter which they might very fairly and properly take into their consideration that there was a place where liquor could be obtained within twenty yards of the theatre itself. I cannot for a moment bring myself to say that they have exercised their discretion wrongly in this matter, and the discretion being reposed in them, and being exercised in a manner which I certainly cannot say was wrong, it seems to me that the application is not supported, and that the rule consequently must be discharged.

WILLS, J.—I am of the same opinion. The Lord Chancellor, in the case of *Sharp* v. *Wakefield*, 39 W. R. 561, [1891] A. C. 173, at p. 179, lays down very clearly the sort of discretion which is to be exercised in matters of this kind. He says: "And 'discretion' means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's case*, 5 Rep. 100*a*—according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself."

Now, applying those principles, is there anything which the County Council have taken into consideration in this matter which is not within those limits—"to which an honest man competent to the discharge of his office ought to confine himself"? It seems to me that the very fact that an excise licence may be got practically as a matter of course if the theatre licence is granted is one of the things that a man who wished to do his duty in this matter could not help taking into consideration. One of the grounds upon which it is well recognized that justices in special sessions may fairly refuse a licence to a public-house is that there are too many in the immediate neighbourhood where the house is proposed to be opened. They refuse the licence very much on the same grounds on which it is refused here—namely, that if the man got the alehouse licence he could get the excise licence as a matter of course. That was a matter which they would take into their consideration. It might as well be said that they had no right to take that into consideration in granting or refusing an alehouse licence. It seems to me that they might perfectly well have taken this view. The grant of this licence will necessarily practically carry with it a licence to sell liquors within the walls of the theatre. There is a public-house already twenty yards off. This is multiplying facilities for drinking in a neighbourhood where it is not safe to do so, and where to do so would probably lead to disturbance and disorder. If that is not a good ground for exercising a discretion, I do not know what can be. Mr. Macmorran has pointed out that the licensing authority may make it very difficult to question what it has done by simply refusing the licence and not saying why they do so. I suppose that was intended as a sort of warning to the County Council in case he should be successful in getting the case sent back to them, that they must not suppose that as a matter of course they can get round a decision against them by simply holding their tongues. I must say in this case I think this particular authority has been perfectly straight about it and told everybody exactly what they meant to do and why they meant to do it, and they come honestly to ask the court whether they were right or wrong in what they did. I think they are right, and therefore this rule must be discharged.

Rule discharged with costs.

Solicitors, *Badham & Williams*, for *Trevor Edwards*, Wakefield; *Andrew Wood & Co.*, for *Newman & Bond*, Barnsley.

Q. B. Div.
(Pollock, B., and Bruce, J.)

May 13.

THE RHYMNEY IRON CO. (LIMITED) (*Appellants*) *v.* FOWLER (SURVEYOR OF TAXES) (*Respondent*). (*a*.)

Inland revenue — Income tax — Deductions — Money wholly laid out for purposes of trade—Colliery company — Contributions to Coalowners' Association — Income Tax Act, 1842 (*5 & 6 Vict. c.* 35), *s.* 100, *Schedule D, rules applying to the first and second cases, rule* 1.

The owners of a colliery were members of a coalowners' association, and paid to the funds of that association certain sums of money in return for which the association indemnified them against losses in case of strikes. In returning the amount of their profits for the purposes of the Income Tax Act, the colliery owners claimed to deduct the yearly average of the excess of their contributions over the amounts received as indemnities.

Held, that the deductions claimed could not be allowed, as the subscriptions paid to the association were not "money wholly and exclusively laid out or expended for the purposes of" the trade carried on by the colliery owners, within the meaning of the first of the rules applying to both the first and second cases in Schedule D, section 1, *of 5 & 6 Vict. c.* 35.

Case stated by the Commissioners of Income Tax.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts, held at the Police Court, Tredegar, on the 30th of October, 1895, the Rhymney Iron Co. (Limited) appealed against an assessment made upon the company as colliery proprietors under Schedule D of the Income Tax Acts for the year 1895-96, on the ground that in arriving at the profits assessable no deduction had been made for the sums contributed by the company to the Monmouthshire and South Wales Coalowners' Association.

The amount claimed as a deduction was £601 5s., being the yearly average of the excess of their contributions over the amounts received as indemnities during the five years to the 5th of April, 1895.

The appellant company were members of the said association, and paid to the funds thereof the subscription provided for in a deed of arrangement.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The appellants argued that the payments were proper deductions, inasmuch as they were disbursements wholly and exclusively laid out or expended for the proper business purposes of the colliery.

Rule 63 shows what subscriptions are payable by members of the association.

Rules 80, 81, 82, and 84 provide for the support by the association of any member by way of indemnity on a scale laid down.

The appellants urged that the subscriptions made to the association should be treated as an insurance against loss caused by labour disputes; that these disbursements were made exclusively for the purposes of the trade, being made solely to secure and indemnify the subscriber against loss or diminution in his general annual receipts.

The Surveyor of Taxes contended that by section 8 of 29 & 30 Vict. c. 36 collieries were to be assessed according to the rules prescribed by Schedule D of 5 & 6 Vict. c. 35, so far as the same were consistent with the rules laid down in No. III. of Schedule A of the same Act; that the deduction claimed was not admissible, inasmuch as it did not fall within the scope of the deductions allowed by the rules of either Schedule A or Schedule D; that the balance of profits and gains had repeatedly been held in the Exchequer courts to be the difference between the receipts and the expenditure necessarily incurred in obtaining those receipts; that the contributions to the coal-owners' association was purely voluntary, and could cease at the option of the payer, and formed no part of the working expenditure of the colliery; that it had been clearly decided in the case of *Watney* v. *Musgrave*, 28 W. R. 491, 5 Ex. D. 241, that the costs and expenses to be deducted from the receipts are merely and only the costs and expenses of production of the articles; that the contributions are of a totally different character from the mere cost of production, and further, that they were not a necessary payment in working the colliery, inasmuch as several colliery proprietors in the district did not subscribe to the association, but still succeeded in carrying on their business.

The commissioners decided that the subscriptions were not admissible as absolutely necessary working expenses of the colliery, and confirmed the assessment.

The question stated for the opinion of the court was, Were the contributions paid to the Monmouthshire and South Wales Coalowners' Association a proper deduction in arriving at the profits of a colliery for income tax purposes?

Asquith, Q.C. (*Muir Mackenzie* with him), for the appellants.—The company were entitled to make these deductions, for the money paid by them to the association was money wholly and exclusively laid out or expended for the purposes of maintaining the colliery as a going concern, and therefore came within section 100, Schedule D, of the Income Tax Act, 1842.

Sir R. Webster, A.G. (*Danckwerts* with him), for the respondent.—The payments made to the association were merely voluntary contributions, which might cease at any time. They were not part of the expenses of maintaining the colliery as a going concern. The deductions claimed could not be allowed, as they did not fall within the rules of either Schedules A or D.

Asquith, Q.C., replied.

POLLOCK, B.—I confess that I do not feel any difficulty in deciding this case, although one always has in these cases a feeling that it seems hard on a man, doing what is prudent, that he should not when he comes to face the Income Tax Commissioner be in the same position as if he were facing trustees, or somebody to whom he had to render an account of how money was spent. But that is not the guiding rule in these cases at all. We must go, as has been said before by many judges, by the words of the Act of Parliament, and we must not allow any item in favour of the person who is taxed, merely because it is an item which would properly find its way into a profit and loss account between a man and his partners, or as kept for himself. There are a great many things that a prudent trader might treat as deductions, because he wished to make a fund to provide against future accidents and things of that kind, which are not dealt with at all by the Income Tax Acts.

Now in the present case this institution, which the commissioners themselves say is a very useful one, is an association whereby, according to rule 63, a subscription for every ton is payable by a member. Then by rule 81 "a member shall be paid an indemnity on any deficiency of actual daily output up to and not in excess of the tonnage assured, to be calculated upon an average of the actual output per day." This is not the case of a man who is doing something in order to keep up the colliery as a going concern. It is not like a man who is keeping a reserve, either of working power or of money, for the purposes of working the colliery. It is an indemnity against what may happen from many causes, especially in the case of strike, namely, that the colliery is not working, and while that is so there is a loss—as the learned counsel for the appellants very properly put it, not merely the loss of the daily earning of the colliery, but also of the deterioration of the colliery while it is not being worked, and it may be flooded or injured in other ways. When we come to the words of the deductions disallowed, which are these, "Any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade," it seems to me, without adding to those words, it would be sufficient to say: "This is not money laid out for the purposes of such trade; it is money laid out in order to provide for an unfortunate contingency, by reason whereof the trade cannot be worked." That is a very different thing. It is true that the judges have sometimes said that "expended for the purposes of such trade" means "for the purposes of carrying on such trade." I do not think myself that it is necessary to make that addition in order to come to the conclusion at which I have arrived. I must say this, that not only has the case of *Watney* v. *Musgrave* nothing to do with it, but I doubt very much if this case could be brought within the principle of *Watson* v. *The Royal Insurance Company*, *ante*, p. 89, [1896] 1 Q. B. 41, for reasons which I need not now go into.

In the result our judgment must be for the Crown.

BRUCE, J.—I am of the same opinion. I think we cannot extend the words in the first rule "expended for the purposes of such trade" to include expenses incurred to meet the contingency of loss while the trade is not being carried on. I was very much struck at first with the argument of the learned counsel for the appellants when he said the expenses were expenses incurred for the purpose of maintaining the colliery as a going concern, for the maintenance of the machine; but it is not for the maintenance of the machine for the purpose of carrying on the business, but it is for the maintenance of the machine while the business is not being carried on. I do not think we can give that extended meaning to the words.

Appeal dismissed with costs, and judgment for the Crown.

Solicitors for the appellants, *H. Becher*, for *Simons & Sons*, Pontypridd.

Solicitor for the respondent, *Solicitor of Inland Revenue.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills, J.) May 12.

SOUTH STAFFORDSHIRE WATERWORKS CO. *v.* SHARMAN. (*a*.)

Detinue—Finding of goods—Title of finder—Rings found in pool—Title of owner of pool as against finder.

Where an owner of land has a de facto *possession of the land and an actual control over the same, a chattel found upon or beneath such land is presumed to be in the possession of the owner of the land, who can claim possession of the chattel from the finder.*

Appeal by the plaintiffs from the Lichfield County Court.

The action was an action of detinue to recover two gold rings, as the property of the plaintiffs, found by the defendant in the Minster Pool, Lichfield, while the defendant was in the plaintiffs' employment. The plaintiffs claimed the return of the rings or £5 for their value, and £1 damages for their detention.

The plaintiffs were the freeholders of the land covered by the Minster Pool, situate near the Cathedral, Lichfield.

The defendant was employed by the plaintiffs, with about forty other labourers, to clean out the pool, and while the defendant was so employed he found in the mud from the bottom of the pool the two gold rings in question. The plaintiffs demanded the rings, but the defendant refused to deliver them up, but he afterwards placed the rings in the hands of the police, with whom they remained a considerable time. The police endeavoured to find the original owner, but failed to do so, and they afterwards handed the rings back to the defendant from whom they had received them.

The plaintiffs then demanded the rings from the defendant, but the defendant refused to deliver them up, and the present action of detinue was then brought.

It was proved as a fact that there was no special contract between the plaintiffs and the defendant as to giving up any articles that might be found.

For the plaintiffs the cases of *Reg.* v. *Rowe*, 7 W. R. 236, 28 L. J. M. C. 128, and *Elwes* v. *Brigg Gas Co.*, 35 W. R. 192, 33 Ch. D. 562, were cited, and it was contended that the present case was governed by the principles acted upon in those two cases, and the plaintiffs also relied on Pollock and Wright on Possession, pp. 40-41.

The defendant relied on *Armory* v. *Delamirie*, 1 Sm. Lead. Cas., 10th ed., p. 343, and *Bridges* v. *Hawkesworth*, 21 L. J. Q. B. 75.

The learned county court judge decided, on the authority of *Armory* v. *Delamirie* and *Bridges* v. *Hawkesworth*, that the defendant had a good title against all the world except the true owner, and he gave judgment for the defendant with costs, with leave to appeal on the terms that the plaintiffs should pay the defendant's costs in any event.

The plaintiffs appealed.

(*a*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

W. Wills, for the plaintiffs.—The learned judge was wrong in finding for the defendant. The plaintiffs were the freeholders of this land, and they had not only the possession, but the *de facto* control over the pool and the contents of the pool. Everything found in the pool was therefore presumptively in the possession of the plaintiffs. *Armory* v. *Delamirie* does not apply to such a case as this, nor does *Bridges* v. *Hawkesworth* apply, as there the bundle of notes was found in a part of the shop to which customers had a right to go. The principles applicable are those laid down in *Reg.* v. *Rowe*, where a piece of iron found in a canal was held to be presumptively the property of the canal company; in *Elwes* v. *Brigg Gas Co.*, where a prehistoric boat found in the soil was held to be in the possession of the freeholder of the soil. [He was stopped.]

Disturnal, for the defendant.—I admit that if there is a *de facto* control over the place where the article is found the article presumably belongs to the person who has such control. Here, as in *Bridges* v. *Hawkesworth*, there was no actual or *de facto* control by the plaintiffs over the pool or the contents of the pool. The principle therefore laid down in *Bridges* v. *Hawkesworth* applies to this case, as well as the same principle laid down in *Armory* v. *Delamirie*. The onus is on the plaintiffs, and they have not discharged that onus, and have not shown that the mere ownership of land proves a presumptive ownership of every chattel found on the land.

He also referred to *Reg.* v. *Clinton*, Ir. Rep. 4 C. L. 6, 18 W. R. C. L. Dig. 29; and *Brew* v. *Haren*, Ir. Rep. 11 C. L. 198, 25 W. R. Dig. 248.

Lord RUSSELL OF KILLOWEN, C.J.—In this case I think the learned judge was wrong, and his judgment must be reversed. The case raises an interesting question. It is no doubt correct that before the plaintiffs can succeed they must show that they had a *de facto* control over this particular *locus in quo* and its contents. Can it be said that this pool and its contents were under the control of the plaintiffs? I think they were under the control of the plaintiffs, just as the iron found in the canal in *Reg.* v. *Rowe*. I think that the principles on which this case ought to be decided are well laid down in Pollock and Wright on Possession, p. 41: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also; and it makes no difference that the possessor is not aware of the thing's existence. So it was lately held concerning a prehistoric boat imbedded in the soil. It is free to anyone who requires a specific intention as part of *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession, constituted by the occupier's general power and intent to exclude unauthorized interference." That passage is entirely applicable to this case, and it shows the difference between the present case and some of the cases referred to on behalf of the defendant, of things thrown away into a public place or into the sea, where there was not in anyone a real *de facto* possession or a general power and intent to exclude unauthorized interference. *Bridges* v. *Hawkesworth* is a case standing by itself and on its own special grounds, and I think it was rightly decided. There a person had dropped a bundle of banknotes in a shop—in the part of the shop that was open to the public; and it was held that a customer who came in and picked up the bundle was entitled to the notes as against the shopkeeper, and the real ground of the decision is that given by Patteson, J.: "The notes never were in the

custody of the defendant" (the shopkeeper) "nor within the protection of his house before they were found." The general principle seems to be this, that where there is possession of a house or land with a manifest intention to exercise control over it, and with actual control over the particular *locus in quo*, then if a chattel is found on it by a servant or a stranger the presumption is that the thing found belongs to the owner.

For these reasons I think the judgment must be for the plaintiffs.

WILLS, J.—I entirely agree.

Appeal allowed. Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Burton, Yeates, & Hart*, for *Johnson, Barclay, Johnson, & Rogers*, Birmingham.

Solicitors for the defendant, *Nelson & Son*, for *H. S. Chinn & Son*, Lichfield.

C. C. R.
(Lord Russell of Killowen, C.J., Pollock, B., Hawkins, Cave, and Wills, JJ.)

April 25; June 16.

REG. *v.* LILLYMAN. (*a*.)

Criminal law—Rape and indecent assault—Evidence—Particulars of complaint made by prosecutrix—Admissibility.

Upon the trial of a prisoner on a charge of rape or indecent assault or kindred offences against women the particulars of a complaint made by the prosecutrix as soon as possible after the acts complained of may be given in evidence as part of the case of the prosecution for the purpose of enabling the jury to judge whether the conduct of the prosecutrix was consistent with her sworn testimony that the acts complained of were done against her will.

Case stated by Hawkins, J.

The facts and arguments sufficiently appear in the judgment.

J. E. Fox, for the prisoner.

Sir R. Finlay, S.G. (*Henry Sutton* and *Cracroft* with him), for the prosecution.

Cur. adv. vult.

June 16.—The judgment of the COURT (Lord RUSSELL OF KILLOWEN, C.J., POLLOCK, B., and HAWKINS, CAVE, and WILLS, JJ., was delivered by

HAWKINS, J.—The prisoner was tried before me at the Nottingham Assizes upon an indictment containing three counts.

The first charged him with an attempt to have carnal knowledge of one Florence Sevestre Green, a girl above the age of thirteen and under the age of sixteen. The second with an assault on the same girl with intent to ravish her. The third with an indecent assault, also upon the same girl. The girl was examined as a witness in support of these charges and deposed to the acts she complained of having been committed without her consent.

For the Crown, evidence was tendered in chief of a complaint made by the girl to her mistress, in the absence of the prisoner, very shortly after the commission of the acts charged, and it was proposed to ask the witness called for that purpose to state the details of the complaint in the language used by the girl. Counsel for the prisoner (Mr. Fox) objected, first, that the complaint could not be given in evidence at all; and, secondly, that even if the fact of a complaint having been made was admissible, the particulars of it could not be elicited in the examination in chief. I overruled both objections, and the complaint with full particulars was deposed to by the witness. The jury found the prisoner guilty on the first count only. That, however, does not affect the question we have to decide, because, although to establish guilt upon that count it was not essential to prove want of consent, yet, as the girl had emphatically stated that whatever was done was against her will, the reason which, in our opinion, as it will appear, made the complaint evidence upon the second and third counts were equally applicable to the first. It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the *res gestæ*, can be admitted.

It clearly is not admissible as evidence of the facts complained of; those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness. And, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted.

The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains.

In every one of the old text-books proof of complaint is treated as a most material element in the establishment of a charge of rape or other kindred charge. In Hawkins' Pleas of the Crown, book 1, c. 41, s. 3, it is said: "It is a strong but not a conclusive presumption against a woman that she made no complaint in a reasonable time after the fact"; and in Blackstone's Commentaries, vol. 4, c. 15, p. 211, referring to the time when Bracton wrote, in Henry the Third's reign, it is said: "But in order to prevent malicious accusations it was then the law that the woman should immediately after, *dum recens fuerit maleficium*, go to the next town and there make discovery to some credible persons of the injury she has suffered." Later on, at p. 213, it is said: "And first the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon circumstances of fact that occur in that testimony. For instance, if the witness be of good fame, if she presently discovered the offence and made search for the offender . . . these and the like are concurring circumstances which give greater probability to her evidence. But, on the other side, if she be of evil fame and stand unsupported by others; if she concealed the injury for any considerable time after the opportunity to complain; if the place where the fact was alleged to be committed was where it was possible she might have been heard and she made no outcry, these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned."

It is too late, therefore, now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily after the acts complained of as could reasonably be expected.

We proceed to consider the second objection, which is that the evidence of complaint should be limited to the fact that a complaint was made, without giving any of the particulars of it.

No authority binding upon us was cited during the argument either in support of or against the objection. We must therefore determine the matter upon

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

principle. That the general usage has been substantially to limit the evidence of the complaint to proof that the woman made a complaint of something done to her, and that she mentioned in connection with it the name of a particular person, cannot be denied; but it is equally true that judges of great experience have dissented from this limitation, and of those who have adopted the usage none have ever carefully discussed or satisfactorily expressed the ground upon which their views have been based.

Rex v. *Brazier*, decided in 1779, is the earliest authority I propose to cite as throwing any valuable light upon the subject. Before that case there existed an impression in the minds of some of the judges that, although a child incapable of understanding the nature and obligations of an oath was not a competent witness, nevertheless, upon a charge of rape or assault with intent to commit that crime, she might and ought to be heard without oath to give the court information, and that upon such unsworn information the accused person might be convicted. In *Rex* v. *Brazier*, tried before Buller, J., and reported in East P. C. 443, and Leach C. C. 199, that learned judge went still further, and admitted as evidence such information on the testimony of third persons to whom it was first given. There the prisoner was indicted for an assault with intent to commit a rape upon a girl under seven years of age. The girl herself, by reason of her then presumed incompetency to be sworn, was not produced as a witness on the trial; inasmuch, however, as she had on the afternoon of the day on which the outrage was charged to have been committed immediately on her coming home made a statement to her mother (though not in the presence of the prisoner) of the full particulars of the alleged assault, her mother was allowed to prove this statement, and it was left to the jury as evidence of the facts complained of, and practically upon it the prisoner was convicted. The case was afterwards twice considered by the judges. Upon the first occasion two of them (Gould and Willes, JJ.) expressed a view that the girl's statement was admissible as part of the transaction itself. This view was not, however, adopted by the rest of the judges; and on the second occasion they were all unanimously of opinion that no testimony whatever could legally be received except upon oath,* and that no evidence on oath of the commission of the crime having been given, the evidence of the girl's statement to her mother ought not to have been received. This case, therefore, in effect decided that the mere complaint is no evidence of the facts complained of, and that the admissibility of the evidence of the complaint is dependent upon proof of the facts by sworn or other legalized testimony. It is obvious, however, that upon the assumption that the complaint was admissible in evidence, it was in the case referred to admitted with all its details.

When and for what reason the proof of the complaint was first limited to answers to such questions as these: "Did she make a complaint?" "Did she mention a name?" "Whose name?" &c., I have not been able to discover. *Rex* v. *Clarke*, 2 Stark. 243, is cited in several text-books on criminal evidence as an authority that in proving the complaint the particulars of it cannot be given in evidence, but the ruling of Holroyd, J., certainly does not go to that extent. That learned judge ruled, indeed, that the fact of the woman having made a complaint was admissible in evidence, as also was a description of her state and appearance at the time; but he did not rule that the particulars of such complaint could not be given in evidence; he only ruled, and in our opinion correctly ruled, that they were not evidence of the truth of her complaint or the statements of fact on which it is based. In this sense the ruling is cited in 1 Phillips on Evidence, p. 204, and in this sense we adopt it as settled law. That case is clearly not an authority for the limitation of the evidence of the complaint.

In *Reg.* v. *Walker*, 2 Moo. & Rob. 212 (1839), on the trial of a person for assaulting a female with intent to commit a rape, Parke, B., permitted a relative of the woman to whom she had made immediate complaint to give evidence generally that such complaint was made, but refused to allow the witness, on examination in chief, to state the particulars of it, upon the ground that according to the usage which had then obtained such particulars should not be given, but that it should be left to the prisoner's counsel to bring the details of the complaint before the jury if he thought fit so to do. It is clear, however, that the learned Baron did not approve of such usage, for he prefaced his ruling by saying: "The sense of the thing certainly is that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix and all that she then said; but for reasons which I could never understand the usage has obtained."

Reg. v. *Megson and Others*, 9 C. & P. 420 (1840), was an indictment against the prisoners for a rape on a woman who had since died without having made any admissible deposition which could be laid before the jury. That she had been ravished by somebody was beyond all question. On the part of the prosecution it was sought to put in evidence a detailed account of the transaction in the shape of a complaint by the woman with a view by it alone to show the prisoners to be the guilty persons. Rolfe, B., rejected it, saying: "There is a wide difference between receiving such statements as confirmatory of the prosecutrix's credibility in a charge of rape on which she is examined as a witness, and a case like the present where the complaint made is to be received as independent evidence." In summing up he added: "In ordinary cases of rape, when a witness describes the outrage in the witness-box, evidence of her complaint soon after the occurrence of the outrage is properly admissible to show her credit and the accuracy of her recollection." This case is in our opinion improperly cited as an authority for excluding the particulars of the complaint. We look upon it only as a ruling that the particulars could not be used as independent evidence of the facts alleged, to the same effect as was, according to our interpretation, the ruling in *Rex* v. *Clarke*. The last few words of the summing up rather indicate that Baron Rolfe's view was that for the purpose of confirmation merely the details ought to be given. How otherwise, one might well ask, could the "woman's credit and the accuracy of her recollection" be tested by it?

Reg. v. *Guttridge and Others*, 9 C. & P. 471 (1840), was a very similar case. The prosecutrix was absent when the trial took place. It was sought to put in her complaint made on the following day after the alleged outrage. Parke, B., thought it safer to reject the evidence on the ground that it was not part of the *res gestæ*, but only confirmatory, evidence which could not be used as the prosecutrix had given no evidence. There is nothing in that case to suggest that the learned baron intended to rule that if evidence of the complaint were admissible the particulars ought to be excluded.

In *Reg.* v. *Osborne*, Car. & M. 622 (1842), on an indictment for rape, the prosecutrix on oath stated

* Since the Criminal Law Amendment Act, 1885, under the provisions of that Act and subject to such corroboration as therein required, the unsworn testimony of a child of tender years may be received.

that soon after the alleged outrage, and as she was returning home, she made complaint to a Mrs. Partridge who was called as a witness to confirm her statement. The counsel for the prosecution was allowed to ask, "Did the prosecutrix make any complaint?" to which the answer was, "Yes." He was then allowed to ask, "Did she name any particular person?" to which she also said, "Yes." It was then proposed by the counsel to ask, "Whose name was mentioned?" To this it was objected that the question was inadmissible, upon the ground that though the fact of the complaint was admissible as showing the prosecutrix was not then an assenting party, the name was an important particular as against the prisoner, and therefore could not be asked; and the ruling of Pattison, J., in the case of *Rex* v. *Wink*, 6 C. & P. 397 (hereafter referred to), was cited in support of the objection. In support of the question it was urged that the whole complaint was admissible as part of the *res gestæ*. Creswell, J., ruled that the statement of the prosecutrix did not form part of the *res gestæ* (treating *Rex* v. *Wink* as a direct authority against the question). In this ruling we agree, but if it had been pressed upon that learned judge that the complaint in all its detail was nevertheless a fact admissible for the purpose of showing consistency of conduct on the part of the woman we doubt if he would have rejected the evidence. At all events the case cannot be taken as a ruling upon the point now under discussion, for the decision was founded entirely upon the statements not being part of the *res gestæ*.

In support of the view that all the particulars of a complaint are admissible, it was pointed out that the late Sir James F. Stephen, in his digest of the law of Evidence, note 5 to article 8, says: "I heard Willes, J., rule that they were on several occasions, vouching Parke, B., as his authority." And, after saying that Bramwell, B., had been in the habit of admitting the whole of the complaint, he adds his own view that such practice "is certainly in accordance with common sense." Two reported cases were brought to our attention in which such view was acted upon. In *Reg.* v. *Eyre*, 2 F. & F. 579 (1860), tried before Byles, J., on a trial for rape, the prosecutrix being examined in chief was asked whether she had made any complaint, and what she said. To an objection made by the prisoner's counsel Byles, J., said: "Whatever she said immediately after the occasion and what was said to her in answer is equally evidence." The latter part of this ruling is open to question. In *Reg.* v. *Frederick Wood*, 14 Cox. 46 (1877), tried before Bramwell, L.J., at Chester, the prosecutrix gave evidence that the prisoner came to a room in an inn where she was barmaid when she was alone, committed a rape upon her, and then left the house, and that an hour and a half afterwards a customer came in to whom she made a complaint, mentioning the prisoner's name in connection with it. It was proposed for the prosecution to ask her what she said to the customer and his reply. Bramwell, L.J., said: "I shall admit the conversation; you give evidence of a complaint being made and use the name of the prisoner, leaving it to the jury to infer that the girl said that he had committed the offence we are now trying him for; I do not see why you should not give in evidence all she said when she did so complain, leaving it to the jury to judge of the value of such testimony." The girl then told in minute detail the particulars of all that had, as she alleged, been done to her by the prisoner and the customer's replies to her story. This customer was also called, and spoke again in detail as to the complaint.

I am not aware of any other cases directly bearing upon the question before us. Many others were cited, all of which we have examined; but finding they were decided upon other principles of the law of evidence than that which governs the present case, and that they render no assistance to us in our consideration of it, we abstain from any discussion or expression of opinion upon them.

After very careful consideration, we have arrived at the conclusion that we are bound by no authority to support the exising usage of limiting evidence of the complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so. The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box—negativing her consent and affirming that the acts complained of were against her will—and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her condition, demeanour, and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it? Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint? And are the jury bound to accept the witness's interpretation of her words as binding upon them without having the whole statement before them, and without having the power to require it to be disclosed to them, even though they may feel it essential to enable them to form a reliable opinion? For it must be borne in mind that if such evidence is inadmissible when offered by the prosecution the jury cannot alter the rule of evidence and make it admissible by asking for it themselves.

In reality, affirmative answers to such stereotyped questions as these: "Did the prosecutrix make a complaint?" (A very leading question, by the way.) "Of something done to herself?" "Did she mention a name?" amount to nothing to which any weight ought to be attached; they tend rather to embarrass than assist a thoughtful jury, for they are consistent either with there having been a complaint or no complaint of the prisoner's conduct. To limit the evidence of the complaint to such questions and answers is to ask the jury to draw important inferences from imperfect materials—perfect materials being at hand, and in the cognizance of the witness in the box. In our opinion nothing ought unnecessarily to be left to speculation or surmise.

It has been sometimes urged that to allow the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury they would naturally so treat it. But it never could be legally so left, and we think it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated. With such a direction we think the interest of an innocent accused would be more protected than they are under the present usage. For when the whole statement is laid before the jury they are less likely to draw wrong and adverse inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint of any offence committed by the accused. Moreover, the present

usage and consequent uncertainty in practice (for the usage is not universal) provokes many objections to the evidence on the part of the prisoner's counsel, and these are generally looked upon with disfavour by the jury; and the very object of confining the evidence of the complaint to the few stereotyped questions we have referred to is often defeated by a device, not to be encouraged, by which the name of the accused, though carefully concealed as an inadmissible particular of the complaint, is studiously revealed to the jury by some such question and answer as the following: "In consequence of that complaint did you do anything?" "Yes, I went to the house of the prisoner's mother, where he lives, and accused him." This seems to us to be an objectionable mode of introducing evidence indirectly which if tendered directly would be inadmissible. We are aware that Pattison, J., is reported in *Rex* v. *Wink*, 6 C. & P. 397 (1834), to have suggested that such a mode of obtaining the evidence might be adopted; but we cannot help thinking that there must be some inaccuracy in the report, and the suggestion did not meet with the approval of Creswell, J., in *Rex* v. *Osborne*, 2 C. & K. 624, nor of Brett, J., in *Reg.* v. *Taylor*, 13 Cox. 77 (1875), nor can we approve of it.

In the result our judgment is that the whole statement of a woman containing her alleged complaint should, so far as it relates to the charge against the accused, be submitted to the jury as a part of the case for the prosecution, and that the evidence in this case was therefore properly admitted.

The conviction must be affirmed.

Conviction affirmed.

Solicitors for the prisoner, *Williams & Son*, Lincoln.

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — June 22.

WHITTAKER *v.* "SCARBOROUGH POST" NEWSPAPER CO. (LIMITED). (*a.*)

Practice—Discovery—Interrogatories—Libel in newspaper—Circulation of newspaper.

In an action for libel against the proprietors of a newspaper the plaintiff delivered an interrogatory asking the number of copies printed and circulated of the issue of the newspaper containing the alleged libel. The defendants answered that a considerable number of copies were printed and published.

Held, that the answer was sufficient.

Parnell *v.* Walter, 38 *W. R.* 270, 24 *Q. B. D.* 441, *overruled.*

Appeal from an order made by Collins, J., at chambers.

The action was brought against the defendants, the proprietors of the *Scarborough Post*, for damages for an alleged libel published in their newspaper. The place of trial was Leeds.

The plaintiff delivered an interrogatory asking the defendants what was the number of copies printed and circulated of the issue of the *Scarborough Post* containing the words complained of.

The defendants answered that a "considerable number" of copies were printed and published.

The judge, affirming the master, made an order for a further and better answer, but gave leave to appeal.

The defendants appealed.

Montague Lush, for the defendants.—The judge at chambers felt bound by the decision in *Parnell* v. *Walter*, 38 W. R. 270, 24 Q. B. D. 441, to make an order for a further answer. That case, however, was wrongly decided. It is absurd to ask by an interrogatory as to the circulation of the *Times*. That case was disapproved in *Rumney* v. *Walter*, 40 W. R. 174. Here the action is to be tried at Leeds, and the answer, even if the interrogatory required an answer, is sufficient.

Scott Fox, for the plaintiff.—The defendants are bound to state approximately what the circulation of the issue of their newspaper that contained the libel was. A Leeds jury can have no knowledge of the circulation of the *Scarborough Post*, a local newspaper in a seaside watering place. An interrogatory as to the circulation of the *Times* or other well-known newspaper may be unreasonable; but the principle, though wrongly applied in *Parnell* v. *Walter*, applies in the case of small local newspapers.

He referred to *James* v. *Carr*, 7 Times L. R. 4.

Lord ESHER, M.R.—This is an action of libel against the proprietors of a newspaper. Now if a libel is a serious one, the jury will give substantial damages though it may be published only a small number of times. If, on the other hand, the jury are of opinion that the libel is of such a character that it ought to be treated with contempt, though published very widely, they will probably give contemptuous damages. In *Parnell* v. *Walter* interrogatories as to the circulation of the *Times* were allowed, interrogatories which, as Mathew, J., said in *Rumney* v. *Walter*, were frivolous and ridiculous. It is said, however, that a jury at Leeds will not know anything about the circulation of the *Scarborough Post*. But Scarborough is a large and important watering place, frequented by Yorkshire people. The plaintiff has not ventured to swear that in his belief a jury at Leeds can know nothing about the circulation of the *Scarborough Post*. We cannot lay down that in no case can an interrogatory as to the circulation of a newspaper be put. But if *Parnell* v. *Walter* is a decision that such an interrogatory can be put in every case, even in an action against the *Times* or other known London or provincial newspaper, it is a wrong decision. The interrogatory there was a frivolous and vexatious one, and did not require an answer. The plaintiff comes here relying upon the decision in *Parnell* v. *Walter*, and asks for a further and better answer to the interrogatory. In my opinion the answer is sufficient.

KAY, L.J.—I am of the same opinion. The object of interrogatories is to enable a party to dispense with the proof of some fact which may be admitted, or to obtain information which the other party alone can give. How can a further answer to this interrogatory be material? The *Scarborough Post* is published at Scarborough, and the action is to be tried at Leeds. The answer to the interrogatory admits that a considerable number of copies of the newspaper were printed and published. It is said that a further answer is necessary to enable the jury to assess the damages. Before interrogatories could have been administered at common law, a plaintiff could not have obtained information from the defendants about the circulation of the newspaper except of the vaguest kind, such as is given here. As regards

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the decision in *Parnell* v. *Walter*, the trial was to take place in Middlesex for the sole purpose of assessing the damages, and it does seem to me impossible to say that the jury in the place where that action was to be tried would not have sufficient knowledge of the circulation of the *Times* without being told the approximate number of the copies printed and published. Therefore I should have said that no answer whatever would have been material in that case. But I do not say the same of all newspapers of merely local circulation. I can conceive a case where a jury would have the vaguest possible knowledge of the circulation of a newspaper. The present case relates to a Scarborough newspaper, and the trial is to take place at Leeds, and I think that a jury at Leeds will have sufficient knowledge of the circulation of the newspaper. But if not, the answer says that the circulation is considerable, and I cannot conceive why any further answer should be given.

A. L. SMITH, L.J.—I am of the same opinion. I venture to say that before 1890, when *Parnell* v. *Walter* was decided, such an interrogatory as in that case was never allowed. With all respect for the learned judges who decided that case, I cannot conceive a more ridiculous question. The plaintiff in an action of libel against the *Times* does not require to have the circulation of the *Times* on a particular day, and if he got the information he would not read it to the jury. It is known that the circulation of the *Times* is very great. In my opinion *Parnell* v. *Walter* was wrongly decided. Speaking for myself, I think that *primâ facie* such an interrogatory as this should not be allowed at all in actions of libel against newspapers. In my opinion the judge at chambers should say that such an interrogatory is not wanted in the case of well-known newspapers. In *Rumney* v. *Walter* and *James* v. *Carr* the right view was taken of *Parnell* v. *Walter*, and it is obvious that the court in those cases would not have made the order but for *Parnell* v. *Walter*. The real truth is that damages in an action of libel are not given for the number of publications, but for the gravity of the libel. I agree that there may be a publication of a libel in a newspaper no one knows anything about, and I do not say that the judge may not allow an interrogatory in such a case to show that the newspaper has some circulation, but such cases are rare. Here the defendants say that the circulation is considerable, and in my judgment that answer is more than sufficient.

Appeal allowed.

Solicitors for the plaintiff, *Radford & Frankland*, for *Birdsall & Cross*, Scarborough.

Solicitors for the defendants, *Iliffe, Henley, & Sweet*, for *Watts, Kitching, & Donner*, Scarborough.

From Q. B. Div.
(Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) June 22.

CHADDOCK *v.* BRITISH SOUTH AFRICA CO. (*a*.)

Practice—Discovery—Interrogatories—Company—Leave to interrogate member—Notice of application—Ord. 31, *r.* 5.

Where a company is a party to an action, notice of an application for leave to deliver interrogatories to a member of the company under ord. 31, *r.* 5, *must be served upon the member.*

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal from an order made by Collins, J., at chambers.

The plaintiff applied at chambers for an order for leave to deliver interrogatories to the defendant company, to be answered by Rutherfoord Harris, the secretary of the company in South Africa, or for leave to deliver interrogatories to Rutherfoord Harris, a member of the defendant company. No notice of this application was served upon Harris. A question having arisen at chambers as to whether Harris had resigned the office of secretary, the judge—affirming the master—made an order for leave to deliver interrogatories, to be answered by "the proper officer of the defendant company," and refused to make an order for leave to deliver interrogatories to Harris personally as a member of the company, upon the ground that he had not been served with notice of the application.

The plaintiff appealed.

Arnold Statham, for the plaintiff.—An order should be made directing Harris to answer the interrogatories, as he knows more about these matters than anyone else. The plaintiff is the person to suggest by whom the interrogatories should be answered. If Harris has resigned the secretaryship, he can be required to answer as a member of the company. Ord. 31, r. 5, does not require notice of the application to be given to him, and in *Berkeley* v. *Standard Discount Co.*, 28 W. R. 125, 13 Ch. D. 97, notice of the application was not served upon the member. The proper course, as adopted in that case, is for the member, if he objects to the order, to apply to rescind the order giving leave to interrogate him.

Lord Robert Cecil, for the defendants.—The order is in proper form. If Harris is still the secretary and is the "proper officer" to answer the interrogatories, he will have to answer. If Harris is asked to answer as a member of the company, then notice of the application ought to be given to him.

Arnold Statham replied.

Lord ESHER, M.R.—The plaintiff, having brought an action against the company, proposes to interrogate the company, and for that purpose he may ask for an order to deliver interrogatories to any member or officer of the company. The plaintiff asks to interrogate the company through a member or officer. It is a matter of discretion whether an order for leave to interrogate shall be made. When an application is made to interrogate a company by its secretary, inasmuch as it is the secretary's duty to know all the affairs of the company, I do not think that notice of the application should be given to him. But when an application is made to interrogate a company through a member of the company, as the member cannot be presumed to know all about the affairs of the company, and may or may not have the requisite knowledge, and as an order upon him personally to answer the interrogatories will put him under considerable liabilities, it is a fair rule to lay down that he should have notice of the application. The order may compel him to undertake a long inquiry, which is the business of the secretary, and not of a member; and therefore I think that notice of the application should be given to the member. It is a good rule to adopt, and the judge has a right to insist upon its observance. The plaintiff here is insisting that Harris is still the secretary of the company in South Africa. If he is still secretary, the order will compel him to answer the interrogatories. In my opinion the learned judge, in the exercise of his discretion, as there was a dispute whether Harris was still the secretary, was right in making the order in the form in which he made it. The appeal must therefore be dismissed.

KAY, L.J.—I am of the same opinion. Ord. 31, r. 5, differs from section 51 of the Common Law Procedure Act, 1854, in the addition of the word "member." The plaintiff asks for leave to deliver interrogatories to the company to be answered by Rutherfoord Harris, their secretary in South Africa, or for leave to deliver interrogatories to Rutherfoord Harris, a member of the company. As regards the first part of the order, it does not seem to me to be necessary to give notice of the application to Harris, as the application is to deliver interrogatories to the defendant company, to be answered by Harris, the secretary. There is a dispute whether Harris has resigned the office of secretary. How can the judge at chambers decide that question? It seems to me that this order is very carefully drawn—namely, that the company should answer by its proper officer. If Harris is the secretary, he would seem to be the most proper officer to answer. But the plaintiff asks for an order that Harris should answer, and therefore the second part of the application was put in. This part of the application is for leave to deliver interrogatories to Harris, not to the company, and Harris will have to answer them in his individual capacity. Harris has not been served with notice of this application, nor is he represented before us. In my opinion he should be served with notice of the application. If he were here, he might say that he knew nothing of the affairs of the company.

A. L. SMITH, L.J.—I agree. The plaintiff applies to interrogate the company by Harris, their secretary. A dispute arose whether Harris is still the secretary of the company. The judge at chambers could not try that issue, and so he confirmed the order of the master, and ordered interrogatories to be delivered to the company, to be answered by the proper officer of the company. It may be that Harris is not the proper person to answer. That being so, the plaintiff asks for an order upon Harris to answer the interrogatories personally as a member of the company. The objection taken to that part of the application is that notice of the application should be served upon him before such an order is made. In my opinion that objection is well founded.

Appeal dismissed.

Solicitors for the plaintiff, *Jaques & Co.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) June 11, 20.

BATES *v.* DONALDSON. (*a*.)

Landlord and tenant—Covenant not to assign without consent—Consent not to be unreasonably withheld—Reasonable grounds for withholding consent.

A lease granted by the plaintiff's predecessor in title contained a covenant by the lessee not to assign without the written permission or licence of the lessor, such permission or licence not to be unreasonably withheld in the case of any respectable and responsible assignee. The plaintiff, being desirous of taking possession for himself, entered into negotiations with the lessee for a surrender of the lease. The lessee offered to sell the lease for £400. The plaintiff did not immediately close with this offer, and in the meantime the lessee agreed to sell the lease to the defendant for £400. The plaintiff, while admitting that the defendant was a respectable and responsible person, refused to give his licence for an assignment of the lease to him, on the ground that he himself was willing to give the sum of £400 for the lease.

Held, that this was not a reasonable ground for withholding consent to the assignment.

Appeal from a judgment of Mathew, J., at the trial of an action without a jury.

The action was brought by Sir Edward Bates to recover possession of the premises, No. 14, Cavendish-square. A lease of the premises had been granted by the plaintiff's predecessor in title, W. A. Stanford, to Mrs. Wilson for a term of fourteen years from the 29th of September, 1888. The lease contained a covenant by the lessee not to "assign or underlet the premises without having first obtained a written permission or licence signed by the said lessor, such permission or licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee or under-tenant." The lease also contained a power of re-entry in case of any breach of covenant by the lessee.

In 1895 the plaintiff, understanding that Mrs. Wilson was willing to sell the house, and desiring to obtain possession for himself, entered into negotiations with her through an agent for a surrender of the lease by her to him. Mrs. Wilson offered to sell the lease for £400, but the plaintiff did not immediately close with this offer. On the 7th of February, 1895, the agent, having obtained authority from the plaintiff to accept the offer, called upon Mrs. Wilson for that purpose. Mrs. Wilson had, however, earlier on the same day signed an agreement to sell the lease to the defendant for £400.

The plaintiff, on being applied to for his licence for the assignment of the lease to the defendant, refused to grant it. The defendant brought an action against Mrs. Wilson for specific performance of her agreement, and, having obtained a decree, went into possession.

The plaintiff thereupon brought this action on the ground that there had been a breach of covenant which entitled him to re-enter. It was admitted by the plaintiff that the defendant was a respectable and responsible person.

Mathew, J., gave judgment for the defendant.

The plaintiff appealed.

Channell, Q.C., and *C. A. Russell* (*Sir Edward Clarke, Q.C.*, with them), for the plaintiff.—The learned judge was wrong in holding that the plaintiff withheld his licence unreasonably. The wording of the covenant shows that, even if the proposed assignee is a respectable and responsible person, there may be a reasonable ground for refusing to consent to the assignment. The reasonable ground in this case is that the plaintiff desired to have the house for himself, and was willing to give the same sum of money for the lease as the proposed assignee was willing to give. If the tenant had wished to assign the lease to her son or to some friend, the case would have been different. But it is not unreasonable for the landlord to get an advantage for himself, so long as he does not put the tenant to any disadvantage.

They cited *Barrow* v. *Isaacs & Son*, 39 W. R. 338, [1891] 1 Q. B. 417; *Lehmann* v. *M'Arthur*, 15 W. R. 877, L. R. 3 Ch. App. 496; and *Treloar* v. *Bigge*, 22 W. R. 843, L. R. 9 Ex. 151.

Bucknill, Q.C., and *J. Mulligan*, for the defendant.—The plaintiff withheld his assent unreasonably. A reasonable ground for withholding assent under this covenant must be some objection either with regard

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

to the proposed assignee himself or with regard to his probable use of the premises.

Cur. adv. vult.

June 20.—KAY, L.J., read the following judgment:—This is an action of ejectment by a landlord to recover possession of No. 14, Cavendish-square, for breach of covenant by the tenant. The covenant in question, contained in a lease for fourteen years from the 29th of September, 1888, was not to assign "without having first obtained a written permission or licence signed by the said lessor, such permission or licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee." It is plain on the face of that covenant that it is not sufficient that the proposed assignee should be a respectable and responsible person. The words clearly show that the landlord may nevertheless have some reasonable ground for refusing his consent. I shall not attempt to give any exhaustive definition of what would be in every conceivable case an unreasonable withholding of permission.

The only question which it is necessary to consider is whether in the circumstances of this case the refusal was reasonable within the meaning of this covenant. Counsel admitted, and I agree, that if the proposed assignee intended to use the house for some purpose to which the landlord might reasonably object, though such purpose was not forbidden by the lease nor by any rule of law, the landlord might reasonably refuse to permit the assignment. So I should think there might be other reasons, personal rather to the landlord than the tenant, which might justify his refusal under the terms of the covenant. In this case the plaintiff bought the interest of the original lessor with the intention, he says, of leaving the house to his wife, if she survived him, for herself and his grandchildren to live in after his death. With this object he negotiated with the lessee, Mrs. Wilson, to purchase her interest, and his agent obtained Mrs. Wilson's consent to sell her interest for £400. Not having received any further communication from the plaintiff, five days later Mrs. Wilson agreed to sell her lease to the defendant Donaldson. She did not communicate her intention to do this to the plaintiff, and of course she did not obtain his consent. She did not ask for it. She has no reason for preferring Donaldson to the plaintiff. All that she wants is to get rid of the lease and to get £400 for her interest. The plaintiff says that he has always been willing to give her £400, and he admits that he wishes to compel her to sell it to him, and that this is the reason why when an application was made for his written consent after the contract to sell to Donaldson he refused to give it. It is obvious that if the plaintiff had a right to refuse his consent, that right cannot be taken away or affected by anything done by the lessee before she asked for it. Donaldson has obtained a decree for specific performance against her. That cannot alter the rights of the plaintiff in any way. The sole question is, Was the plaintiff unreasonable in refusing his consent at the time when he was asked to give it? As the proposed assignee in this case is a respectable and responsible person, the plaintiff must show a strong reason for withholding his consent. Clearly it is not sufficient for him to say, "I want to oblige the lessee to sell to me." He must at least be able to show that at the time when the consent was refused, if that was his motive, the refusal did no harm to the lessee. I cannot find that before or at the time when the plaintiff refused his consent he had offered to buy the lessee's interest for £400 or any sum. He does not allege in his pleading that he did so. He does not offer to do so in his pleading. The plaintiff is therefore in the position of asserting simply that he is entitled to eject the defendants Mrs. Wilson and Donaldson because they have not got his written permission. That is not the contract. The lessee had a right to assign without his permission if he withheld it unreasonably. Was it reasonable to refuse without making any offer to buy for himself? If he had answered the request for permission by saying, "I was in treaty with you to buy, and was ready to give the price you asked, and I now offer it to you," the case might have been different, but that at least he ought to have done. He did nothing of the kind. On the contrary, his excuse for refusing permission was that he believed the purchaser intended to carry on at the house his business of a picture dealer, and it was only when this failed that the plaintiff set up the plea on which he now relies. On the whole, I am of opinion that the refusal was under the circumstances unreasonable, and that this appeal should be dismissed.

A. L. SMITH, L.J., read the following judgment:—This is an action of ejectment brought by Sir Edward Bates against Mr. Donaldson, and the question is, What is the meaning of the phrase that "permission to assign shall not be unreasonably withheld" in a clause in a lease? In the year 1889 Sir Edward Bates purchased of Mr. Stanford the reversion of 14, Cavendish-square, expectant upon the determination of a lease theretofore granted to Mrs. Wilson which expires in 1902. In the year 1895 Sir Edward became desirous of obtaining possession of these premises, and through an agent negotiated with Mrs. Wilson for the surrender by her to him of her lease. Mrs. Wilson asked £400 for her unexpired term. The agent was not authorized by Sir Edward Bates to accept this offer, and some days elapsed before he obtained authority from Sir Edward to agree to pay this amount to Mrs. Wilson. In the meantime she, having no contract with Sir Edward that he would give what she asked, on the 7th of February, 1895, entered into a contract with Mr. Donaldson to assign to him the residue of her term for £400. Sir Edward, as it turns out, would have given Mrs. Wilson the £400 which she asked, but when she contracted with Mr. Donaldson she did not know this. It is now admitted that Mr. Donaldson is in every way a respectable and responsible person, and that no objection can be made to him personally, nor is it suggested that he is about to use 14, Cavendish-square, in any improper or undesirable manner.

On the 11th of February, 1895, application was made to Sir Edward Bates for his licence to assign to Mr. Donaldson, and Sir Edward took exception to Mr. Donaldson as an assignee, and ultimately on the 28th of February, 1895, declined to give his assent. It must now, however, be taken that the sole reason he had for refusing his assent was because he wanted possession of the house himself, and he now seeks to eject Mr. Donaldson, who has entered into possession of the house, upon the ground that the following covenant in the lease to Mrs. Wilson has not been complied with by her. It is this: "That the lessee shall not nor will assign or underlet the demised premises for the whole or any part of the term hereby granted without having first obtained a written permission or licence signed by the lessor, such permission or licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee or under-tenant." There is in the lease a power to re-enter in case of breach of any of the covenants therein. It will be seen that it is only when a respectable and responsible person is proposed as assignee or under-tenant that this clause—as to the permission not being un-

reasonably withheld—comes into play. If the person proposed be not a respectable and responsible person, the lessor has an absolute right to refuse permission; if, however, the person proposed be respectable and responsible, then the lessor cannot unreasonably withhold his permission. This stipulation as to the permission not being unreasonably withheld (if a respectable and responsible person is obtained) releases the lessee from the covenant not to assign without permission if the permission is unreasonably withheld, and this was so held in *Treloar* v. *Bigge*.

Now, what is an unreasonable withholding of permission within the meaning of this clause? It is conceded by Mr. Channell, who appeared for Sir Edward Bates, that if a tenant was desirous of assigning to a friend, it would be unreasonable for the lessor to withhold his assent for the purpose of breaking the lease; but, it was said, if it was not to a friend, but to a stranger, and the lessor was willing to pay what the lessee wanted and as much as he could get from a stranger, it was not unreasonable to withhold his assent in order, if possible, to break the lease, if he wanted the premises for himself. This is not my reading of the clause. It is admitted that there is no case in the books which covers the present. Now, when the lessor granted the lease he parted with his interest in the premises for the entire term. The tenant during that term can assign to any respectable and responsible assignee, in which case the lessor is bound not to unreasonably withhold his permission. It is not, in my opinion, the true reading of this clause that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. This clause was inserted, in my judgment, *alio intuitu* altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender the term so that the lessor might obtain possession of the premises, which was the reason why in the present case the assent was withheld. For these reasons I think that Mathew, J., came to a right conclusion, and that this appeal must be dismissed with costs. The Master of the Rolls agrees with the judgments which have been delivered.

Appeal dismissed.

Solicitors for the plaintiff, *Witham, Roskell, Munster, & Weld.*

Solicitors for the defendant, *Norris & Norris.*

High Court of Justice.

Chan. Div. } March 10; May 1.
Stirling, J. }

ALLCARD *v.* WALKER.
In re LUCAS.
WALKER *v.* LUPTON. (*a.*)

Married woman—Settlement—Post-nuptial settlement—Covenant to settle after-acquired property—Real estate at law or in equity—Mistake—Relief in court of equity—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 77—"*Future interests*"—*Malins' Act* (20 & 21 *Vict. c.* 57), *s.* 1—*Power of Divorce Court to vary settlements—Divorce and Matrimonial Causes Acts* (20 & 21 *Vict. c.* 85, *s.* 45, *and* 22 & 23 *Vict. c.* 61, *s.* 5).

In 1877 *a married woman by a deed, separately acknowledged by her, covenanted to settle any real and personal property which might thereafter be devised or bequeathed or descend or devolve to or upon her.*

Held, that such covenant was void as to both classes of property, for section 77 *of the Fines and Recoveries Act did not apply to that which at the date of the deed of covenant was a mere possibility or expectation at some future time of an estate or interest in land; and Malins' Act* (20 & 21 *Vict. c.* 57) *did not apply to a mere expectancy in personal estate; the words in that Act, "every future interest" meaning an interest to which the married woman at the date of the disposing deed has some existing title at law or in equity.*

Where, on the 24*th of April*, 1894, *a decree was made by the Divorce Court for the variation of a marriage settlement by reason of the divorce of the wife for adultery, and such decree proceeded upon a common mistake of both the husband and wife as to what property of the wife was comprised in the settlement;*

Held, that a court of equity could grant relief to the divorced wife in respect of such mistake, but would only do so upon her undertaking to consent that any application to the Divorce Court under section 45 *of the Divorce Act*, 1857 *for a further settlement upon the husband and child of the marriage, should be dealt with in all respects as if it had been made before the* 24*th of April*, 1894, *and was being considered by the court on that day.*

The plaintiff, Georgiana Augusta Konarski, was married to the defendant Waldegrave Charles Fearn Kell on the 6th of May, 1873. There was issue of the said marriage one child only—*i.e.*, the defendant Vernon Kell, who attained his majority in 1894. No settlement or agreement for a settlement was made before or upon the said marriage. By a post-nuptial settlement acknowledged by Mrs. Kell in accordance with the requirements of the Fines and Recoveries Act, dated the 12th of June, 1877, and made between the defendant W. Kell and the plaintiff, then his wife, of the one part, and George Lucas and S. P. L. Konarski (the trustees of the settlement) of the other part, the plaintiff settled upon the trusts therein mentioned (the same being trusts of the usual nature) her share in the residuary personal estate of her uncle, James Lucas, deceased. The plaintiff further covenanted to bring into settlement any real or personal estate of the value of £500 or upwards from any one source, which should be devised or bequeathed or descend to or devolve upon or vest in the plaintiff or in the defendant W. Kell in her right.

At the date of the said post-nuptial settlement the only property to which the plaintiff was entitled was the following—that is to say, (1) an absolute interest as one of his next of kin in a share of the personal estate of the said James Lucas (who died on the 19th of April, 1874), such share being then believed to be one-fifteenth, but ultimately turning out to be two forty-fifths; (2) an interest under an appointment made by the will of Harriet F. Konarski (who died in 1871), the plaintiff's mother, in certain personal estate then in court in a suit *Lucas* v. *Lucas*, such interest being contingent on the plaintiff surviving the expiration of twenty years from the 24th of April, 1871, or previously dying leaving issue then surviving, but as to one moiety of such interest subject to a preceding life interest therein vested in Samuel Konarski, the father of the plaintiff; (3) an interest under the marriage settlement of her father and mother, dated the 24th of April, 1840, and under an appointment in execution of a power contained in that settlement made by her mother's will in certain personal estate comprised in such settlement, subject to a preceding life interest therein vested in her father; (4) an absolute interest in real and personal

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

estate under the will of George Lucas, who died on the 7th of June, 1890; (5) the one-fourth share of her father's real and personal estate on his death intestate in January, 1893.

Of the original trustees of the settlement of 1877, S. P. L. Konarski died on the 11th of December, 1887, and George Lucas died on the 7th of June, 1890; and by an indenture, dated the 8th of May, 1891, the defendants C. W. Murray and Thomas Lupton were duly appointed new trustees of the said settlement jointly with the defendant E. L. Walker.

On the 3rd of May, 1893, a decree *nisi* was made by the Divorce Court for the dissolution of the marriage between the plaintiff and the defendant Waldegrave Kell. Such decree *nisi* was made upon the petition of the defendant Waldegrave Kell, by reason of the adultery of the plaintiff with James Allcard. The decree *nisi* was made absolute on the 13th of November, 1893. On the 18th of November, 1893, the plaintiff married James Allcard, whose wife she now is. No settlement or agreement for a settlement was made before or upon such marriage. On the 5th of December, 1893, the defendant Waldegrave Kell presented a petition in the said divorce proceedings praying that the settlement of the 12th of June, 1877, might be varied in manner therein mentioned. It set out in paragraph 6 thereof the funds then alleged to be subject to the trusts of the settlement, including a sum of £4,344 Consols which had come to the hands of the trustees after the decree *nisi* had been made. Paragraphs 7, 8, and 9 set out certain funds which had not then come to the hands of the trustees, but which Mrs. Kell was entitled to; and in paragraph 10 it was stated that "the funds, shares, and interests mentioned in paragraphs 7, 8, and 9 hereof will be subject to the trusts of the said indenture of settlement of the 12th of June, 1877." Mrs. Kell, then Mrs. Allcard, put in an answer to the petition, and she thereby either expressly admitted or at all events did not dispute the allegations in the petition as to the property subject to the trusts of the settlement, and in particular paragraph 10 was not disputed. The petition was referred to the registrar for report, and in the proceedings before the registrar Mrs. Kell brought in certain proposed terms of settlement which were by the consent of all parties embodied in the report of the registrar dated the 24th of April, 1894. Such report stated (*inter alia*) that the income arising from the funds then subject to the trusts of the said settlement of the 12th of June, 1877, amounted to about £820 per annum, and that with the consent of the petitioner and the respondent it was proposed that the court should order that the trustees or trustee for the time being of the said settlement should out of the income arising from the trust funds comprised therein during the joint lives of Mr. and Mrs. Kell pay to Mr. Kell £300 per annum, and to their only son, Vernon Kell, £150 per annum from the 10th of July, 1894, and on the death of either Mr. or Mrs. Kell, and during the lifetime of the survivor pay to the said Vernon Kell £300 per annum in lieu of the said sum of £150 per annum. The registrar expressly reported that the said Vernon Kell was not separately represented on that application, but that it did not appear that on the whole his interests under the settlement of the 12th of June, 1877, would be prejudicially affected. An order varying the settlement in accordance with the report was made on the 24th of April, 1894. At the date of the decree *nisi* sums amounting in round figures to £25,000 had been paid to the trustees of the settlement in respect of interests of the plaintiff which at that date were vested in possession in her or in Mr. Kell in her right. Between the dates of the decree *nisi* and the decree absolute sums amounting in round figures to £6,000 were also paid to them. Sums amounting to about £18,500 were still payable in respect of the plaintiff's interests in the estates of her father and James and George Lucas.

The writ in this action was issued on the 2nd of May, 1895, and the plaintiff thereby claimed declarations to the following effect: (1) That all the funds transferred to the trustees of the settlement subsequent to the date of the decree *nisi* were the absolute property of the plaintiff; (2) that the share of the plaintiff in the real estate of her father was not subject to or affected by the settlement; and (3) that all the funds which had not yet come to the hands of the trustees of the settlement in respect of the plaintiff's interests in the personal estates of her father and James and George Lucas were not subject to or affected by the settlement.

No question was raised as to the sums, amounting to £25,000, which came to the hands of the trustees before the date of the decree *nisi*, and it was further admitted by counsel for the plaintiff that in the event of the plaintiff's claim to the other funds proving successful she was bound to elect, and that in the event of her electing to take adversely to the settlement (as was her intention) the surplus income of the £25,000 admitted to be effectually settled, after providing for the annual sums of £300 and £150 directed to be paid to Mr. Kell and his son by the order of the 24th of April, 1894, ought to be applied to make good what may be lost by any parties disappointed by the plaintiff's election. On behalf of Mr. Kell and his son it was admitted by their counsel that down to the 8th of April, 1895, all parties proceeded on the footing that the settlement of 12th of June, 1877, was binding on the plaintiff.

Cozens-Hardy, *Q.C.*, and *Ashworth James*, for plaintiff. —At the date of the settlement (1877) the plaintiff was a married woman; therefore she could not bind her property by contract, nor could she convey or assign interest which she then had either in possession or reversion. The dissolution of the marriage between her and her husband dates from the decree *nisi*, not from the final decree: *Wilkinson* v. *Gibson*, 15 W. R. 983, L. R. 4 Eq. 162. The distinction between the decree *nisi* and the decree absolute is clearly laid down in *Prole* v. *Soady*, 16 W. R. 445, L. R. 3 Ch. App. 220. The effect of these two cases is to prove that this settlement is a nullity excepting so far as regards the property reduced into possession before the decree *nisi*. This contract, then, was a void contract, not a voidable one, consequently it was not capable of being ratified. In order to bind the plaintiff's property a new settlement was required, and the resettlement made by order of the Divorce Court is not a new settlement. There was nothing in the divorce proceedings which could bind the plaintiff by way of estoppel, and there has been no compromise of a doubtful right. With respect to the funds paid to the trustees since the decree *nisi*, they hold them in trust for the plaintiff. The plaintiff has the right to intercept all funds which have not yet reached the hands of the trustees. She must elect whether she will affirm or repudiate the settlement so far as funds reduced into possession previous to the decree *nisi* are concerned. There was no reduction into possession of her interest under George Lucas' will, although his executor was one of the trustees of the settlement: *Baker* v. *Hall*, 12 Ves. 497; *Wall* v. *Tomlinson*, 16 Ves. 413.

Graham Hastings, *Q.C.*, and *H. Terrell*, for the trustees of the settlement.

Buckley, *Q.C.*, and *A. & B. Terrell*, for Waldegrave Kell and his son Vernon.—It is necessary to consider what power the wife had in law to deal with her various

kinds of property. Upon her father's intestacy she became entitled to land as well as personal property, and under George Lucas' will to the proceeds of the sale of real estate. This entails a consideration of the Fines and Recoveries Act. Section 77 of that Act enables a married woman to dispose of lands of any tenure, and also any estate which she or her husband in her right may have in any lands of any tenure. The definitions given in the Act of the words "land and estate" were designed to include every possible description of real estate or interest in real estate: *Briggs* v. *Chamberlain*, 11 Hare, 69 (see Woods, V.C., at p 74). The personal estate of the wife was bound by Malins' Act (see sections 1 & 2). The words "future interests" in section 2 is to be contrasted with the words "reversionary interests," and includes everything to which you are not entitled at present. They mean not only interests which are "future" as regards the enjoyment thereof, but also as regards the right and title thereto. Whatever a married woman does under the Act she does as effectually as if she were a *feme sole*, and a disposition under the Act will bind property if when you come to select you can identify it: *Tailby* v. *The Official Receiver*, 37 W. R. 513, 13 App. C., 523. As to the meaning of the word "dispose," see *Pride* v. *Bubb*, 20 W. R. 220, L. R. 7 Ch. App. 64; *Crofts* v. *Middleton*, 4 W. R. 439, 8 De G. M. & G. 192 (at p. 212). As to the meaning of "disposition," see *Carter* v. *Carter*, *ante*, p. 73, [1896] 1 Ch. 62. Disposition, under the Fines and Recoveries Act and Malins' Act, is satisfied by what the wife did here. With respect to the money received by the trustees since the decree *nisi*, she cannot now recover them. *Prole* v. *Soady* is not in point, as in that case no money was actually received. In *Wilkinson* v. *Gibson* the fund was not settled at all. Here there is a settlement, and the funds were not paid to the trustees under a mistake. At any rate, if they were paid under a mistake, it was a mistake of law and the wife cannot recover them: *Bate* v. *Hooper*, 3 W. R. 639, 5 De G. M. & G. 338; *Skyring* v. *Greenwood*, 4 B. & Cr. 281. If we are wrong on these points, we contend that there has been a new settlement. Mr. Kell filed a petition to vary the post-nuptial settlement of 1877. That was compromised, and the result was a new settlement made by order of the Divorce Court, the terms thereof being agreed between the parties. The Divorce Court gets its power to deal with these funds from the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45, and the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5; see *Milne* v. *Milne & Fowler*, 19 W. R. 1118, 2 P. & D. 295. [STIRLING, J., referred to *Benyon* v. *Benyon*, 15 P. & D. 54, 38 W. R. Dig. 71.]

Cozens-Hardy, Q.C., in reply.—The Fines and Recoveries Act does not apply. She, being a married woman, had no power to contract, but only to dispose, and she had no real estate at the date of the settlement. Malins' Act does not apply to funds in possession, nor to future interests which arose under instruments executed prior to the date of the Act. Neither does it apply to interests arising under intestacies. There is no general power in, nor was it the object of, the Act to enable a married woman to bind mere expectancies of interests. Again, there is no consideration for the settlement. That, however, is not of any consequence, as she had no power to make it. This is not an action to recover a debt, but to recover specific property received under a mistake. There is no difference between a mistake of fact and a mistake of law so long as the interests of third parties are not affected: *Huddersfield Banking Co.* v. *Henry Lister & Son*, 43 W. R. 567, [1895] 2 Ch. 273; *Cooper* v. *Phibbs*, 15 W. R. 1049, L. R. 2 H. L. 149; *Jones* v. *Clifford*, 24 W. R. 979, 3 Ch. D. 779. The trustees admit that they hold these funds as trustees, and the plaintiff says that they hold them as trustees for her. There was no new settlement or compromise. The order of the 24th of April, 1894, was the operative thing. The plaintiff does not object to a further application to the Divorce Division, and will not raise any question of jurisdiction.

Buckley, Q.C.—The mistake here was a mistake of law, not a mistake of fact, and *ignorantia juris non excusat*. The cases cited by Mr. Cozens-Hardy were mistakes of fact, not of law.

STIRLING, J., stated the facts as above set out, and continued:—This settlement was not made in pursuance of any ante-nuptial contract. Whatever binding effect it has must be derived either from the Fines and Recoveries Act or from Malins' Act. First, as to the Fines and Recoveries Act. The plaintiff was not entitled to any real estate at the date of the settlement, but she did become so entitled on the death of her father in 1893. Is this real estate bound by the covenant to settle after-acquired property? The Fines and Recoveries Act only enables a married woman to settle an estate at law or in equity in real estate; and I do not think in 1877, when this post-nuptial settlement was made, that the plaintiff's interest in her father's estate could be so described. She had at the best but an expectation that at some future time she might become entitled to some estate or interest therein. Next, as to Malins' Act, which enables a married woman to dispose of property to which she may be entitled under any instrument made after the 31st of December, 1857. Of the five interests (specifically mentioned above) of the plaintiff, the first and fifth arose under intestacies, while the second and third arose under instruments made before the 31st of December, 1857. Consequently none of these four interests could be disposed of under this Act. The fourth interest arose under the will of George Lucas, dated the 23rd of May, 1890; and it is contended this is a "future interest" within the meaning of the statute. I am of opinion that it is not; but merely a possibility or expectation of interest, and not an "interest" either at law or in equity, nor a "future interest" within the meaning of the Act, which I think contemplated a future vested interest: *Davis* v. *Angel*, 10 W. R. 722, 4 De G. F. & J. 524, and *Re Parsons*, 38 W. R. 712, 45 Ch. D. 51, 57.

Therefore I think that so far as the plaintiff is concerned the settlement of the 12th of June, 1877, and the covenant to settle after-acquired property are void, and not merely voidable, and therefore incapable of being simply affirmed by the plaintiff when she ceased to be under disability. It is said that the proceedings in the Divorce Court for a re-settlement amount to the making of a new settlement, and that she, so far as her property was concerned, being then in the position of a *feme sole*, is bound by that settlement. Now the re-settlement was made on the assumption by all parties, that the funds specified above were or would be subject to the trusts of the settlement of 1877. I think that assumption was incorrect. It is said, however, that this was a mistake of law, and that relief cannot be given in respect of it. In my opinion this is not so. The maxim *ignorantia juris haud excusat* is used in respect of the ordinary law of the land, not of a "private right," and here the mistake was one which related to the existing rights and interests of private individuals: *Cooper* v. *Phibbs*. Moreover, it was laid down by Turner, L.J., in *Stone* v. *Godfrey*, 5 De G. M. & G. 90, 2 W. R. Dig. 12, that "this court has power to relieve against mistakes at law as well as

against mistakes of fact," and this was again recognized in *Rogers* v. *Ingham*, 25 W. R. 338, 3 Ch. D. 351. The mistake was made on the occasion of the Divorce Court dealing with the petition to vary the existing settlement. The power of that court so to deal is derived from the Divorce and Matrimonial Causes Act of 1859 (section 5), but such powers only apply to "property settled" on the marriage or prior to the divorce of the parties. Now the order of the Divorce Court was made on the assumption that all the plaintiff's property was subject to the trusts of the settlement of 1877, and it only deals in terms with the funds therein comprised. I think it is clear that none of the parties intended to deal with any funds not so comprised or to make a new settlement. The income of the £25,000 admittedly comprised in the settlement is sufficient to provide for the annual sums of £300 and £150 directed to be paid by the order of the 24th of April, 1894, and if the case rested there I should be of opinion that nothing had happened to deprive the plaintiff of her right to relief, at all events, so far as the £18,500 (which had not on that date reached the trustees' hands) is concerned.

The case, however, does not rest there, for under the Divorce Act of 1857, s. 45, it is provided that the court after a decree for divorce or separation in consequence of the adultery of the wife (the case here) may direct such a settlement to be made out of the wife's property in possession and reversion as to it may seem good; and it is clear that the court would have been asked by Mr. Kell and his son to exercise these powers on their behalf if they had known that the property of the plaintiff was not subject to the post-nuptial settlement of the 12th of June, 1877, and it is possible that the court would have given Mr. Kell more than £300 a year, and would have required a further settlement to be made for the benefit of the son. Therefore I think, under the circumstances, if the plaintiff is to obtain the relief for which she asks, that the Divorce Court should have an opportunity given to it of exercising the powers conferred upon it by the Act of 1857; and as it is in my power to impose terms upon the plaintiff (for she comes here seeking equitable relief), I declare that the plaintiff's title to relief in respect of the £18,500 still outstanding is made out, she on her part undertaking (as a term of such relief) that any application to the Divorce Court for a further settlement out of the funds to which this action relates shall be dealt with by that court in all respects as if such application had been made prior to the 24th of April, 1894, and were being considered by the court on that day.

There remains the question of the funds which came to the trustees' hands after the decree *nisi*. I think Mr. Kell's right to deal with the plaintiff's property ceased when the decree *nisi* was made (*Wilkinson* v. *Gibson*, *Prole* v. *Soady*). Sums amounting to over £10,000 have been paid to the trustees with the knowledge of the plaintiff since the decree *nisi*, under a mistake as to the existing rights of the parties. I cannot see that any rights of third parties have intervened, or that anything else has happened to preclude the plaintiff from relief, and I think that upon the same undertaking as before that relief ought to be given.

Solicitors, *Seaton F. Taylor; Mander & Watson; B. H. Van Tromp.*

Chan. Div. }
Romer, J. } March 25.

MACKEOWN v. BOUDARD PEVERIL GEAR CO. (*a*.)

Company—Shares—Contract to take shares—Prospectus—Rescission—Non-disclosure of material facts.

A person who has contracted to take shares in a company cannot avoid his contract on the ground that the prospectus did not set forth all the material facts pro and con. *which might induce a person to apply or not apply for shares. A misstatement or concealment in a prospectus which will be sufficient to avoid the contract must be of such a character as to make the prospectus as it stands misleading.*

Trial of action.

This was an action in which the plaintiff, Dr. W. A. Mackeown, of Belfast, claimed rescission of a contract to take thirty-five shares in the defendant company on the ground of misleading statements contained in the prospectus of the said company. The facts of the case were as follow.

The defendant company was registered in the year 1894, with a capital of £40,000, afterwards increased to £45,000, divided into 4,500 shares of £10 each, and having for its objects the acquisition and working of certain patented inventions of one Marcus Boudard relating to the driving gear of cycles, and known as the "Boudard Peveril Gear."

In October, 1894, a prospectus was issued, on the faith of which the plaintiff, according to his statement of claim, applied for the shares.

This prospectus, after describing the invention of the gear, stated that "within a few weeks of each other the following exciting, and at the time unheard-of performances, took place, showing how much cycling will be changed by the advent of the Boudard Peveril Gear. All the following were officially timed by official timekeepers of the Roads Record Association."

The prospectus then set forth certain records or performances in cycling—viz., "Edinburgh to London," which race was described as "faster than the world's previous fastest record," "fifty miles Polytechnic C.C.," "fifty miles world's record," and "100 miles world's record," of which it was stated that this had been lowered by the Boudard tandem, which travelled "faster than the fastest cycle had ever been known to travel"; and "Land's End to John o' Groat's."

This list was followed immediately by the statement: "Such extraordinary performances are sufficient to prove that every rider to whom speed is an object will be bound to have it"—*i.e.*, the Boudard Peveril Gear.

The prospectus continued: "Of course the records quoted are by no means final. Such velocity has been and will be increased, and the true merits of the new Boudard system are therefore all the more likely to be clearly seen and appreciated."

The plaintiff, in his statement of claim, asserted that these statements had been made for the purpose of inducing persons to believe, and had as a matter of fact induced the plaintiff to believe, that it had been proved that such additional speed could be obtained by a cycle fitted with the Boudard Peveril Gear over that obtained by a cycle not so fitted that any rider to whom speed was an object would be bound to have such gear; that the cycle trade would be revolutionized by the introduction of the Boudard Peveril Gear; and that accordingly the shareholders

(*a*.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

in the defendant company would derive large profits therefrom.

It appeared on the evidence that, while the statements of the prospectus contained a correct account of performances which had actually taken place, some at least of the performances described had been beaten, and had therefore ceased to be records before the issue of the prospectus. The prospectus also set forth a time table showing the alleged gains in speed attained over various distances by the use of a Humber bicycle with Boudard higher speed in 1894, as compared with a Humber bicycle without Boudard speed in 1891.

The plaintiff submitted that such table was intended to produce the belief, and did in fact induce him to believe, that the gains in speed so shown were wholly attributable to the Boudard Peveril Gear, whereas they were attributable to other improvements on the Humber bicycle.

The defendants denied that the time table was intended to induce such belief.

In his lordship's opinion the plaintiff's evidence was not altogether satisfactory. The plaintiff stated that he did not know much about bicycling, but applied for the shares under the belief that the records were still existing records. In cross-examination he admitted that the statement as to the records in the prospectus was not the only thing that induced him to apply for shares. It was shown that he was a competent business man, and well acquainted with the working of companies.

C. E. E. Jenkins, for the plaintiff. — The defendants in this action cannot escape by saying that the untrue statements in their prospectus are merely so much puffing. The principles to be followed in such a case as the present is that laid down in the *New Brunswick, Canada, Railway Co.* v. *Muggeridge*, 9 W. R. 193, 1 Dr. & Sm. 363. That case was approved in *Central Railway Co. of Venezuela* v. *Kisch*, 15 W. R. 821, L. R. 2 H. L. 99, at p. 113. A prospectus ought, as was stated in that case, to be characterized by the utmost candour. Such statements as those in the present prospectus are traps for unwary investors. [ROMER, J.—It is not enough that something is not stated. There must be such a suppression of material facts as to render the prospectus misleading. His lordship referred to *Heyman* v. *European Central Railway Co.*, L. R. 7 Eq. 154, 17 W. R. Ch. Dig. 85.] There has in this case been such a material suppression of facts as to make the prospectus misleading.

Neville, Q.C., and *P. Wheeler*, for the defendants.—The prospectus does not as a matter of fact set forth that the records were existing records. The use of the words "at the time unheard-of performances" show that they were not existing records. The plaintiff, as his cross-examination showed, put a wrong construction on the prospectus; and if it was the fact, as he says, that he applied for his shares on this misconstruction, this will give him no right to rescind. The mere fact that certain things are not stated in a prospectus will not make it misleading, unless such omission materially alters other facts stated. All that this prospectus meant to state was that the invention of the Boudard Peveril Gear would greatly improve bicycling.

C. E. E. Jenkins replied.

ROMER, J.—In my judgment no sufficient case has been shown to entitle the plaintiff to have his contract to take shares rescinded. Mr. Jenkins, who has argued the case for the plaintiff very well, at first complained of the prospectus generally, saying it was of too laudatory a character—particularly in attributing the records set out in the prospectus too much to the merits of the gear, and not sufficiently to the merits of the riders, the improvements made in cycling machines from 1891 to 1894, and the improvements in the tracks. But in the absence of any distinct misrepresentation in the prospectus, and of any improper concealments in any respect, this was not sufficient to justify the plaintiff in repudiating the contract. The plaintiff was a clever man, and had previously been acquainted with public companies, and it is impossible to conceive that he can have been deceived by the quality of puffing common to this and other prospectuses, or can have believed that the performances referred to were entirely owing to the gear. Nothing in the evidence induces me to believe that the gear was not of considerable merit, or that the performances recorded were not to a great extent due to the merits of the gear. In fact, these merits seem to have had a great deal to do with the performances in question. Has there, then, been such a misrepresentation or concealment of facts as will entitle the plaintiff to the relief claimed? In my judgment there was no misrepresentation in the prospectus, because it is clear that all the records and events stated in it did in fact take place as stated.

But it has been contended on behalf of the plaintiff that the prospectus also represented that the performances had never been excelled between the time when they took place and the time when the prospectus was issued. There is nothing in the prospectus that in my opinion amounts to such a statement. It is clear that the records were only referred to as being extraordinary at the time when they were made. This is shown, for example, by the fact that the statement of performances was prefaced by the following words: "Within a few weeks of each other the following exciting, and at the time unheard-of, performances took place." Then, dealing with the ride from Edinburgh to London, the prospectus only described it as being "fasterthan the world's previous fastest record." [His lordship proceeded to comment on other records referred to in the prospectus, and continued:] On page 3 of the prospectus there was a statement which, though curiously phrased, was not difficult to understand. It was as follows: "Of course the records quoted are by no means final. Such velocity"—clearly meaning the velocity which led to the records—"has been and will be increased, both on old and new gear"; and then followed a statement of the merits of the particular gear, the inference being that when the gear was again tried it would again establish a record. It was perhaps not unnatural that the plaintiff, when he was in the box, argued rather than gave evidence; but there is a great difference between the statements of a man like the plaintiff arguing in the box as to what he thought the prospectus meant, and what his impression actually was when he first read it, and I am not satisfied that when he first read the prospectus he did give to it the meaning which he seeks now to place upon it, or that he thought that the words "the records quoted are by no means final" meant what he now said that he understood them to mean. There was, in fact, no misrepresentation. But it was then said that the non-statement in the prospectus of later performances on cycling machines entitled the plaintiff on that ground alone to relief. Counsel for the plaintiff, however, put the case far too high. When there is no question of misrepresentation it is impossible to state broadly that a contract to take shares can be rescinded because the directors of the company in the prospectus have not stated all the material facts *pro* and *con* which might induce a person to apply for shares or abstain from so doing. It is impossible to say that any prospectus is misleading merely because all the material facts are not set out.

In some cases to set out such facts a whole volume would be required, and to require such a statement would make the issuing of all prospectuses dangerous. The statement that a person was entitled to relief on the ground of mere non-disclosure in the prospectus must be qualified by restricting the statement to cases in which the facts not disclosed were such that the omission to disclose them rendered the prospectus, as it stood, misleading. I cannot find any such omission in this case, and I am not satisfied that the absence of any statement as to the further performances rendered the prospectus misleading. The plaintiff is not entitled to relief, and consequently his action must be dismissed, with costs, except as to certain matters as to which the defendants refused to make admissions. These costs the defendants must pay.

Action dismissed.

Solicitors, *Woodcock, Parker, & Ryland*, for *Gaunt & Lingard*, Manchester; *J. B. Purchase.*

Q. B. Div.
(Cave and Wills, JJ.)

June 24.

HOCKLEY *v.* ANSAH.
REGAN, *Garnishee.* (*a.*)

Practice—Appeal—"Practice and procedure"—Garnishee order—Judicature Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.

An appeal from an order of the judge at chambers affirming an order of the master making absolute a garnishee order is a matter of practice and procedure within section 1, *sub-section* 4, *of the Judicature Act*, 1894, *and the appeal therefore lies to the Court of Appeal, and not to the Divisional Court.*

Appeal by the garnishee from an order of Pollock, B., at chambers, affirming an order of the master making absolute a garnishee order attaching a debt due from the garnishee to the judgment debtor.

Rufus Isaacs, for the plaintiff, took the preliminary objection that the appeal was a "matter of practice and procedure" within section 1, sub-section 4, of the Judicature Act, 1894, and that the appeal therefore lay to the Court of Appeal, and not to the Divisional Court.

F. Dodd, for the garnishee, contended that the appeal would finally determine the rights of the parties. The case did not come within sub-section 4.

M'Harg v. *Universal Stock Exchange*, 43 W. R. 464, [1895] 2 Q. B. 81, was referred to.

THE COURT (CAVE and WILLS, JJ.), held that the Divisional Court had no jurisdiction to hear the appeal.

Appeal struck out.

Solicitors for the plaintiff, *Smith & Gofton.*

Solicitors for the garnishee, *Templer, Dunn, & Miller.*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Q. B. Div.
(Cave and Wills, JJ.)

June 4, 5.

COUNTY COUNCIL OF MIDDLESEX (*Appellants*) *v.* THE ASSESSMENT COMMITTEE OF ST. GEORGE'S UNION, IN THE COUNTY OF LONDON (*Respondents*). (*a.*)

Poor law—Rating—Occupation—Sessions house—Building used partly for Crown purposes and partly for county council administrative purposes—Proportionate rateability—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67)—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41).

A sessions house used partly by a county council for administrative purposes, and partly for Crown purposes as the sessions house and for other judicial business, is rateable for poor and other rates and assessments under the Valuation (Metropolis) Act, 1869, *so far as it is used for local administrative purposes, and so far as it is used for Crown purposes it is not so rateable.*

Special case.

This was a case stated pursuant to section 40 of the Valuation (Metropolis) Act, 1869, by order of Cave, J.

The question raised related to the rateability for poor and other rates and assessments under the above Act of a building known as "The Sessions House" or "Guildhall," Westminster.

The premises were inserted in the supplemental valuation list of the united parishes of St. Margaret and St. John the Evangelist, Westminster, in the St. George's Union in the county of London, made and deposited under the aforesaid Act on or about the 31st day of May, 1894. The entry in the said list relative to the said premises was as follows:—

Number of assessment—407.

Name of occupier, name of owner; Sir Richard Nicholson, clerk of the Council—The Middlesex County Council.

Description of property—That part of the Guildhall, Westminster, being the county hall, committee rooms, offices, office of the county surveyor, vaults, and rooms used by the caretaker, and such parts of the building as are used by the Middlesex County Council for administrative purposes as distinguished from Crown purposes.

Situation of property—Broad Sanctuary.

Gross value—£225.

Rateable value—£188.

The appellants duly objected before the Assessment Committee of St. George's Union, the respondents, pursuant to the said Act, to the said assessment and valuation; and failing to obtain redress duly appealed, pursuant to the said Act and the Local Government Act, 1888, to the Court of Quarter Sessions for the County of London.

The following facts were set out in the case:—

(5) The old Sessions House at Westminster was erected by commissioners appointed under 18 Geo. 3, c. 72; 39 Geo. 3, c. 82; 44 Geo. 3, c. 61; and 47 Geo. 3, ss. 11, c. 67, and upon a site acquired under those Acts. The said old Sessions House was subsequently managed and maintained until the passing of the Local Government Act, 1888, under the said Acts and 7 & 8 Vict. c. 71 (the Middlesex Sessions Act, 1844).

(6) In the year 1777 the site of the Sessions House and the buildings thereon were rated or assessed to the poor rate at the annual value of £188, and were inserted in the land tax assessment books in 1806

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

at the rate of £101 5s., and assessed in the sum of £20 5s.; and in 1806 at the rate of £93 15s., and assessed in the sum of £18 15s. The land tax was redeemed in 1892. In the year 1892 and from 1845 to 1892 (inclusive) the property was inserted in the land tax assessment books at the rate of £365, and was in 1892 assessed in the sum of £3 16s. 0½d. The sums assessed varied throughout the period 1845 to 1883 (inclusive); but during 1884-92 (inclusive) it was £3 16s. 0½d. In the year 1892 the appellants took the opinion of counsel, who advised that the appellants were not liable to the tax; but as the question might be litigated the Council were advised, having regard to the smallness of the amount, that it would be less expensive to redeem the tax.

(7) Prior to the Local Government Act, 1888, for a period during which the cellars under the Sessions House were let to a wine merchant, the said cellars were assessed and rated to the poor rate. Except as aforesaid, the Sessions House was never before the making of the said supplemental list assessed or rated to the poor rate, or any other rate.

(8) Prior to the commencement of the Local Government Act, 1888, the Sessions House was used for holding courts of assessment sessions and quarter sessions, and for the other judicial business of the justices of the county, and for the public business of the county of Middlesex conducted in or out of sessions by the justices of the county. The courts were also lent when not required for the county business for sittings of the superior courts at Westminster, and for holding arbitrations, wreck inquiries, and other public inquiries of a judicial or quasi-judicial character; for such use a small fee was charged to meet the cost of cleaning, &c., after user, and such fee went to the resident housekeeper.

(9) After the passing of the Local Government Act, 1888, the apportionment of the property and liabilities was made between the county of Middlesex and the newly created county of London, as required by and pursuant to sections 40 (6) and (7) and 62 (1) of that Act; and upon such apportionment, by order of the commissioners appointed by section 61 of the said Act, and dated the 12th day of April, 1892, the Guildhall with its fixtures, fittings, furniture, and effects as it stood on the 1st day of April, 1889, was apportioned to the county of Middlesex. In fact, from the 1st day of April, 1889, by arrangement, it was used for the purposes of the county of Middlesex, and the Clerkenwell Sessions House and the offices of the Metropolitan Board of Works in Spring-gardens were used for the purposes of the county of London.

(10) The accommodation existing at the Guildhall being insufficient for the public, judicial, and administrative business of the county of Middlesex, additions were made to the old Sessions House. No other offices have been provided by the Middlesex County Council. . . . All the alterations and additions were made either within the ancient building or upon the ancient site. The premises were used partly for the administrative business of the County Council, and partly for the purposes of or in connection with the quarter sessions.

The questions for the opinion of the court were:

(*a*) Is the said Guildhall, or any and what part thereof, rateable and within the description of rateable property the subject of the Valuation (Metropolis) Act, 1869?

(*b*) Upon what principle is the said Guildhall, or any rateable part thereof, to be valued and assessed for the purpose of the poor or other rates?

(*c*) Is the question whether the parts of the building used by the County Council exclusively are capable of being let separately from the rest of the building material?

(*d*) Is the value at which the assessment (if any) of the Guildhall or any and what part thereof is to be made limited by any and which of the sums mentioned in paragraph 6 of this case, or by any and what proportion thereof, or limited in amount upon any and what other principle?

Danckwerts, for the appellants.

Bosanquet, *Q.C.*, and *W. C. Ryde*, for the respondents.

CAVE, J.—It appears to me that there is really very little to be said upon this case, either on the one side or on the other. The decisions, and especially the decisions of late years, starting with the *Mersey Docks case*, 21 W. R. 913, L. R. 8 Q. B. 445, have taken a very different view of rateability from that which was formerly taken, and the distinction has been drawn, and for a very good reason, between Crown purposes or Imperial purposes, and purposes of local government; and although to some extent that had come into prominence before the Local Government Act of 1888, yet undoubtedly the Local Government Act of 1888 did accentuate very much the difference, because by that Act bodies were formed in each county to which was permitted the power of governing in a great variety of local matters, and different bodies were set up in different counties which might take different views of what was the course to be adopted in the shape of bye-laws for their own particular counties, and in that way enormous change was made. Still, that leaves one matter undoubtedly a Crown matter, and that is the administration of justice. Although it is very clearly a Crown purpose, it is necessarily administered through local channels, requiring therefore local courts in which local magistrates from time to time, as well as the general judges of the land, sit, and, of course, used by them as sessions houses; all of them, and very properly, being exempted from rating as being used for strictly Imperial or Crown purposes, and not in any sense for local purposes. Now that distinction has been too well established by recent cases for us to do anything more than follow it, and I do not propose to give the reasons already given by courts of higher authority than this why that rule should be adopted.

One point has been suggested as raising a difference. It is said that, whereas in previous cases the municipal corporations have been held rateable for buildings occupied by them for municipal purposes, that the same rule does not apply to a county council created by statute and not by charter, and carrying on its functions under the Local Government Act, which is, of course, a general Act. I am unable myself to see the force of that argument. The essential difference between the premises rateable and premises not rateable is that in one case the user is for a local purpose, and in the other case for a Crown or Imperial purpose; and it is none the less a local purpose whether those purposes are carried out by a municipal council or whether they are carried out by a county council administering the affairs of the county generally. If there was any difference between the two—which, however, I do not think there is—I should be inclined to think it more important that the county council should be rateable than that the municipal buildings should be rateable, because the municipal buildings would at any rate be in the corporate boroughs, and consequently the corporation would more or less get the advantage which would be derived from that. In

the case of a county council, on the other hand, the county building, the building which is used for administrative purposes must necessarily be in one of a few towns out of several which may be in the county, and the other towns derive comparatively little benefit from any custom or traffic, or anything of that kind which is brought to the towns in which they are by the local situation of the county council building. However, I do not think that would be enough to found a distinction upon; but the real distinction is that which is insisted on in so many cases, the distinction between Crown purposes and local purposes; and I think we can best answer the question which is put to us by saying that so far as it is used for local administrative purposes the Sessions House, as it is at present, is rateable, and that so far as it is used for Crown purposes it is not rateable.

Now it is said there is some difficulty in carrying out this principle. I myself cannot see that there is any difficulty. It is said, for instance (to take an instance), that the clerk to the justices in quarter sessions and the clerk to the Council is one and the same person, and that he occupies premises at the Sessions House which would be required equally for both purposes, if he had not to discharge the other purpose. That may be so, although one finds it a little difficult to understand; but if it is so, why should not the rateability be apportioned? Suppose, for instance, the use made for county purposes occupies half of the year, we will say, and the use made for sessions purposes occupies another half of the year—not, of course, divided into actual periods, but adding the different periods together—they should say that about half the use of it was made for one purpose, and half for the other. Why in such a case is not the total rateability to be divided—half charged upon the County Council, and the other half not charged at all, because it cannot be charged on the Crown? It seems to me there is no difficulty in ascertaining the proper rateability because they are in some other proportion. Of course it is not necessary that they should be in moieties, they may be in some other proportion according to the circumstances of the particular case; and in that way the gentleman who is to be entrusted with the duty of ascertaining what is the proper proportion of the rateability will have no difficulty in arriving at a just and proper conclusion. In case, however, there should arise any difficulty which we do not at present foresee, and which has not as yet been brought to our notice, we propose to retain the case for the present, giving leave to the parties to apply in case any difficulty of this sort should happen to arise, so that they may come here at once without the expense of having to state another case in order to obtain the opinion of the court if any difficulty does arise. Subject to that (and I do not think there is any other question which we can answer at the present moment with satisfaction) I think we may say that the Sessions House is rateable so far as it is used for administrative purposes, and that the extent to which that use goes is a matter of detail to be inquired into by the proper officer.

WILLS, J.—I am of the same opinion. It seems to me that the principles to be applied have been laid down so completely, and are so completely beyond controversy in the present day, that the case really does not present any extreme difficulty. It is quite clear that in so far as these premises are occupied for the purposes which the House of Lords has called "Imperial," there is no rateability. They are put on the footing of premises occupied for the servants of the Crown, and decisions have established that amongst those purposes are two specifically. There may be others, but there are two as to which there is no doubt, that is to say for all purposes connected with the administration of justice and with the business of the police. Either of these purposes has been decided by the House of Lords to be such as brings the occupation, so far as it relates to such matters, within the category of an occupation by the servants of the Crown and for the purposes of the Crown. To that extent it is quite clear that these buildings are not rateable. Again, it has been decided that in so far as premises are used for keeping the records of the county, that that purpose is one which creates an occupation which is not rateable. As to that, therefore, there is no difficulty. Mr. Bosanquet has said that the chief difficulty in this case arises with regard to the use of an office by the clerk of the peace which is used for the common purposes of the administrative business of the Council, and the performance of the duties of the clerk of the peace in connection with the administration of justice. There, it seems to me, that the only possible thing to do, and the only thing to be done in accordance with the established principles of rating, is to make a division. In so far as these offices are occupied by the clerk of the peace for the purpose of carrying on any matter of business that is connected with the administration of justice, the issue of summonses, the precepts for summoning juries, the collection of fines—all purposes, in short, connected with the administration of justice—the occupation is one which is not rateable. There may be other purposes for aught I know (it is impossible to specify them beforehand) which fall within the same rule; but in so far as these offices are used purely for local and municipal purposes and are part of the local administration by the County Council, as the body acting in municipal matters and for the regulation of municipal matters, the buildings are rateable. It does not seem to me that a sensible man with any experience in these matters would have any practical difficulty in making a division. The principle, I think, has been correctly stated in the case, under the heading of "description of property in the rate-book." The only difficulty is the application of that principle. Should any further difficulties arise, those difficulties would be met by the course proposed by my brother Cave, namely, that we should retain this case and give the parties leave to apply if it should be necessary.

I ought to say with regard to the limitation in the local Act it seems to me it could only apply to the plot of land which was originally assigned to the court-house, and that there is nothing in the subsequent Acts, under which a totally distinct area has been appropriated for the purpose of the administration of justice, which revives that section and applies it to the new locality.

Appeal dismissed, with costs.

Solicitor for the appellants, *Sir R. Nicholson.*

Solicitor for the respondents, *W. J. Fraser.*

Q. B. Div.
(Grantham and Collins, JJ.) May 18.

KILLICK v. GRAHAM.
LINTERN v. BURCHELL. (a.)

Inland Revenue—Excise—Licence to deal in plate—Soliciting orders—Secretary of watch club—Inland Revenue Act, 1867 (30 & 31 *Vict. c.* 90), *ss.* 1, 3, 17.

The respondent was a telegraph clerk and the secretary of a watch club formed in a provincial town by a London watchmaker who held an excise licence for dealing in plate. The respondent collected subscriptions from the members of the club, and at intervals conducted a ballot, the winner in which was entitled to select a watch or other article supplied by the watchmaker. The respondent thereupon informed the watchmaker as to the article chosen, and the article was forwarded by the watchmaker to the respondent, who handed it to the member in question. The respondent was paid a commission by the watchmaker. The respondent had no excise licence to deal in plate.

Held, that the respondent was a person soliciting, taking, or receiving orders within the meaning of section 17 *of the Inland Revenue Act*, 1867, *and was not within the exemption as to* bonâ fide *travellers in that section, and was therefore liable to a penalty.*

These two appeals were argued together, the facts being similar.

KILLICK v. GRAHAM.

Special case stated by justices for the borough of Bedford.

The respondent was charged on an information by the appellant, who was an officer of Inland Revenue, with having in July, 1895, dealt in plate without having in force a proper licence, contrary to 30 & 31 Vict. c. 90, s. 3.

The respondent was a clerk in the Post Office at Bedford, and was also secretary to the City of London Watch Club Co., of which Peck, a watchmaker in London, was the proprietor. A telegraph messenger in the Bedford Post Office named Gaunt was a member of the club, and he received a watch from the respondent under the following circumstances. Gaunt joined the club in February, 1895. He paid his first subscription on that day, and received a card from the respondent on which the subscriptions paid by him were marked as they were paid. He paid thirty weekly subscriptions of one shilling to the respondent. The members of the club balloted every month for the right to choose an article, and when Gaunt was successful in the draw he selected a watch, which he received from the respondent. Gaunt was not bound to choose a watch; he might have had, if he pleased, a microscope or a bag. The respondent did not ask Gaunt to choose a watch, and kept nothing in stock; but he communicated Gaunt's wish to Peck, and told Gaunt he would get the watch for him. Gaunt received the watch before he had paid all his subscriptions; he paid the remainder afterwards, and, having paid the last, the respondent wrote on the card: "Settled 31 Aug., /95. F. F. G. for H. S. Peck." The respondent told the appellant that he acted as secretary of the club and as Peck's agent for the supply of watches and other articles. The respondent received a small commission from Peck for any article supplied through him.

On the part of the respondent it was contended that he, being secretary to the club, was not within 30 & 31 Vict. c. 90, s. 17, and the justices dismissed the information upon that ground.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The question of law for the opinion of the court was whether the respondent, being secretary of a club, was a person requiring a licence as a dealer in plate.

LINTERN v. BURCHELL.

Special case stated by justices for the county of Southampton.

The information was similar to that in *Killick* v. *Graham*, and the facts were practically the same, with the exception that the respondent, who was in the employ of a fellmonger, received a commission upon the amount of the subscriptions collected by him from the members, and that the watch was supplied with a warranty from the dealer with whom the respondent was in communication.

The justices dismissed the information.

The Inland Revenue Act, 1867, s. 1, requires an excise licence to be taken out by "every person who shall trade in or sell any article composed wholly or in part of gold or silver in respect of every house, shop, or other place in which his trade or business shall be carried on."

Section 3.—"Every person who shall do any act or carry on any trade or business for which a licence to deal in plate is required by this Act without having in force a proper licence authorizing him so to do shall for every such offence forfeit the sum of £50."

Section 17.—"If any person shall solicit, take, or receive any order for spirits, wine, or other article for the dealing in, retailing, or selling whereof an excise licence is by law required without having in force a proper excise licence authorizing him so to do, he shall forfeit the penalty imposed by law upon a person dealing in, retailing, or selling such article without having an excise licence in force authorizing him so to do. . . . Provided always that nothing herein contained shall be deemed . . . to impose a penalty upon a *bonâ fide* traveller taking orders for goods which his employer is duly licensed to deal in or sell."

Sir R. B. Finlay, S.G. (*Danckwerts* with him), for the appellant in each case.—The respondents in both cases are liable to a penalty, for they have either "traded in or sold" articles of silver within section 1, or they come within the words "solicit, take, or receive" an order in section 17. The respondents are not protected by calling themselves agents for Peck: *Hotchin* v. *Hindmarsh*, 39 W. R. 607, [1891] 2 Q. B. 181; and they cannot escape liability by the formation of a club: *Bowyer* v. *Percy Supper Club*, 42 W. R. 29, [1893] 2 Q. B. 154; *Pletts* v. *Campbell*, 43 W. R. 634, [1895] 2 Q. B. 229; *Pletts* v. *Beattie*, [1896] 1 Q. B. 519, 40 SOLICITORS' JOURNAL, 297.

Joseph Walton, Q.C. (*Hextall* with him), for the respondents.—The respondents do not sell or solicit orders. They induce other persons to join together for the purpose of buying certain articles from someone else. Until the draw has taken place it is not certain that the article will be of plate. Further, the respondents have no place of business. If they in fact solicited orders, they are protected by the exemption in section 17 as to *bonâ fide* travellers.

He cited *Stuchbery* v. *Spencer*, 55 L. J. M. C. 141, 35 W. R. Dig. 118.

Sir R. B. Finlay, S.G., replied.

GRANTHAM, J.—This is a case which has given me very great difficulty, but I have come to the conclusion that, whatever may be the liability of the respondents under sections 1 and 3, they cannot get out of the liability imposed by section 17, which seems to have been intended to be a kind of general net to include all cases of this kind in which people endeavour, I do not say improperly, to increase their

trade in exciseable articles without paying any further licence duty. That seems to me to be the object and scope of section 17. The section contains a proviso by which *bonâ fide* commercial travellers are exempted from the necessity of taking out a licence. I confess I cannot bring these respondents within the term "*bonâ fide* traveller," which is a well-known trade term applying to a man who goes about the country soliciting orders which he sends up to his employer for execution. I do not think that the respondents are *bonâ fide* travellers within the meaning of the section, but they do solicit, take, or receive orders for watches. It is true that other articles besides watches may be obtained, but that is probably introduced for the very purpose of preventing the application of the Act. The club was primarily a watch club, and was kept up by a watchmaker. He employed an agent to solicit people to subscribe for watches. Then there was a ballot, and the successful man got his watch at once. The agent got the order, and the watch was sent down to the agent, and was handed by him to the winner in the ballot. I come to the conclusion that the respondents are persons soliciting, taking, or receiving orders for these particular goods. I do not see how it can be said that the respondents are travellers, for one of them is a telegraph clerk and the other a fellmonger.

The appeal must therefore be allowed.

COLLINS, J.—I am of the same opinion; and as we are differing from the justices I will add a few words to the judgment of my learned brother. My mind has vacillated a good deal during the arguments, because it is essential that the Crown, in taking penal proceedings, should make a clear case. I am not satisfied that this case comes within either section 1 or section 3, but when we come to consider section 17 a greater difficulty is presented. I am not sure that what the respondents have done is within the spirit of the enactment, although it may come within the letter. It would, I think, have been possible for the watchmaker in London to do all that he has done here by sending round a person to do week by week what the respondents did on the spot, and that would, I think, amount to the soliciting of orders by a *bonâ fide* traveller, in which case there would be nothing that the Crown could lay hold of. The question is, Do the facts bring the case within section 17? When we look at what is done in the formation of these clubs we find that it is an elaborate machinery to procure an order from some person to a watchmaker for a watch, the particular person being chosen by ballot. The secretary is paid a commission, and induces people to join the club; out of their subscriptions a fund results, and then the order for a watch is given. The sale to the member of the club is brought about through the agency of the secretary, who therefore, it seems to me, comes within the first part of section 17 as being a person who solicits an order for an exciseable article. I agree that that section primarily applies to the case of a person who, having a licence, solicits orders in a place for which he has no licence; but the words of the section are wide enough to include the case of a man soliciting orders on behalf of another person who himself has a licence, and that is why an exemption is provided in the case of *bonâ fide* travellers.

I was much impressed by the argument of the respondents' counsel upon this point, and in one sense what they have done is little more than would be done by a *bonâ fide* traveller. I think, however, the facts are too strong to admit of the respondents being called travellers; in the one case the respondent lives at a place where his work as a fellmonger is carried on and solicits persons working in the same shop as himself to join the club, in the other case the respondent is a post office clerk. I think it would be straining the words too much to hold that the respondents are *bonâ fide* travellers.

The respondents therefore do not come within the exception in section 17, but fall under the general prohibition in the earlier part of the section. The cases must go back to the justices to convict.

Appeal allowed in both cases.

Solicitor for the appellant, *Solicitor of Inland Revenue.*

Solicitor for the respondents, *H. E. Tudor*, for *Conquest & Clare*, Bedford.

Q. B. Div.
(Pollock, B., and Bruce, J.)

May 14, 15.

BROOKE & CO. (LIMITED) *v.* THE COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland revenue—Stamp duty—Conveyance—Agreement for sale of goodwill and trade-marks—Business carried on abroad and in England—Trade-mark registered in England—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 59.

An agreement under seal was entered into for the sale of a business carried on in the United States, including the goodwill of the said business and the trade-marks and names used in connection therewith, to purchasers in the United Kingdom. The vendors were manufacturers of soap in America, a large proportion of which they sold wholesale to a syndicate in England. The vendors were also owners of a trade-mark registered in and extensively advertised throughout the United Kingdom, whereby a demand for the soap had been created therein.

Held, that the goodwill and trade-mark were "property" within the meaning of section 59 *of the Stamp Act*, 1891, *and not "property locally situate out of the United Kingdom" within the exception contained in that section, and that therefore so much of the consideration as represented the price paid for the said goodwill and trade-mark was chargeable with conveyance duty under section* 59 *of the Stamp Act*, 1891.

Case stated.

This was a case stated by the Commissioners of Inland Revenue pursuant to section 13 of the Stamp Act, 1891.

On the 4th of July, 1895, an instrument, a copy of which formed part of this case, was presented on behalf of Benjamin Brooke & Co., Limited (the appellants), to the Commissioners of Inland Revenue under the provisions of the 12th section of the Stamp Act, 1891, 54 & 55 Vict. c. 39, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The instrument was dated the 25th day of July, 1895, and was an agreement under seal made and entered into between Benjamin Brooke & Co., of Philadelphia, Pennsylvania, in the United States of America (the vendors), of the one part, and the appellants of the other part.

The facts set out in the case are as follow:—

(3) By clause 1 of the agreement the vendors agreed to sell and the appellants to purchase the freehold works of the vendors (situate in America), the machinery, furniture, and stock-in-trade of the vendors, the book and other debts due to the vendors in connection with their business, the full

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

benefit of all securities for the same, and of all contracts, engagements, rights, and privileges to which the vendors were entitled in relation to the said business, also the goodwill of the said business, all the trade-marks and names used in connection therewith, and all the cash, agencies, assets, and other property of every description to which the vendors were at the date thereof entitled in connection with the said business, excepting certain profits mentioned in clause 9 of the agreement.

(4) It was provided that the consideration for the sale should be the sum of £250,000, payable partly in cash and partly in shares. The purchase money of £250,000 was made up on the following basis:—

	£	s.	d.
Freehold works	18,779	3	1
Machinery and fixtures . .	3,435	4	5
Book debts at 31st December, 1894	31,845	7	0
Stock at same date . . .	95,544	14	7
Cash and sundry assets at same date.	5,361	3	10
Goodwill and trade-marks . .	189,237	19	7
	258,213	12	6
Less liabilities at 31st December, 1894	8,213	12	6
	£250,000	0	0

None of the book debts due to the company at the date of the agreement were book debts payable by customers in England.

(5) The vendors were and for many years had been the manufacturers of a well-known soap called "Brooke's Soap." This soap was and is manufactured by them at the premises in Philadelphia mentioned in the agreement. Sales were effected by the vendors to purchasers resident both in the United States and elsewhere, about twenty thirty-oneths in value of such sales being made as hereinafter mentioned to a syndicate of persons in the United Kingdom, about seven thirty-oneths to residents in the United States, and about four thirty-oneths to residents in other European countries and the colonies.

(6) The vendors were and for some years had been the owners of the trade-mark or brand "Brooke's Soap, Monkey Brand," relating to their said soap, which is registered as a trade-mark in England. This trade-mark or brand they circulated very extensively throughout the United Kingdom in newspapers and otherwise as part of pictorial advertisements which drew attention to their said soap, and by means of these advertisements a considerable demand for the soap had been created, and at the time of sale existed in the United Kingdom. The advertisements contained no indication either to the place where the soap was manufactured or to any place where the same could be purchased; and the place of manufacture was never advertised or published in England. These advertisements were inserted by and at the expense of the vendors, a very large sum being spent yearly upon them, and the vendors had an office in London exclusively devoted to the insertion of such advertisements and to other matters connected therewith.

(7) The vendors did not take orders from or deal in any way with either the retail vendors of the soap in England or with the consumers there. Their dealings with purchasers in England were exclusively confined to selling to a syndicated association, consisting of three firms, all resident in the United Kingdom. This syndicate was accustomed to send from England orders to the vendors at their manufactory in Philadelphia for such quantities of soap as they required, and the soap was then despatched therefrom direct to them in England, and was paid for by remittances sent by the syndicate to Philadelphia. The purchasing syndicate then resold it to retail vendors and others in England at such prices as they thought fit.

(8) The vendors' course of business in other European countries was substantially identical with the above.

(9) The commissioners were of opinion that in fact the thing which by the agreement was agreed to be sold under the words "the goodwill of the business and the trade-marks used in connection therewith" was, firstly and principally, the trade-mark and the right of using the same by way of advertisement in the various countries to which they apply; and, secondly, the local business connection with retail vendors and others which had been created in each of those countries by the circulation of these advertisements, and that these were "property" within the meaning of section 59 of the Stamp Act, 1891. They were further of opinion that the United Kingdom trade-mark, the right of using the same and the connection in the United Kingdom created by the advertisement thereof, were not "property locally situate out of the United Kingdom" within the exception contained in that section. They accordingly held that so much of the consideration of £189,237 19s. 7d. hereinbefore mentioned as represented the price paid for the said last-mentioned matters was chargeable with conveyance duty. They arrived at the sum apportionable to the said last-mentioned matters by taking the proportion which the entire profits made by the company for the year 1894, namely, £31,316, bears to the profit made by the English order for that year, namely, £19,989, and assessed *ad valorem* conveyance duty at the sum of £536 10s. If the commissioners are correct in holding that all the said last-mentioned matters are chargeable with duty under section 59, the accuracy of the apportionment and of the *ad valorem* duty assessed is not questioned. The instrument has been stamped in conformity with the assessment. A further fixed duty of 10s. was also assessed. No question is to be raised in this case as to the liability to *ad valorem* conveyance duty of the matters other than the goodwill and trade-marks.

(10) The appellants being dissatisfied with the assessment have, in pursuance of the 13th section of the Stamp Act, 1891, required the commissioners to state and sign a case setting forth the questions on which their opinion was required, and the assessment made by them, and the commissioners do hereby state and sign this case accordingly.

The questions for the opinion of the court were:—

(1) Whether the instrument is chargeable with the duty of £536 10s. in accordance with the assessment of the commissioners?

(2) If not, with what duty the instrument is chargeable?

The appellants contended that the goodwill and trade-mark were not subject to duty under the statute 54 & 55 Vict. c. 39, s. 59, and that they were not within the meaning of that section; and further that the said goodwill and trade-mark were property locally situated out of the United Kingdom.

The commissioners maintained that the instrument was a contract or agreement made in England under seal, and—as regards the subject matters thereof referred to in paragraph 9 of the case—was made for the sale of an interest in property not being property locally situate out of the United Kingdom, or property excepted from or by, section 59 (1) of the Stamp Act, 1891. They further maintained that it was apparent

from the facts of the case that by far the most valuable asset which was the subject of the instrument was the "goodwill and trade-marks," and that one hundred and ninety-nine three hundred and thirteenths of the profits of the vendor company were derived from trade in or with the United Kingdom; that the vendor company had a goodwill in the United Kingdom corresponding to such profits, and had trade-marks the interest in which was the creature of the law of the United Kingdom, and had names used in connection with their business which were known and used in the United Kingdom, and the use of which in the United Kingdom was valuable; and that the interest in such goodwill, trade-marks, and names, as regards the United Kingdom, was valuable only under and by virtue of the interest therein given and the protection afforded by the laws of the United Kingdom, and by reason of the exploitation of such goodwill, trade-marks, and names in the United Kingdom.

Murphy, Q.C. (*A. T. Lawrence* with him), for the appellants.—The American company did not carry on business in England: *Grainger* v. *Gough*, *ante*, p. 561, [1896] A. C. 325, and therefore there could be no goodwill in this country. You cannot have a goodwill except in connection with a business, and that business must be carried on where the goodwill is. The assessment is also on the trade-marks; a trade-mark is not within the meaning of the Act. If there is no goodwill in England, it follows from section 70 of the Trade-Mark Act, 1883, that the trade-mark cannot be transferred here, for it can only be transferred with the goodwill.

Sir R. Webster, A.G., *Bosanquet, Q.C.*, and *English Harrison*, for the respondents.

POLLOCK, B.—It is apparent from the facts of the case that by far the most valuable part of the assets is the goodwill of the trade-mark. You can have a trade-mark in this country in respect of a thing manufactured abroad. Then if you have a trade-mark that trade-mark is in itself a goodwill. If beyond the trade-mark you have taken the trouble to send agents over here to advertise and see the probable or possible vendees, you do create, not only a trade-mark, but a goodwill, and that goodwill is one which extends principally to regular customers and increases the value of the article. It is therefore quite clear that this appeal must be dismissed.

BRUCE, J., concurred.

Appeal dismissed with costs.

Solicitors, *Budd, Johnsons, & Jecks*; *The Solicitor of Inland Revenue.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) — April 16, 17.

In re DEWHURST & SONS' APPLICATION. (*a.*)

Trade-mark — Registration — "Words" — Burmese words—Disclaimer—Risk of deception—Undertaking that trade-mark shall be used only on goods exported to particular country—Patents, Designs, and Trade-Marks Acts, 1883 *and* 1888 (46 *&* 47 *Vict. c.* 57; 51 *&* 52 *Vict. c.* 50).

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

Burmese words expressed in Oriental characters are "words" within the meaning of section 10 (e) *of the Patents, Designs, and Trade-Marks Act*, 1888. *Regard must therefore be had, in deciding whether a trade-mark containing such words shall be registered, to the meaning of such words; and accordingly, on the principle of the* Red Star case, 42 *W. R.* 420, [1894] 2 *Ch.* 26, *when there are already on the register trade-marks containing a representation of a golden fan, a trade-mark including the Burmese words for "The Golden Fan Brand" will not* (*at any rate without a disclaimer of the exclusive right to use those words, as to the effect of which,* quære) *be allowed to be registered. The consent of the owners of the trade-marks resembling that for which registration is sought is not a sufficient ground for allowing such registration, for the court has also to protect the public from being deceived.*

In such a case the court has no jurisdiction to allow registration upon an undertaking that the trade-mark shall be used only upon goods exported to a particular country, even if in that country there is no risk of deception.

Appeal from the Vice-Chancellor of the County Palatine of Lancaster.

The applicants, Messrs. John Dewhurst & Sons, were cotton spinners and sewing cotton manufacturers. In June, 1895, they applied at the Manchester branch of the Trade-Marks Registry Office for registration in class 23 of a trade-mark in respect of sewing and other cottons. The trade-mark consisted of three white shells on a golden shield, the words "Oriental Three Cord," and certain Burmese characters, as to which the question in this case arose. In the application for registration it was stated that the meaning of the Burmese characters was "the Golden Fan Brand." There were already upon the register in the same class other somewhat similar trade-marks, one of which consisted of a representation of a golden fan. Consents to the present application had been obtained from the owners of those trade-marks. The comptroller nevertheless refused to allow the applicants' trade-mark to be registered without a disclaimer under section 64, sub-section 2, of the Act of 1883 (as amended by section 10 of the Act of 1888), of the exclusive right to use the Burmese characters. The applicants appealed to the Board of Trade, by whom the appeal was referred to the Palatine Court. There was evidence that the applicants had a considerable trade with Burmah in goods sold under the trade-mark in question, which was known to the natives as the Golden Fan Trade-Mark.

The Vice-Chancellor made an order directing the comptroller to proceed with the registration, and the comptroller appealed.

On the hearing of the appeal the applicants offered to undertake that the goods to which the trade-mark applied should not be exported elsewhere than to Burmah.

Sir Richard Webster, A.G., *Astbury, Q.C.*, *Ingle Joyce*, and *T. Clarkson*, for the comptroller, cited the *Red Star case*, *In re the Trade-Mark of La Société Anonyme des Verreries de l'Etoile*, 42 W. R. 420, [1894] 2 Ch. 26; *Eno* v. *Dunn*, 39 W. R. 161, 15 App. Cas. 252; *In re Apollinaris Co.'s Trade-Marks*, [1891] 2 Ch. 186, 39 W. R. Dig. 237; and *In re Rotherham & Sons' Trade-Mark* 14 Ch. D. 585, 28 W. R. Dig. 229.

Hopkinson, Q.C., *John Cutler*, and *A. S. Wills*, for the respondents, Messrs. Dewhurst & Sons, cited *Johnston* v. *Orr-Ewing*, 30 W. R. 417, 7 App. Cas. 219; *Rosenthal* v. *Reynolds*, 40 W. R. 521, [1892] 2 Ch. 301; *In re Holt & Co.'s Trade-Mark*, *ante*, p. 369, [1896] 1 Ch. 711; *In re Keep's Trade-Mark*,

32 W. R. 427, 26 Ch. D. 187; *In re Mitchell's Trade-Mark*, W. N. 1878, p. 101; and *Mouson* v. *Boehm*, 32 W. R. 612, 26 Ch. D. 398.

Sir Richard Webster, A.G., replied.

LINDLEY, L.J., stated the facts, and continued:—Now that shows the reason why these gentlemen desire to register this label, although they have on the register, and have had for some years, a portion of the label—namely, that part which consists of three shells on a gold shield. They have also on the register the words "Three Shells Brand" under the label. But the affidavit which I have read, I have alluded to for this purpose as showing that these gentlemen had a reason for asking to be allowed to register something more. They want to register the words "The Golden Fan Brand" in Burmese characters. The object of that, of course, is perfectly obvious, because it will give them then a monopoly of the use of these words as part of their trade-mark, and make it an essential part of their trade-mark.

Now, they apply to the comptroller to register that as so many words under clause (*e*) of section 64 of the Trade-Marks Act of 1883, as amended by section 10 of the Act of 1888: "A word or words having no reference to the character or quality of the goods, and not being a geographical name." It is obvious that "The Golden Fan Brand" comes within that description. They are words in Burmese, and it is sought to register them in Burmese characters. The comptroller then takes this objection. He says: "If you like to register these hieroglyphics under the second part of section 64, and disclaim them as part of your trade-mark, I have no objection; but if you insist upon my registering these as 'words' under clause (*e*) of section 64, so as to make these words an essential part of your trade-mark, then I do object, because it appears to me that they will necessarily be calculated to deceive." And he grounds that objection upon this. He says: "I have already upon the register several registered trade-marks of fans applicable to class 23 in cotton goods, and, in particular, there is on the register a mark, No. 16,003, of Mr. Boyd, which is a golden fan. Therefore," he says, "I have on the register a golden fan applicable to the same class of goods, and you are asking me to register, not as additional words with a disclaimer, but as an essential part of a new trade-mark, not a golden fan, but the words 'Golden Fan'"; and he says, "Having regard to the principle which was laid down by the Court of Appeal in the *Red Star case*, I decline to do that. I will do it for you if you like to take it as additional words with a disclaimer; but I will not do it for you if you insist on having it as an essential part of your trade-mark." The Vice-Chancellor of the Duchy considered that objection, and came to the conclusion that the *Red Star case* differed from the present, and the difference which the learned Vice-Chancellor pointed out, and which unquestionably exists, is this. He says that in the *Red Star case* there was first of all the objection; and, secondly, there was evidence that the plate which was registered with a star was called by the name of the "Star Brand" or "Star Glass"; and under those circumstances the Vice-Chancellor said there was positive evidence that deception not only was likely, but really did take place. He says there is no such evidence here; and it is true there is no evidence here, except that which I have referred to—namely, the existence on the register of a golden fan with reference to and as applied to cotton goods in class 23.

Now, we must consider that point and see what is to be done. Could Messrs. Dewhurst require the comptroller to register their mark if these hieroglyphics were expressed in language intelligible to Englishmen? In other words, if, instead of the hieroglyphics, you had their equivalent, "The Golden Fan Brand," ought the court to compel the comptroller to put such a mark on the register? Upon that point, I come to the conclusion that unquestionably the court ought not to do anything of the kind. The meaning of them is before the comptroller, as I shall show presently; but the principle of the *Red Star case* would cover that. Whether it covers this, is another matter; but if the application were to put on the register the words "Golden Fan" or "Golden Fan Brand" as applied to cotton goods, the answer would be that they must be calculated to deceive, because they only express in words what the golden fan of Mr. Boyd expresses to the eye. That is the principle upon which the *Red Star case* proceeded, and I do not think that any evidence which could be adduced would get over that objection, because we know perfectly well that if you once put upon the register a golden fan in the shape of a picture like Mr. Boyd's, and you also put on the register a mark called "The Golden Fan," although without a golden fan, the two must mislead the public; and Mr. Boyd's consent is no answer to that. Mr. Boyd's consent is important in this respect, that it would show that he was not a competitor, perhaps, and did not care about it; and the fact that he did not oppose the registration would be some evidence that in his opinion it was not calculated to deceive, at all events to any extent which injured him. I am assuming, of course, that there are no pecuniary arrangements between them which would amount to a purchase and sale.

Now, having gone that far, I have gone a very long way; because what the comptroller has to do is this. He says, "You bring me those hieroglyphics; I do not know what they mean; I know nothing at all about them; you must tell me what they mean." Rule 15 says: "Wherever a trade-mark consists of or includes words printed in other than Roman characters, there shall be given at the foot or on the back of each representation a translation of such words signed by the applicant or his agent." I have been looking for it, but I cannot find any similar rule applicable to ordinary European languages in which Roman letters are used. I suppose that the comptroller or the Board of Trade have persons sufficiently conversant with those languages to render translation unnecessary; but, when you get beyond that, this rule is important as showing that the comptroller ought not to register Oriental words, or words in Oriental characters, without knowing what they mean. He is entitled to require a translation; and accordingly we have on the application by Messrs. Dewhurst this indorsement on the form which they have signed and sent in: "The meaning of the Burmese characters appearing on the mark is 'The Golden Fan Brand.'" The comptroller's position is this: "Now you tell me what these hieroglyphics mean, you are asking me to put on the register the words 'The Golden Fan Brand'; the object being that this trade-mark may be called the Golden Fan Brand; that is to say, for the very same object which you would have if you were to put these words on the register in the English language." He says: "The principle of the *Red Star case* is applicable to this case, and I, in the exercise of my discretion, think I ought not to do it." I do not think the court can say that he was wrong in that. I can see the importance to Messrs. Dewhurst of succeeding, because they would get advantages by having this mark registered which they would not have without it. Let us see what the position of the register will be, and how far the interests of the public will be protected, if that is done. As to the consents, I do not say that they are immaterial, it appears to me

that they are valuable as affording some evidence that there may not be deception; but when you come to consider that these trade-marks are on the register for an indefinite time; when you consider that unless they are restricted to particular countries —which is a point I will deal with presently—they are applicable all over the world; and when you consider how they are sold and passed from one hand to another, these consents do not protect the public at all, and I do not see how any evidence can get over the difficulty that there will be upon the register two trade-marks—one a picture of a golden fan, and the other the words "The Golden Fan." That ought not in my judgment to be allowed, by reason of the obvious deception which must grow up if these words are used, as they would necessarily be in the course of trade, should the trade be pushed in other countries than Burmah. Therefore, I think on that principle, which is an extremely far-reaching one, that the comptroller is right. I think that it does not matter what the language is, nor what the hieroglyphics are, if the meaning of the hieroglyphics and the meaning of the foreign language is a mere verbal description of a mark already on the register. If you have a mark on the register applicable to cotton goods, consisting of a golden fan, you cannot have another mark called a "Golden Fan" in any language or in any hieroglyphics. That appears to me to be the real broad ground upon which we ought to decide this case.

It was urged on behalf of Messrs. Dewhurst that, whether these words are registered as additional words and disclaimed, or whether they are registered as words and as an essential part of the trade-mark, there will be the same probability or possibility of deception. It is said that there is no deception in either case. I think the Attorney-General's answer to that is sufficient. It is a very different thing to register words as part of your trade-mark and to disclaim the right to any exclusive use of them, and to register those same things as an essential part of your trade-mark which gives you an exclusive right to use them. Whether the comptroller was not a little too indulgent in saying, "I will accept this mark if you will treat these words as an addition to your mark with a disclaimer," it is not necessary to consider; but I do see that there is an immense practical difference between the two things; and it appears to me, I confess, for the reason I have given, that it is not illogical or unreasonable for the comptroller to take the view: "You may have these if you like, but you must have them with a disclaimer, if you have them at all, under the second clause of section 64; but you must not have them under the clause as an essential part of your trade-mark, and I will not register them unless I am compelled."

The other point which has been suggested is this. It is said that under section 62, sub-sections 4 and 5, the court can order this mark to be registered, subject to any conditions which the court may think proper. Now we are asked to do this. The applicants say: "If you will not allow us to register this without any conditions or without any limitations, we shall be quite content if you will allow us to register it upon this condition, that we shall only put the mark on goods exported to Burmah." Under the Act, apart from the general words of the sub-sections to which I have referred, there is nothing that gives the court power to do this. There is nothing in the schedules and nothing in the rules which have been made under the authority of the Act which authorizes the court to impose such a condition as that which is suggested. In other words, there is no provision made by the Legislature for granting a trade-mark which shall be used only in one particular country. When you see the difficulty of enforcing any such condition in practice, you see the good sense of there being no provision for registering a trade-mark which shall be confined to any particular country.

Then it is said, "Well, but similar things have been done"; and reference was made by Mr. Hopkinson and Mr. Cutler to *In re Keep's Trade-Mark* and *In re Mitchell's Trade-Mark*, and other cases, in which the court certainly did order the comptroller to enter upon the register a note of an agreement between the two litigants, as I may call them, respecting the use which should be made of a particular registered mark. I will observe that those cases were decided when there was a rule which does not exist now. They were decided upon the interpretation of a rule which has been abolished, and which contained some language which possibly might justify that. I doubt very much whether those cases have not gone too far; but, at all events, they have gone far short of what we are asked to do here. The utmost the court has ever done is to say: "We will direct the comptroller to put on the register a note of an agreement which binds the registered owner of a trade-mark to some rival as to the mode in which he shall use that trade-mark." We have no such agreement here, and we are not asked to direct the comptroller to put on the register any memorandum of any such agreement; but we are asked to go further, and do it ourselves, and say: "You shall be put upon the register upon condition that you only use these marks upon goods which are exported to Burmah." I think we ought not to do it, and I think we ought not to do it for this reason. I doubt very much whether the Legislature ever contemplated such a mode of working the Trade-Marks Acts as that. As I pointed out during the argument, without the very greatest possible care we should be raising questions of international law of a very serious character and very great difficulty, and we should be imposing terms which we could not possibly enforce —which of itself is quite a sufficient reason for not imposing them. Upon these grounds, therefore, I think that on this point the comptroller is right.

I purposely abstain from saying anything about what I understand is the great point, namely, whether or not the comptroller is right in saying that he ought not to be compelled to register any Oriental words, for it is not necessary to decide it on the present occasion. If the comptroller thinks it is right to allow the words to go on as additional marks, subject to a disclaimer, I do not express any opinion precluding him from doing so. I think that the comptroller was perfectly justified in declining to register this mark, and therefore this appeal must be allowed.

LOPES, L.J.—It occurs to me that this short answer may be given to the case. If the words sought to be registered had been in English, and had been the words "The Golden Fan Brand," I take it it is perfectly clear that the comptroller would not and ought not to have permitted the registration of those words as an essential part of the trade-mark, because, having regard to the *Red Star case*, it appears to me that it has been distinctly held that if words are sought to be registered which convey the same meaning as any symbol or picture which had been previously registered would convey, then those words cannot be registered as an essential part of the trade-mark, because they would be calculated to mislead or deceive. But it is said here that these words, being in Burmese, would not be calculated to mislead or to deceive. Now, if we were to hold that the mere fact that the words in question were in the

Burmese language was sufficient to rebut the probability of deception, I ask, Where are we to stop? We should have to go the length of holding that the fact of words being in any foreign language would be sufficient to rebut the probability of deception. In my opinion that cannot be done. I think, therefore, that the comptroller was right in only permitting the registration of these words subject to the disclaimer of any intention to use them as an essential part of the trade-mark.

I now desire to refer to a matter which I consider very important. We have been told that the rival tradesmen, those who have trade-marks resembling, as pictures, the words sought to be registered, consented to this registration. Those consents are some evidence of there not being a probability of persons being deceived; but to say that they are to have any greater effect would be most mischievous. The public have no notice of these consents; but the object of the Act is to protect the public as well as traders. It is obvious that these consents might be bought and sold, and anything more mischievous than that it would be impossible to imagine.

It was suggested that we might limit the use of these words to goods exported to Burmah, so that the trade-mark might be used there. To my mind such a limitation would be absolutely useless, for I cannot see how it could be enforced. But, again, I think that it would be against the policy of the Act. It seems to me essential that the register should be kept clear and in proper order, and if limitations of this kind could be inserted on the register—I do not think they can—I think it would prevent the register being so kept. I think, therefore, that the decision of the comptroller was right, and that this appeal ought to be allowed.

KAY, L.J., stated the facts, and continued:—As was pointed out by Lindley, L.J., it is essential for an applicant, if he is proposing to use as part of his trade-mark any other characters than Roman characters, to send to the comptroller a translation of the characters which it is desired to put on, in order that the comptroller may know the meaning of the characters which are proposed to be registered. The meaning of these words, as explained on the face of the application, is "The Golden Fan," on the back of the application the translation is "Golden Fan Brand." Now, I cannot help remarking that there is no golden fan upon this mark at all. There are three shells which are not in gold, put upon a golden shield. But the evidence given by Mr. Dewhurst is this: "We send out cotton goods, among other places, to Burmah, and in the Burmese markets the Burmese seem to have taken the shells for fans, and they have called the goods which we sell 'Golden Fan' or 'Golden Fan Brand' goods." It is rather curious, because the shells are not in gold, and they are not fans, but the evidence is not contradicted, and there is no attempt to deny it, and for the purposes of this application we must take it to be true. So that the comptroller, being compelled by the rule to consider the meaning of these Oriental characters, and being told that the meaning is "Golden Fan Brand," finds that he has got upon the register a golden fan, amongst other things; and observe, although Messrs. Dewhurst want to register this mark for only a part of the goods comprised in class 23, the golden fan is upon the register for all the goods in class 23, including, of course, these cotton goods, "sewing, crochet, and embroidery cottons of various kinds," for which Messrs. Dewhurst want to register this mark.

I find in section 73 these words: "It shall not be lawful to register as part of or in combination with a trade-mark any words the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice." The comptroller has, therefore, to consider not only whether the mere appearance of the words is calculated to deceive, but whether the use of those words would be calculated to deceive. Suppose the owner of the golden fan trade-mark, which, as I have said, extends to the whole of the goods in class 23, of which these cotton goods are part, chose to carry on in Burmah a trade in cotton goods of this very kind, the use of the words "Golden Fan Brand" in Burmah would be calculated to deceive people who wanted to buy golden fan goods. But that objection is said to be untenable because the owners of these marks on the register have signified their consent to these Burmese words being put on the register. I do not think that is conclusive; it is only some evidence that they are not calculated to deceive. But if the comptroller thinks that there is sufficient similarity between these marks to make the use of one calculated to deceive, he is not concluded by a consent given in that way, quite apart from the mode in which that consent may have been obtained. I therefore think that in the exercise of the discretion of the comptroller, when he is asked to put this mark upon the register and is told that the parties are not satisfied to treat these words as added words, and to disclaim the exclusive use of them, but intend to have them as an essential part of this trade-mark which he is asked to register, he has a right to say, and is justified in saying: "I think if I were to put them on the register the use of the words would be calculated to deceive, and therefore I do not think it right to put upon the register, which has already upon it a golden fan for this class of goods, words which import—and I am bound to know the meaning of them—Golden Fan Brand. Therefore I will not consider in what language the words happen to be or whether the words would be intelligible to any ordinary European, because it is a part of this legislation, embodied in rule 15, that the comptroller shall know what is the meaning of the Oriental words, and shall consider that meaning with reference to section 73." I, for that reason, think that there was quite sufficient ground in this case for the comptroller saying that he refused to register these words, unless they were treated as added words, with the condition which in that case the statute imposes. Whether he is right in saying, "I will register them if that condition is complied with," I do not at present say. It was not complied with, it was refused; and accordingly the only mode in which he could have registered them was as an essential part of the trade-mark.

But then it is said: "We are quite content to submit to a condition that these words shall not be used in any country except Burmah." In the first place I cannot find that this Act of Parliament enables the court to put upon the register a trade-mark with a limitation of that kind. I should expect, if that were the meaning of the Legislature, to find a very distinct provision to that effect. The only section which in any way can be treated as having that meaning, or giving to the comptroller, or the Board of Trade, or this court, any power of limiting registration in that way is section 62, which refers to the imposition of conditions, but I do not think myself that it has that meaning. I do not think imposing conditions in that section means a limitation of the geographical area within which the trade-mark can be used. There is nothing in the rules which empowers the Board of Trade, or this court, or the comptroller, to make a limitation of that kind in putting a trade-mark on the register.

For these reasons I think that the discretion exercised by the comptroller was properly exercised, and that the mark ought not to be put upon the register.

Appeal allowed.

Solicitors, *Solicitor to the Board of Trade; C. Urquhart Fisher*, for *Sale, Seddon, & Co.*, Manchester.

From Q. B. Div.
(Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) July 27.

TOTTENHAM URBAN DISTRICT COUNCIL *v.* WILLIAMSON. (*a.*)

Local government—Nuisance—Abatement—Action by local authority—Consent of Attorney-General—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 107.

Proceedings by a local authority under section 107 *of the Public Health Act*, 1875, *to enforce the abatement of a nuisance from which the local authority suffers no damage, can only be taken with the consent of the Attorney-General.*

Wallasey Local Board *v.* Gracey, 35 *W. R.* 694, 36 *Ch. D.* 593, *approved.*

Appeal from an order of Day, J., discharging an *interim* injunction for the abatement of a nuisance.

The action was brought by the Tottenham Urban District Council against the defendants to compel them to abate an alleged nuisance consisting of premises kept in such a state as to be injurious to health within the meaning of section 91 of the Public Health Act, 1875.

The question was whether the plaintiffs were entitled to bring the action without the consent of the Attorney-General.

Day, J., held, on the authority of *Wallasey Local Board* v. *Gracey*, 35 W. R. 694, 36 Ch. D. 593, that in the absence of special damage the local authority could not sue in respect of a public nuisance except with the sanction of the Attorney-General by action in the nature of an information.

The plaintiffs appealed.

Montague Lush, for the plaintiffs.—Section 107 of the Public Health Act authorizes a local authority by action to put a stop to nuisances prohibited by section 91. It provides that "any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, cause any proceedings to be taken against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance under this Act, or for the recovery of any penalties." The section treats proceedings to abate nuisances and proceedings to recover penalties on the same footing. In neither case is the sanction of the Attorney-General necessary. Where such sanction is required the Act expressly so provides (see sections 69 and 253). The decision of Stirling, J., in *Wallasey Local Board* v. *Gracey* is not binding on this court, and ought to be overruled.

Cock, Q.C., and *Pocock*, for the defendants.

LORD ESHER, M.R.—I am of opinion that the judgment of Stirling, J., in *Wallasey Local Board* v. *Gracey* was perfectly right, and that this appeal must be dismissed.

KAY, L.J.—I am of the same opinion. The ordinary law is that where a person complains of a public nuisance he applies to the Attorney-General, and the Attorney-General becomes plaintiff at the relation of that person and proceeds by information. No other course is open to the person who complains, unless he has suffered special damage. I do not think that the Public Health Act gives any new remedy in this respect. I agree with Stirling, J., that section 107 only refers to proceedings known to the law. The present proceedings are not known to the law, because the fiat of the Attorney-General was necessary before they could properly be taken. In my opinion the action is misconceived.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Howard & Shelton.*

Solicitor for the defendants, *J. Perry Godfrey.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith, L.J.) July 21.

WILLESDEN LOCAL BOARD *v.* WRIGHT. (*a.*)

Local government—Paving expenses—Apportionment—Award of arbitrator—Remedy of local authority—Proceedings to enforce award—Jurisdiction of High Court—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 12.

An award of an arbitrator under section 150 *of the Public Health Act*, 1875, *fixing the proportion of paving expenses payable by an owner of premises to the local authority is not enforceable under section* 12 *of the Arbitration Act*, 1889.

Appeal from an order of Pollock, B., refusing to enforce an award.

The Willesden Local Board served notices, under section 150 of the Public Health Act, 1875, on the respondent and the other owners of premises fronting a street within their district, requiring them to execute certain paving works.

The owners having failed to comply with the notices, the Local Board executed the works, and an apportionment of the expenses was made by their surveyor.

The respondent having disputed the apportionment which was made against him, the matter was referred to arbitration in accordance with the terms of the section, and an award was made that the contribution payable by him was £175.

After the expiration of the six months within which the amount might have been recovered in a summary manner by proceedings before justices, the Local Board took out a summons at chambers to have the award enforced pursuant to section 12 of the Arbitration Act, 1889.

The master held that he had no jurisdiction to enforce the award, and Pollock, B., affirmed his decision.

The Local Board appealed.

R. E. Moore (*H. C. Munroe* with him), for the appellants.—The master and the judge thought that the only method by which the Local Board could recover this sum was—as provided by section 150 of the Public Health Act—in a summary manner, which is explained by section 251 to mean before a court of summary jurisdiction. But the Act itself provides other remedies. Section 180, sub-section 14, allows a local authority to enforce an award by proceedings

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

in the High Court. By section 257 a local authority may bring an action to recover paving expenses. Section 261 allows such expenses, if they are under £50, to be recovered in the county court. The proper remedy for the Local Board in this case is to enforce the award in the High Court.

He cited *Sandgate Local Board* v. *Keene*, [1892] 1 Q. B. 831, 40 W. R. Dig. 131, and *Brierley Hill Local Board* v. *Pearsall*, 33 W. R. 56, 9 App. Cas. 595.

John Mews, for the respondent.—The only remedy for the Local Board is to go to a court of summary jurisdiction. The respondent wishes to dispute his liability to pay anything in respect of these paving expenses. He cannot do this in proceedings on the award, which only fixes the amount of contribution, and does not touch the question of liability.

He cited *West* v. *Downman*, 29 W. R. 6, 14 Ch. D. 111; *Walker* v. *Beckenham Local Board*, 50 L. T. N. S. 207, 32 W. R. Dig. 8; *Tottenham Local Board* v. *Rowell*, 25 W. R. 135, 1 Ex. D. 514, and 29 W. R. 36, 15 Ch. D. 378; and *Eccles* v. *Guardians of Wirrall Union*, 34 W. R. 412, 17 Q. B. D. 107.

Lord ESHER, M.R.—The question is whether the master and the judge were right in refusing to enforce this award. If it could be enforced under the Arbitration Act, they had no reason for refusing to enforce it. But in my opinion they were right, because this award is not such an award as can be enforced under the Arbitration Act at all. In *West* v. *Downman* this court had to construe the Public Health Act, 1848, and we held that, inasmuch as before that Act a local board could not have recovered paving expenses from owners of property, and as the Act imposed on owners for the first time the liability to pay such expenses, the only remedy was the remedy given by the Act itself. Now what does the Public Health Act, 1875, say about a remedy? A remedy is given by section 150—viz., by summary proceedings before justices. We must look at the whole Act, and see if there is any other remedy given. It is argued that another remedy is given by section 261. That section provides that if the amount of a demand which a local authority is empowered to recover in a summary manner is under £50, proceedings may be taken before a county court judge, who will then determine the same question which would be determined by justices if the amount were over £50. That, however, does not alter the liability, it merely alters the tribunal which determines the liability. At any rate, section 261 clearly does not give any right to take proceedings in the High Court. Then does section 257 authorize a local authority to bring an action in the High Court? That section deals with expenses for the repayment of which an owner "is made liable under this Act"—I think that means made liable under section 150 by order of a court of summary jurisdiction—and it provides that the local authority may make such expenses a charge on the premises in respect of which they have been incurred, and may bring an action to enforce that charge. But it does not give any new right against the person who is owner at the time when the work is done. Then there is section 180, sub-section 14, which provides that "any submission to arbitration under the provisions of this Act may be made a rule of any of the superior courts, on the application of any party thereto." It is said that this by implication gives power to the local authority to take proceedings in the High Court to enforce an award. But, in my opinion, that is not a necessary implication. I think that the words of the sub-section are satisfied by saying that they prevent either party from revoking a submission to arbitration. We are therefore left to section 150. That section contains the arbitration clause; but all that an arbitrator can do is to fix the amount, he cannot impose a liability. The result is that the only remedy which was open to the local authority here was to go before justices. They did not take that course within six months, and now it is too late for them to do so. I therefore think that the learned judge was right in refusing to make an order to enforce this award, and the appeal must be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. This award fixed the amount of the respondent's contribution, and the question of amount cannot now be disputed. The appellants seek to enforce the award, and they ask us to make an order which will have the effect of shutting out the respondent from raising any defence which he may wish to raise on the question of his being liable at all. I think that this is not such an award as comes within section 12 of the Arbitration Act, as it is not an adjudication as to liability. The question whether an action can be brought to recover these expenses does not arise, but in my opinion this is not an award which can be summarily enforced.

Appeal dismissed.

Solicitor for the appellants, *W. G. Greig.*

Solicitor for the respondent, *E. Huelin.*

From Prob. Div. & Adm. Div. (Lindley, Lopes, and Kay, L.JJ.) } May 5; June 6.

WATKINS *v.* WATKINS. (*a.*)

Divorce — Maintenance — Alienability — Matrimonial Causes Act, 1866 (29 & 30 *Vict. c.* 32), *s.* 1.

Maintenance granted to a divorced wife under section 1 *of* 29 & 30 *Vict. c.* 32 *cannot be prospectively released or assigned.*

Appeal from the President.

An order had been made, on the wife's petition, for the dissolution of the marriage of the parties, and subsequently an order was made under section 32 of the Act 20 & 21 Vict. c. 85 that the husband should pay to the wife a sum of £80 a year by way of permanent maintenance.

In 1886 the wife executed a deed by which she purported to release the husband from all obligation to pay her allowance; but in 1892 Romer, J., set aside the deed. Later in the same year the wife by deed bound herself not to enforce the order, provided the husband made certain other payments to her.

In January, 1895, the wife obtained from the President an order for payment of £600, arrears of her allowance. This order was not enforced, and she afterwards agreed to withdraw it.

In July, 1895, she obtained a writ of sequestration to enforce payment. The husband then applied to the President to set aside the order for payment of £600, which had been obtained *ex parte*, and to set aside the writ of sequestration. The President refused the motion, but held that the wife was entitled to recover arrears of her allowance only as from October, 1893. Both parties appealed; but in the wife's appeal there was nothing requiring a report.

W. T. Barnard, for the husband.

Bargrave Deane, for the wife.

B. D. Kilburn and *Holman*, for the sequestrators.

(*a.*) Reported by R. C. MACKENZIE, Esq., Barrister-at-Law.

The authorities relied upon sufficiently appear from the judgments.

Cur. adv. vult.

June 6.—The following written judgments were delivered :—

LINDLEY, L.J.—The Divorce Act of 1857 established divorces as distinguished from judicial separations, and contained provisions defining the position and rights of divorced wives. A woman divorced is no longer a wife; she has not the rights, nor has she the duties, of a married woman. She is at liberty to marry again. The equitable doctrines of separate use and restraint against anticipation have no application to her until she does marry again. Whatever property she may have or acquire is her own; her former husband has no interest in it. He, on the other hand, is not bound to support her; she has no implied authority to pledge his credit even for necessaries. She is free from him, and he from her. Section 26 of the Act of 1857, which makes a husband liable for the support of his wife if he does not pay her the alimony ordered by the court, only applies to judicial separation. There is no similar enactment applicable to cases of divorce. The court for divorce has, however, power to make orders for the maintenance of a divorced wife (section 32), and for the custody of the children of the marriage (section 35), and for the execution of settlements for the benefit of the innocent party and of such children (section 45). These powers have been enlarged by later Acts, and rules have been made for their exercise. On the present occasion we are only concerned with the power to order maintenance after divorce. This is conferred by section 32 of the Act of 1857 and by section 1 of the amending Act of 1866. The rules relating to it are those of the 26th of December, 1865, 95 to 103. It is not immaterial to observe that alimony for wives after judicial separation—*i.e.*, permanent alimony—is governed by other sections and rules, viz., sections 22, 24, 26, and rules 81 to 94. Permanent alimony for a judicially separated wife is and always has been inalienable by her. The court which ordered it never lost control over it, and she could not by assignment or otherwise deprive herself of her right to it so long as she and her husband lived separate and apart from each other. This doctrine is based on the old ecclesiastical law, and was recognized and acted upon in *In re Robinson*, 33 W. R. 17, 27 Ch. D. 160. In *Linton* v. *Linton*, 33 W. R. 714, 15 Q. B. D. 239, and again in *In re Hawkins*, 42 W. R. 202, [1894] 1 Q. B. 25, it was held that the bankruptcy of the husband did not discharge him from his obligation to pay his wife alimony under an order of the court. The question now arises whether the same doctrine applies to an order for permanent maintenance after a divorce as to alimony after judicial separation. The learned President has held that it does. He came to this conclusion on various grounds, and he appears to have thought that the point was really decided by *Linton* v. *Linton*. The judgment of the Master of the Rolls in that case certainly shows that he did not consider permanent maintenance under section 1 of the Act of 1866 as more alienable than alimony. But *Linton* v. *Linton* was a case of judicial separation and not divorce, and the differences between the two are so great that a decision on the one cannot be regarded as if it were a decision on the other. The headnote in *Jardine* v. *Jardine*, 30 W. R. 91, 6 P. D. 213, is so worded as to suggest that the full court had decided that the court could modify orders for permanent maintenance; but all that the court said was that the allowance of £500 a year was not too much, as it could be reduced. The question which has now to be decided, and decided for the first time, turns simply on the interpretation and effect of section 1 of the Act of 1866. The object of the section is plain: it is to enable the court to order divorced husbands who cannot make settlements to maintain their divorced wives out of their earnings. The payments are to be made to the divorced wife for the joint lives of herself and her former husband weekly or monthly, and are to be for her maintenance and support. This language points to a purely personal allowance. Such allowances are by no means unknown to the law. Alimony is one instance, an officer's full or half pay is another. It is true that in a case like this the court has no power to increase the allowance once made, and there is good reason for this, for, the marriage bond being at an end, there is no reason why the woman's allowance should increase with her late husband's means. On the other hand, if he cannot pay the allowance fixed by the court, the court can reduce it or suspend its payment, or even discharge the order for maintenance, and so release the husband altogether. This power goes far to show that permanent maintenance under section 1 of the Act of 1866 is more like alimony than an ordinary annuity, or than an annuity ordered to be secured under section 32 of the Act of 1857. I cannot think that if a divorced wife became bankrupt the Legislature intended that her former husband should be compelled to pay her allowance to her trustee or to a purchaser of it from him.

It is, however, necessary to notice two difficulties which here present themselves. In the first place, a deed or will granting an allowance to a person for his or her maintenance and support, without more, is alienable: see *Younghusband* v. *Gisborne*, 1 Coll. 400. But this is because an absolute gift cannot be fettered by imposing a particular mode of enjoyment. It does not follow that an Act of Parliament must be construed so as not to infringe this rule. In the next place an annuity ordered to be secured under section 32 of the Act of 1857 has been decided to be property alienable and chargeable by the divorced wife: see *Harrison* v. *Harrison*, 36 W. R. 748, 13 P. D. 180. Is an allowance to be paid to a divorced wife under section 1 of the Act of 1866 more personal and inalienable than such an annuity? It is certainly less secure and less permanent. Under section 32 of the Act of 1857 an annuity may be ordered to be secured to the wife for her own life, but this cannot be done under section 1 of the Act of 1866. In *Harrison* v. *Harrison* there was no deed securing the annuity to be construed. There was only an order to secure an annuity. As pointed out by Cotton, L.J., on p. 183 (13 P. D.), a deed might have been drawn making the annuity determinable on alienation whether voluntary or involuntary, and the only point decided was that the wife's solicitor, who had procured her the order for its payment, would have been held entitled to a charge on the annuity for his costs under 23 & 24 Vict. c. 127, s. 28, if it had not been for other circumstances which induced the court not to give him such a charge. I do not think that this case compels me to put upon section 1 of the Act of 1866 an interpretation which I should not otherwise think correct. Fry, L.J., on p. 187, drew attention to the fact that an annuity ordered to be settled under section 32 of the Act of 1857 was very different from an allowance ordered to be paid under section 1 of the Act of 1866. I concur in this view of the two sections. Although, therefore, I cannot regard *Linton* v. *Linton* or any other previous cases as actually deciding the question before us either one way or the other, yet, having regard to the language and object of the section and the analogies to which I have alluded, I have arrived at the conclusion that the interpretation put upon it by the learned President is correct, and that allow-

ances to divorced wives made under it are personal to themselves and cannot be assigned. Nor can they, in my opinion, be released without the sanction of the court. A divorced wife need not enforce an order for her own maintenance unless she pleases, and she may release and perhaps assign her right to arrears. But it does not follow that she can bind herself not to enforce payment in future, nor that she can assign her right to future payments. I do not say that an order under section 1 of the Act of 1866 for permanent maintenance cannot be discharged by the court with the consent of the divorced husband and wife, even if the man is able to pay it; but until such an order is discharged the divorced wife cannot, in my opinion, prospectively deprive herself or be deprived of the benefit of the maintenance which the court has ordered to be paid to her.

LOPES, L.J.—This case raises an important question. It is whether sums of money for the maintenance of a divorced wife ordered by the court under the power conferred on the court by section 1 of 29 & 30 Vict. c. 32, are alienable. This Act was passed in 1866, and was intended to enlarge the power of the court in cases where the husband had no property on which the payment of a gross or annual sum could be secured. Section 32 of 20 & 21 Vict. c. 85 had said that the court may, in pronouncing any decree for a dissolution of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross or annual sum of money as to the court may seem reasonable, and for that purpose may refer it to one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed to be executed by all necessary parties. The court under this section could only act where there was property upon which the sums of money ordered could be secured. I do not doubt that the court could have directed that the deed to be prepared should contain a provision against alienation or anticipation by the wife, but in the absence of such a provision the wife would no doubt be at liberty to alienate. There is a substantial difference between permanent alimony, which is ordered after a judicial separation, and maintenance which is ordered after a divorce. There is, too, a substantial difference between the position of a wife who is judicially separated from her husband and a wife who is divorced. In the former case the relations of husband and wife continue, and cohabitation may at any time be resumed. In the latter case the woman is no longer the wife. She cannot again become the wife unless, after the decree is made absolute, she remarries her former husband. She may marry again. He is not bound to support her. She cannot pledge her husband's credit, even for necessaries. In point of fact, she becomes in every respect in the eye of the law a *feme sole*, with all the liabilities and all the privileges of a *feme sole*. It is plain that permanent alimony and maintenance must stand on a different footing. Permanent alimony has been held to be inalienable: *In re Robinson*. Some of the grounds assigned for its being inalienable do not apply to maintenance. The court has not the same control over maintenance. The court can alter or take away alimony whenever it pleases, it is completely under the control of the court. The Act with which we are concerned in this case is 29 & 30 Vict. c. 32. [His lordship read the section, and continued:—] Is the maintenance, which is to be for the support of the wife, alienable? After much consideration I come to the conclusion it is not. The object of the Legislature was to compel the husband to make such a provision for the wife out of his monthly or weekly earnings for her support as would keep her respectable, and be in substitution for that support to which she would have been entitled had she continued his wife, and which would not have been capable of being alienated or anticipated by her. It is to be during their joint lives, and to be paid at short intervals, and the court keeps its hand upon the maintenance, because if the husband is unable to make the payments the court can discharge or modify the order, or temporarily suspend the same as to the whole or any part of the money ordered to be paid, and again revive the same order wholly or in part. Why should the court reserve to itself a power to revive a modified or suspended order if the wife might have alienated her interest? The court would not be concerned to restore an order made in favour of a wife to assist an assignee who could have no claim on the husband; nor do I think the court would be justified in enforcing an order for maintenance against the husband on the application of the assignee. In my judgment this maintenance is in the nature of a personal annuity, and, though in many respects unlike permanent alimony, is, very much for the same reasons as apply to permanent alimony, inalienable. The allowances in both cases are given to the wife, like half-pay given to officers in the Army and Navy, in order that she may maintain herself, and in their very nature are, in my judgment, inconsistent with alienation. I think the learned President was right, and that this maintenance cannot either be alienated or released.

KAY, L.J.—The question in this case is whether a provision for the maintenance of a divorced wife, by periodical payments, which the Divorce Court has ordered the former husband to pay, under the power conferred upon it by the Act of 1866, can be released to the former husband by the divorced wife. By an Act of 1857 (20 & 21 Vict. c. 85), s. 32, the court, in pronouncing a decree for dissolution of marriage, may order that the husband should secure, to the satisfaction of the court, a gross or annual sum of money, and refer it to conveyancing counsel to settle a deed securing it upon the property of the divorced husband. It was decided in *Harrison* v. *Harrison* that where the court had made an order under that statute for securing an annual sum to the divorced wife, but no deed had been executed, the provision by way of annuity was alienable. Cotton, L.J., intimated in that case that a deed might be so framed as to make the annuity cease on alienation. As the grantee of such a provision is no longer a married woman, the only mode of doing this, according to the ordinary law of property, would be to limit the annuity so that it would altogether cease or should go over to another person upon any attempt to alienate. Except in the case of a woman actually under coverture, the power of alienation, which is an incident of property, cannot otherwise be taken away from a person who is not under disability. The sole exceptions to this rule are the case of a married woman who has separate property, as to which she is a *feme sole*, who may nevertheless be restrained from anticipating that property, and certain allowances like the half-pay officers in the Army, which for public reasons are treated as inalienable. Now, that being the state of the law, the Act of 1866 was passed. It had been found that in many cases where divorce was decreed the divorced husband had no property on which a provision for the divorced wife could be secured. Accordingly the statute 29 & 30 Vict. c. 32, s. 1, was passed, which has been read. The power of making this kind of provision for the maintenance of a divorced wife is altogether a creature of statute. Neither Act says anything about its being inalienable. If the provision were a gross sum, or, it

would seem, any sum by way of annuity, under the Act of 1857 it might be assigned, according to *Harrison* v. *Harrison*, unless the deed securing it were so framed as to make it cease on the attempt to alienate it. Alimony, though permanent, has been held to be inalienable: *In re Robinson*. But alimony is a provision for a wife, not for a woman who is no longer a wife. Moreover, the court which granted it has power to alter it or even to take it away. Under the Act of 1866 there is a similar power as to maintenance. The court has power to diminish the amount, or to discharge the order or suspend it in case the divorced husband should become unable to continue to pay it, but only in that event. The statutes do not in terms give any other power to interfere with it when once granted. But the provision is intended for the personal "maintenance and support" of the divorced woman. In cases which come under the Act of 1866, and where the husband has no property on which it can be secured, it must often be the only thing the woman has to depend upon for her livelihood. Although I feel strongly the difficulty arising from the silence of the statutes upon the point, and also from the decision of this court in *Harrison* v. *Harrison*, I am not disposed to differ from the judgment of the President in the present case, and I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors, *Meredith, Roberts, & Mills*, for *Sibly & Dickinson*, Bristol; *E. J. Moeran; Rowcliffes, Rawle, & Co.*

High Court of Justice.

Chan. Div. }
Chitty, J. } July 18.

In re LEE'S SETTLEMENT TRUSTS. (*a*.)

Trustee—New trustee—Decrease in number of trustees—Vesting order—Jurisdiction—Trustee Act, 1893, *ss.* 26, 35.

Where one of four trustees of a settlement has been adjudicated a bankrupt and absconded, the court has jurisdiction to make an order vesting the estate in the other three trustees, although the number of trustees be thereby diminished.

Petition.

By an ante-nuptial settlement of 4th September, 1882, the intended husband covenanted with the four trustees therein named to pay to them within six months after the marriage a sum of £10,000 with interest from the marriage, and if this sum should not be then paid, that he would pay interest thereon at 4 per cent. He charged all his interest in certain real estate with the payment of this £10,000 and interest.

By another settlement of even date the trusts of this £10,000 and of £5,000 South Australian bonds were declared.

In 1891 one of the four trustees was adjudicated a bankrupt and absconded, and his whereabouts was unknown. The £10,000 was still outstanding, and the £5,000 South Australian bonds were deposited in the joint names of the four trustees at Coutts' Bank.

The husband and wife and the three continuing trustees now applied by petition under the Trustee Act, 1893, ss. 26, 35, that the right to sue for and recover the said sum of £10,000 and the interest from time to time to become due for the same, and the benefit of all securities for the same, including the charge created by the first mentioned settlement on the share of the husband in the real estate therein mentioned, might vest in the three trustees, to be held by them upon the trusts of the second settlement; and that the right to sue for and recover the £5,000 South Australian bonds, and any interest from time to time due in respect thereof, and all other choses in action (if any), subject to the trusts of the second settlement, might vest in the three trustees, to be held by them on the trusts of that settlement.

As there were three continuing trustees, it was submitted by the petitioners that it was not necessary to appoint a new trustee in the place of the absconding trustee.

Bryan Farrer, for the petitioners.—In *In re Gardiner's Trusts*, 35 W. R. 28, 33 Ch. D. 590, the court refused to make a vesting order without first appointing a new trustee in the place of the absconding trustee. The reasons for the practice thus settled have now been altered by the Trustee Act, ss. 26, 35, which have widened the jurisdiction of the court. A similar order has been made by the Court of Appeal in *In re Leon*, [1892] 1 Ch. 348, 40 W. R. Dig. 269, under sections 135 and 136 of the Lunacy Act, 1890, where the words are similar to those of sections 26 and 35 of the Trustee Act, 1893. A similar order has been made in *Dugmore* v. *Suffield*, W. N. 1896, p. 50.

CHITTY, J.—Sections 26 and 35 of the Trustee Act, 1893, are very wide in their terms. In my opinion I have jurisdiction to make the order prayed for.

Solicitors, *Farrer & Co.*

(*a*.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

Chan. Div. }
Chitty, J. } July 7.

NORTON *v.* DASHWOOD. (*a*.)

Executor—Devisee—Fixtures—Tapestry.

Tapestry on the walls of a room in a family mansion, which was called the "tapestry room," had about a century ago been affixed to the walls of the room in a manner that skilled witnesses said would now be used if it was required to fix tapestry permanently. The mansion-house had been settled by the will of a former owner in strict settlement, but the will made no mention of the tapestry. The tapestry was claimed as a chattel by the residuary legatee of the will as against the devisee of the mansion-house.

Held, that as regards fixtures a claim by an executor against a devisee was on the same footing as a claim by an executor against an heir; that on the evidence in this case the tapestry was a fixture and passed under the devise of the mansion; and that the case fell within the principle of the decisions relating to claims to fixtures as between executor and heir, and was covered by the decision in D'Eyncourt *v.* Gregory, 15 *W. R.* 186, *L. R.* 3 *Eq.* 382.

Action.

The question in this case was whether certain tapestry on the walls of a room in a mansion-house was a fixture passing under a devise of the house. The facts sufficiently appear from the judgment.

Farwell, Q.C., and *T. L. Wilkinson*, for the plaintiff.

Byrne, Q.C., and *Dunham*, for the defendant.

(*a*.) Reported by RALEGH B. PHILLPOTTS, Esq., Barrister-at-Law.

CHITTY, J., said:—The question relates to the tapestry on the walls of the room called the "tapestry room" in the family mansion-house of the Dashwoods at West Wycombe. The plaintiff, as executor of the late Sir Edwin Dashwood, claims the right to remove and take away the tapestry as a chattel; the claim is resisted by the defendant Sir Robert Dashwood, as tenant for life in possession of the mansion-house. Both parties claim under the will of the late Sir George Dashwood, who died in 1862; at his death he was entitled to the mansion-house and its contents. By his will he settled the mansion-house so that it passed on his death to his widow for life, and on her death in 1889 to Sir Edwin for his life, and on his death in 1893 to the defendant Sir Robert for his life. He also settled as heirlooms to go with the mansion-house certain articles, part by direct gift, and part through the medium of a selection to be made by his trustees. In the first class he included "all and singular the pictures, prints, drawings, books, statuary, and bronzes" in or about the house at his death; in the second, "such and so many of the household goods, furniture, and other chattels and effects" in or about the house at his death as the trustees should think fit to select. The trustees, who were two in number, caused an inventory to be made of the household goods, furniture, and chattels; both signed the inventory, but at different points for the purpose of showing which of the chattels were to go as heirlooms under their power of selection. Inasmuch as the power was conferred upon them jointly, the result was that so many only of the chattels as were covered by both signatures became heirlooms by virtue of the power, and it was so declared in a former action. By virtue of the will all the chattels in the house not made heirlooms by direct gift or through the medium of selection by the trustees passed to the testator's widow as residuary legatee. After her death certain questions in relation to the real estate and the heirlooms arose between Sir Edwin, as tenant for life in possession, and her executors; an action was instituted in which Sir Edwin was plaintiff and her executors and others were defendants. In certain particulars delivered by Sir Edwin pursuant to an order made in the action he claimed the tapestry as heirlooms under the direct gift, adding, in a marginal note, that they were fitted to the tapestry room and formed portion of the building. Subsequently, and apparently as part of a compromise, the executors of the widow sold to Sir Edwin all the furniture and chattels in the house which she was entitled to sell; the present claim of Sir Edwin's executor to the tapestry is founded on this sale. The tapestry is not mentioned in Sir George's will, nor was it mentioned in the inventory of heirlooms signed by the trustees; and, further, it was not mentioned in the sale. The plaintiff, as executor of Sir Edwin, reversing entirely the position taken up by Sir Edwin himself, now claims the tapestry as part of the furniture and chattels which passed to the widow as residuary legatee, and to Sir Edwin as purchaser from her; as against this claim the defendant, Sir Robert, taking up the same position as Sir Edwin formerly did, contends, first, that the tapestry passed with the house as a fixture, and, secondly, that, if it did not, it passed as an heirloom under the direct gift by virtue of the word "fixtures."

I proceed to consider the question whether the tapestry passed with the house. It results from what I have already stated that the question arises between the devisee of the house on the one hand and the residuary legatees on the other hand, both claiming under the same will. In regard to fixtures and a claim to remove them, the law has regard to the relation of the parties, and differs according to the nature of that relation. It will suffice to mention three sets of cases. As between landlord and tenant the claim of the tenant to remove fixtures set up by himself is the most favoured; as between tenant for life and remainderman the claim of the tenant for life to remove fixtures set up by himself is less favoured; and as between executor and heir, where both claim under the same owner, the claim of the executor to remove fixtures set up by the owner is still less favoured. In former times it has been said that the heir was a favoured person; but in my opinion no distinction can be maintained between a claim by the executor against the heir and a claim by the executor against the devisee. The present case falls within the principle of decisions between executor and heir. In considering any questions of fixtures the important circumstances to be regarded are, first, the mode of annexation of the article and the extent to which it is united with the freehold; secondly, its nature and construction, as whether it has been put up for a temporary purpose or by way of permanent improvement; and, thirdly, the effect its removal will have upon the freehold: see Amos on Fixtures, 3rd ed. (1883), p. 125; and Smith's Leading Cases, 10th ed. (1896), vol. 2, p. 208. The second head, involving purpose or intention, appears to me to have peculiar force when the case arises between executor and devisee. It will readily be perceived that if a man annexes an article belonging to himself to the freehold, an intention or purpose of making the annexation permanent is more easily inferred where the freehold also is his own property than where the freehold is the property of another.

The material facts are these. The tapestry has stood on the walls, as it now stands, for at least a century; the room itself has apparently for the same period been known as "the tapestry room." The room itself is a highly ornamented chamber, and the decoration of the room, including the ceiling, has been designed and coloured with reference to the tapestry, which is the principal ornament. The tapestry itself and the room are well shown in the photographs of the three sides of the room capable of being photographed. The tapestry represents figures of men, women, boys, animals, landscape, and sea. It is thus described in the particulars delivered by Sir Edwin: "Tapestry panel with numerous carts, horses, &c., representing in landscape the Harvest Home; another panel representing Game at Bowls, &c.; another panel representing Fish Market." So Sir Edwin himself speaks of "tapestry panel." Wainscot and its panels pass to the heir (*Cave* v. *Cave*, 2 Vern. 508). The tapestry has been cut and pieced so as to fit and cover the spaces in the walls left by the doors and the mantelpiece. This is well shown in the photograph of the wall where the chimneypiece stands. Part of the tapestry lies behind the entablature there shown over the doorway, and to some extent behind the frieze over the mantelpiece. The tapestry appears not to have been designed originally for the room; some additional portions have been added for the special purpose of filling up the wall spaces. Some of the figures on one wall have apparently been copied in the tapestry on another wall. A species of frame following the outline of the wall spaces has been worked in tapestry, so that the tapestry appears to stand in frames. The mode of affixing to the wall is this. Chases have been cut in the plaster right down to the brickwork; into these chases battens two and a half inches broad by three quarters of an inch thick have been placed and securely fixed by strong iron nails firmly driven into the brickwork. The nails, being very old and rusty, are difficult to extract. The tapestry itself is nailed

to the battens by old nails, about half an inch long, like modern tacks; these nails are also rusty. The tapestry itself could not be removed from the walls without suffering injury by tearing; the removal of the nails holding the battens to the wall would involve some injury to the brickwork. The removal of the tapestry, the great feature of the room, would, in the language of the Lord Keeper in *Cave* v. *Cave*, 2 Vern. p. 508, leave the room "maimed and disfigured." The tapestry if removed would be comparatively of little use or value as a chattel. Underneath the tapestry is a carved dado in wood suitable to the tapestry itself; the dado is affixed by screws. The plaintiff does not venture to claim the dado itself; it is plainly part of the room itself. The tapestry could not be got off the walls without removing the entablature over one of the doors, nor probably without removing the frieze over the chimneypiece.

On the question of permanent annexation, one of the skilled witnesses for the plaintiff admitted that if he desired to fix tapestry permanently to a room he should fix it in the way this tapestry is fixed. The other suggested a cement moulding or something of that description running round the tapestry. The skilled witness called by Sir Robert said that the system actually adopted is that which would now be adopted for permanently fixing the tapestry to the walls.

Upon these facts I hold that the tapestry passed with the devise of the house itself. The case is covered by Lord Romilly's decision in *D'Eyncourt* v. *Gregory*, 15 W. R. 186, L. R. 3 Eq. 382. That was a case between tenant for life and remainderman. The method of annexation of the tapestry in that case does not substantially differ from the annexation in the present case. Being of this opinion, it becomes unnecessary for me to decide whether the tapestry would have passed as an heirloom under the word "fixture." Had it so passed it would have vested in a tenant in tail by purchase on his attaining twenty-one. It probably never occurred to the testator when making the careful dispositions found in his will, or to the trustees when they signed the inventory of heirlooms, to doubt that the tapestry passed with the house. But these circumstances form no ground for my decision.

The costs of this question will be the defendant Sir Robert Dashwood's costs in any event.

Solicitors, *Long & Gardiner; Morse & Simpson.*

Chan. Div. North, J. June 20, 27.

FREWEN v. LAW LIFE ASSURANCE SOCIETY. (*a.*)

Will—Tenant for life—Devise including onerous and beneficial estates.

A testator devised various real estates in England to A. for life, with remainder to his first and other sons in tail male. On some of the estates the charges exceeded the rents and profits, and the assignees of the tenant for life desired to give up possession of these estates while retaining the estates which returned a profit.

Held, that the estates being all given in one gift, the onerous estates could not be disclaimed.

Syer *v.* Gladstone, 34 *W. R.* 565, 30 *Ch. D.* 614, *commented upon.*

Action.

The testator devised all his manors, lordships, messuages, lands, tenements, and hereditaments of freehold and copyhold tenure situate in six counties, and also nine advowsons and all other his freeholds in England, to trustees for a term of 2,000 years, and subject thereto to his son Edward Frewen for life, with remainder to his first and other sons in tail male, and the testator declared that every estate for life thereinbefore limited should be unimpeachable for waste, and that the trusts of the term of 2,000 years should be to raise by mortgage of the hereditaments comprised in the term the amount required for payment of debts, expenses, and legacies thereinafter bequeathed in aid of his personal estate; and the testator gave his trustees a power of sale over his estate (except the mansion-houses and the lands held therewith), and declared that the net rents and profits of his estate should (so long as the legacies, portions, and money to be raised by mortgage should remain unpaid) be divided into two equal parts, one to be retained by the person entitled in possession to his English estates, and the other to be paid to his trustees, who, after thereout paying interest on mortgages, &c., should therewith form a fund for the payment off of mortgages, legacies, and portions. There were also separate devises of the testator's estates in Galway and County Cork.

The testator died in 1870, and in 1881 the tenant for life effected a mortgage. In 1885 a receiver was appointed, and eventually the tenant for life was foreclosed by the defendants. In 1887 the defendants went into possession of all the English estates. On some of the estates the charges exceeded the amount of the receipts, and the defendants proposed to give up possession of these estates while retaining possession of those estates which returned a surplus. The plaintiff, who was the first tenant in tail in remainder, accordingly instituted this action.

Swinfen Eady, Q.C., and *Dauney*, for the plaintiff.—The rents of the English estates are given as a whole, and the tenant for life and his assigns are bound to pay interest upon all the existing mortgages, and the surplus arising from one estate must go to keep down the charges upon estates the income of which is less than the charges upon them.

They cited *Guthrie* v. *Walrond*, 31 W. R. 285, 22 Ch. D. 573; *In re Hotchkys*, *Freke* v. *Calmady*, 34 W. R. 569, 32 Ch. D. 408.

Vernon Smith, Q.C, and *Methold*, for the defendants.—There is no liability to apply the surplus rents of one property towards paying the charges upon another property. The case is very like *Syer* v. *Gladstone*, 34 W. R. 565, 30 Ch. D. 614. If the security of any mortgagee of the testator is insufficient, such mortgagee has no personal remedy against the tenant for life. His only remedy is to go into possession or obtain payment from the testator's estate. As the tenant for life is not liable to pay, he clearly can give up possession of the onerous estates.

Swinfen Eady, Q.C., replied.

Cur. adv. vult.

June 27.—NORTH, J.—In this case the mortgagees of the tenant for life have entered into possession of the estates, and they propose to give up possession of certain property, while keeping possession of the rest. The will of the testator seems to me of great importance in the matter. The will contains a devise of freehold and copyhold messuages in England to trustees for a term of 2,000 years, and subject thereto to Edward Frewen for life, with remainder to his first and other sons in tail male. The plaintiff is the eldest son of Edward Frewen, and has attained the age of twenty-one years, and is in a position to bar the entail. Then there are separate devises of the Galway estate and the Cork estate, and the residu-

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

ary personal estate is left to Edward Frewen. The trusts of the term are, as long as mortgages and legacies and charges are unpaid, to pay half the income to Edward Frewen, and with the other half to keep down the mortgages, charges, &c.

The testator died in 1870. The tenant for life effected a mortgage for £12,000 in 1881. In 1885 a receiver was appointed, and in 1887 the defendant was let into possession of all the English estates upon giving an undertaking. On the 9th of November, 1895, the solicitor for the defendant wrote a letter with a statement of the rents of the various properties, and the cases in which the rents do not meet the disbursements. There is over £2,000 a year not included in the specific mortgages, and only subject to the annuities, &c. The charges include an improvement charge, a jointure of £500 a year, seven mortgages for £63,400, and nine mortgages created by the trustees of the term for about £100,000. Of the mortgages created by the testator, in the case of the property mortgaged to Lord Colvile for £30,000, and to Turton for £12,000, the rents are insufficient to meet the charges, and this is also the case in four other instances. In one case, that of Lord Colvile, foreclosure proceedings have been commenced. Many of the charges have nearly expired; for instance, there is an annuity of £1,000 to a lady of seventy-four, and there are improvement charges payable by instalments terminating in 1900 or thereabouts. Some of the mortgagees are willing not to press for their money if the interest is kept down, but if the defendants give up possession of the property and no interest is paid, they will take proceedings. Some of the mortgagees will agree to take less interest than is due under their mortgage deeds, but this will not benefit the estate, as the defendants have taken an assignment of the right to interest at the higher rate.

The plaintiff says that the rents of the English estates are given as a whole, and the tenant for life and his assigns are bound to pay interest upon all the existing mortgages, and that the surplus of one estate must go to keep down other charges. The defendants contend that the properties can be dealt with differently, and that there is no liability to apply the surplus from the rents of one property towards paying the charges of another property. It is clear upon reading the will that the English estates are given as a whole, it is quite impossible to divide the gift, and the tenant for life is bound to keep down the interest.

What is the law upon the subject? In *Guthrie* v. *Walrond*, Fry, L.J., says (22 Ch. D., p. 577): "It appears to me plain that when two distinct legacies or gifts are made by a will to one person, he is, as a general rule, entitled to take one and disclaim the other; but that his right to do so may be rebutted if there is anything in the will to show that it was the testator's intention that that option should not exist." In *Syer* v. *Gladstone* I cannot find anything in the case to justify the headnote either in 34 W. R. 565 or 30 Ch. D. 614. The judge decided that the life tenants were bound to keep down the interest out of the rent that they received. The interest payable under the mortgage was about £700, the income was less than £300, so £400 had to be provided from some other source. The real decision seems to have been that the life tenants were bound to indemnify the testator's estate to the extent of the value of the proceeds of the house and furniture received by them. In *In re Hotchkys* Cotton, L.J., says (32 Ch. D., p. 417): "It is true that where two legacies are given to a person by a will the legatee may say, 'I am much obliged to the testator for legacy A, and I will take it; but I decline to take legacy B.' The two things are not connected together so as to be part of the one thing given to the legatee. There are two things given to the legatee, and the legatee is in no way bound to take one if he does not like to take it; but on the other hand he may take the one entire and separate thing which is given him without taking the other. In my opinion it does not at all depend upon the question whether it is given in one sentence or in two sentences; and that will explain the case of *Syer* v. *Gladstone*, which was pressed upon us in support of the contention of the tenant for life. In that case there was a gift of property and of certain things on the property. That was a case where there were two bequests, one of land or houses, and the other of chattels. In my opinion there were two separate gifts, of which the legatee might accept one and reject the other. But here what is given to the tenant for life and to the remainderman is an aggregate." Lindley, L.J., too, says (32 Ch. D. 419): "It appears to me that, having regard to the terms of the gift, she is to be considered for the purpose of the construction of this will as having had an aggregate property given to her for her life." Those words are thoroughly applicable to the present case. The testator has given the English property as one undivided whole, and there is no right to split it up. There is a mortgage for £63,000 for which the testator's estate is liable. It is said if the mortgage is insufficient the only right of the mortgagee is to enter into possession of the rents and profits, and that there is no obligation upon the tenant for life to pay the mortgage. I am not satisfied that this proposition is right. The testator charged the estate in the way he has done to prevent the mortgagees from going into possession. I am also not satisfied that the construction contended for is correct. In *In re Fitzgerald*, 36 W. R. 385, 37 Ch. D. 18, mortgagees who were not parties to a voluntary settlement were held to be *cestuis que trustent* under the deed, and entitled to the benefit of the provisions for accumulation therein contained. Cotton, L.J., says (37 Ch. D. 23): "Is it right that the trust should be considered as liable to be put a stop to by the owner of the estate? I think not." And this he says he would have held even if he had not thought that the mortgagees were *cestuis que trustent*. It seems to me to make no difference whether there is an express trust or a devise to one for life with remainder over, carrying with it a well-known legal liability.

The plaintiff is right, and is entitled to have the rents treated as one sum, and not to have them split up.

Solicitors, *Collisson & Richard; Walters, Deverill, & Co.*

Chan. Div. | North, J. | June 2.

In re HARKNESS AND ALLSOPP'S CONTRACT. (*a*.)

Vendor and purchaser—Trustee—Married woman—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 18, 24.

Land was conveyed by deed in 1885 *to three trustees, one of whom was a female. In* 1889 *the female trustee married. In* 1896 *the three trustees contracted to sell the property.*

Held, that the concurrence of the husband of the female trustee was necessary.

Summons under the Vendor and Purchaser Act, 1874.

(*a*.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

By an indenture dated the 3rd of July, 1885, certain property was conveyed to Edith Herbert Hall, spinster, Alfred Reckless, and Herbert Hall as joint tenants upon trust for sale.

Edith Herbert Hall in the year 1889 intermarried with Thomas Harkness.

On the 24th of February, 1896, the trustees contracted to sell the property to Allsopp & Sons (Limited).

This summons was taken out to determine whether the concurrence of Thomas Harkness in the conveyance was necessary, and whether the deed must be acknowledged by Mrs. Harkness under the Fines and Recoveries Act.

Swinfen Eady, Q.C., and *Peterson*, for the purchaser.—Before the Married Women's Property Act the concurrence of the husband would have been necessary: *Avery* v. *Griffin*, L. R. 6 Eq. 606, 16 W. R. Ch. Dig. 141. Section 1 (1) only refers to property to which the married woman is entitled beneficially. Section 18 does not include real estate.

Brinton, for the vendors.—The intention of the Act was that a married woman should be able to deal with all property, whether trust property or not, in the same way as a *feme sole*. Section 24 makes her solely liable for breaches of trust.

He cited *Bathe* v. *Bank of England*, 6 W. R. 612, 4 K. & J. 564, and *In re Drummond & Davies' Contract*, 39 W. R. 445, [1891] 1 Ch. 524.

Swinfen Eady replied.

NORTH, J.—I have had occasion to consider this point before, and I think that the concurrence of the husband is necessary, notwithstanding the Married Women's Property Act, 1882. Its title is "The Married Women's Property Act, 1882." If a married woman is sole trustee or is one of two or three trustees, how can it be said that the property of which she is trustee is in any way her property? It is not so at all in the ordinary sense of the word.

The phrase "The Married Women's Property Act" is a very good, useful title, and expresses the purpose which the Act was intended to effect. Its object was to prevent the property of ladies being under the control of their husbands as it had formerly been. At one time it was almost entirely so; but by degrees, as the law improved, various devices were resorted to by which the property of a lady was prevented from becoming absolutely the property of her husband, and a day arrived at last on which it was thought desirable to turn the thing round, as it were, and to say that a lady's property should be by law her own property, and not, as it had been, her husband's, unless some special precautions were taken.

This Act was then passed; there was an earlier Act ten years before, but the Act of 1882 went further than anything that had been done before, and, indeed, further than most persons would have thought of going down to the time when it came into operation. It was a long step in advance at the time when the Act was passed, but its object was to prevent a married woman's property from becoming her husband's property. That intention is shown very clearly in the first sub-section of section 1. [His lordship read the sub-section.] A woman is to be capable of acquiring, that is to say, getting the property and having it as hers without the intervention of any trustee. It need not be conveyed to trustees for her separate use, but she may acquire it herself without the intervention of a trustee. If she does so, she may hold it also without the intervention of a trustee, and it is no longer necessary for the law to find a trustee to act for her, or to make her husband into a trustee.

"Separate property" in section 1 (1) means separate from her husband, and she can deal with it as she likes, instead of its being his property to deal with as he likes. To speak of a married woman's separate property when she is a trustee of it, perhaps for another married woman whose separate property it may also be said to be, is not very natural, and is not the mode in which the words are used in this Act. Section 18 goes beyond the general scope of the Act, because the Legislature could not help seeing that a married woman is now more frequently than formerly an executrix, administratrix, or trustee. [His lordship read the section.] It has been suggested that the whole of this section is confined to property of the particular description mentioned in it, but I think that the earlier part of the section is larger, and that a married woman who is an executrix or trustee may sue or be sued whatever the property is of which she is executrix or trustee. But then the section goes on to give directions as to transfer, and the Legislature cannot have intended by the words used to say that the married woman may convey any real estate. A direction that a woman holding property as a trustee may "join in transferring any such annuity or deposit as aforesaid" can only mean that she may do the particular things set out at some length in this section.

It would be most strange that language of this sort should be used, if what was intended was that she may not only sue and be sued in respect of real estate, but may also convey or transfer the real estate accordingly. Some such words would have been used if that was what was meant.

There is nothing in section 24 which helps me very much. It again goes outside the main scope of the Act, and deals with matters in respect of which the married woman is acting as executrix or administratrix. Where a married woman is acting in a capacity which would make her husband liable he is to have conferred on him, to some extent, the same protection from his wife that his wife is receiving from him throughout the Act. In the present case, therefore, the conveyance cannot be made by Mrs. Harkness under the powers given by the Married Women's Property Act without the concurrence of her husband.

Solicitors, *Geare, Son, & Pease*, for *Robotham, Attwood, & Robotham*, Derby; *Indermaur & Brown*, for *Webster & Styring*, Sheffield.

Chan. Div.
Kekewich, J.

June 16, 17, 18.

HODSON v. HEULAND. (*a*.)

Specific performance—Parol agreement—Possession prior to agreement—Continuance in possession—Statute of Frauds (29 *Car.* 2, *c.* 3), *ss.* 1, 4.

Where a tenant in possession of premises continues in possession after a verbal agreement for a lease exceeding three years, and such possession is unequivocally referable to the verbal agreement, it is an act of part performance sufficient to take it out of the Statute of Frauds.

Trial of action.

This was an action for specific performance of an alleged agreement by the defendant to grant to the plaintiff a lease of certain premises exceeding three years.

On the 27th of April, 1895, the plaintiff and defendant verbally agreed to the terms, and on the

(*a*.) Reported by F. T. DUKA, Esq., Barrister-at-Law.

30th the plaintiff took possession; and on the 1st of May it was verbally agreed between the parties that the rent originally agreed should be increased in consideration of another portion being added to the premises.

A draft lease was approved on the 8th of May, but not signed by the defendant.

The plaintiff continued in possession and paid rent to the defendant.

In February, 1896, the defendant gave the plaintiff notice to quit as a tenant at will, whereupon the writ in this action was issued.

The term agreed was to be to the 24th of June, 1895, and then for three years more.

Warrington, Q.C., and *Elgood*, for the plaintiff.—Possession and payment of rent are sufficient acts of part performance: *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467; *Pain* v. *Coombs*, 1 De G. & J. 34, 6 W. R. Ch. Dig. 83.

Renshaw, Q.C., and *Norman Craig*, for the defendant.—The possession was not unequivocally referable to the agent. Payment of rent is insufficient for part performance. The plaintiff is only a tenant at will: *Nunn* v. *Fabian*, L. R. 1 Ch. App. 35, 14 W. R. Ch. Dig. 119; *Humphreys* v. *Green*, 10 Q. B. D. 148, 31 W. R. Dig. 82; *Dale* v. *Hamilton*, 5 Hare, 369, 2 Ph. 266; *Goodtitle d. Galloway* v. *Herbert*, 4 T. Rep. 680.

KEKEWICH, J. [after holding that, on the evidence, there was a concluded parol agreement arrived at on the 1st of May, the terms of which were accurately expressed in the draft prepared by the plaintiff's solicitor], said:—Now, can I enforce this agreement? I think there is possession sufficient as part performance to oblige me to grant relief to the plaintiff. The plaintiff has been and is in possession, and the only difficulty consists in that the agreement was not arrived at till the 1st of May, when the plaintiff was already in possession. The possession being antecedent to the contract no doubt makes a difficulty, and it is argued that the court cannot regard possession taken antecedent to the contract as evidence of that contract, or rather as letting in the consideration of the parol contract within the rules laid down in the cases. The doctrine can be stated in the words of Grant, M.R., in *Frame* v. *Dawson*, 14 Ves. 387, as quoted by Lord O'Hagan in *Maddison* v. *Alderson*, 8 App. Cas., at p. 484. It has never, so far as I am aware, been said that a continuance of possession cannot be evidence of a parol contract. Very great difficulty has been found, and generally I think insuperable difficulty, in enforcing a parol agreement for the renewal of an existing lease owing to the fact that the tenant is already in possession independently of the proposed new lease. I am not aware that it has been said to be fatal. It is only a difficulty which may and generally is insuperable. The act which amounts to part performance must be unequivocal. If a continuance in possession is unequivocal, why should it not have the same force as a taking of possession? The difficulty lies in that it is more difficult to prove. It is a difficulty not of principle, but of evidence. In the case before me the difficulty is, in my opinion, easily overcome. On the 27th of April the parties were so far agreed that there was every probability of a final agreement, and under these circumstances possession was taken on the 30th of April. On the 1st of May they knew that the terms agreed on the 27th of April were not the terms on which the tenancy was to be continued. It seems to me that if the parties intended to part, that parting ought to have taken place forthwith, and I am bound to conclude that when the plaintiff continued in possession after the 1st of May he did so because on that date the parties had come to a definite agreement. On the 2nd of May he is either a trespasser or a tenant. I do not go into the question of payment of rent, as I think the facts of this case get over the practical difficulties, and that I am bound to enforce the contract on that ground. The plaintiff is entitled to specific performance of the agreement for a lease and to the terms of the draft lease, which I hold express the terms of the parol agreement.

Solicitors, *Charles Jupp*, for *Lomer & Son*, Southampton; *Speechly & Co.*, for *Charles Lamport*, Southampton.

Chan. Div. | July 14.
Romer, J. |

Re WOOD.

ATTORNEY-GENERAL v. ANDERSON. (*a*.)

Intestates' Estates Act, 1884—*Escheat—Equitable interest—Proceeds of the sale of real estate directed to be sold under will—Beneficial interest ineffectually disposed of—Intestates' Estates Act*, 1884 (47 & 48 *Vict. c.* 71), *ss.* 4, 7.

Under sections 4 *and* 7 *of the Intestates' Estates Act*, 1884, *the law of escheat applies to proceeds of the sale of real estate directed to be sold under the will.*

This was an action on the part of the Attorney-General, on behalf of the Crown, against the executors of Miss E. S. Wood, deceased, to be entitled, *inter alia*, to the proceeds of the sale of certain freehold property, and for the administration of her real and personal estate. The facts of the case were as follow By her will, dated the 21st of March, 1890, the testatrix devised a certain freehold house to her executors, who were to sell the same as soon as conveniently might be after her decease, and whose receipt for the purchase money should be a good and sufficient discharge to the purchasers thereof; and the testatrix directed that, after payment of the expenses of such sale, the balance remaining should form part of her general personal estate. And she directed that all her just debts, funeral and testamentary expenses, and the legacies given by that her will and any codicil or codicils thereto should be paid out of her general personal estate; and, after giving various pecuniary legacies as therein mentioned, she appointed the defendants executors of her will. The testatrix on the 5th of September, 1891, added a codicil to her will, in no way affecting the subject matter of the action, and died on the 20th of November, 1893. Her will and codicil were subsequently proved by her executors. The house was sold, and after the debts and legacies had been paid a balance remained in the hands of the executors, representing in part the net proceeds of the sale of the house. Inquiries were directed in the action, and it was found by the chief clerk's certificate that the deceased testatrix had died without leaving any heir or next of kin.

Sections 4 and 7 of the Intestates' Estates Act, 1884, are as follow:—

4. "From and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments."

(*a*.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

7. "Where any beneficial interest in the real estate of any deceased person, whether the estate or interest of such deceased person therein was legal or equitable, is, owing to the failure of the objects of the devise or other circumstances happening before or after the death of such person, in whole or in part not effectually disposed of, such person shall be deemed, for the purposes of this Act, to have died intestate in respect of such part of the said beneficial interest as is ineffectually disposed of."

Ingle Joyce, for the Attorney-General.—The decision in this case depends on sections 4 and 7 of the Intestates' Estates Act, 1884, and it is submitted that under these sections the Crown is entitled. The will of the testatrix contains no gift of the residue of her general personal, or of her real, estate. Under these circumstances, if she had left an heir, he would be unquestionably entitled to the money as against the executors. Having regard to the words of section 7, it cannot be said that the interest of the testatrix in the sum of money arising from the sale has been effectually disposed of, and consequently the Crown is entitled.

Neville, Q.C., and *Ribton*, for the defendants.—On a strict construction of the words in the two sections the Crown is not entitled as against the executors. Section 4 deals with the case of a person dying intestate in respect of any interest, whether legal or equitable, in any incorporeal hereditament or of any equitable estate or interest in any corporeal hereditament, but the sum of money that has to be dealt with in this case is the undisposed proceeds of the sale of real estate. The heir would take, but only because there is a resulting trust in his favour; but the estate that he takes is personal estate. The effect of section 7 is to limit the right of the Crown thereunder to real estate.

ROMER, J.—I am of opinion that the Attorney-General's claim is justified, although the sections are not free from difficulty. In my opinion, however, the net proceeds of the sale of the house constituted a beneficial interest in the testatrix's real estate which remained undisposed of under her will within the meaning of section 7. Hence she died intestate as to a beneficial or equitable interest in a corporeal hereditament. There is therefore under her will an equitable interest in a corporeal hereditament undisposed of. Consequently under section 4, which says that to an equitable interest in a corporeal hereditament, whether devised to trustees or not, the law of escheat shall apply if there is no heir, the law of escheat applies to the proceeds of sale.

Solicitors, *Solicitor to the Treasury; Woodbridge & Sons*, for *Senior & Lambert*.

Q. B. Div.
(Grantham and Collins, JJ.) May 18.

DICKINS v. GILL. (a.)

Post office—Die for making fictitious stamp—Possession—Without lawful excuse—Post Office (Protection) Act, 1884 (47 & 48 *Vict. c.* 76), *s.* 7 (c).

The respondent had in his possession a die for a fictitious stamp which he used for the purpose of making a representation of a postage stamp in a newspaper published in the interest of stamp collectors. The die was made abroad to the respondent's order.

Held, that the respondent had committed an offence within section 7 (c) *of the Post Office Protection Act*, 1884, *which provides that a person shall not, unless he shows a lawful excuse, have in his possession a die for making a fictitious stamp.*

Case stated by the chief metropolitan magistrate.

The respondent appeared to answer an information of the appellant, charging him with having between the 17th of May and the 8th of June, 1895, had in his possession a die for making a fictitious stamp. The proceedings upon the information were for the recovery of the penalty of £20 imposed by section 7 of the Post Office (Protection) Act, 1884.

That section provides that a person shall not (*a*) make, knowingly utter, deal in, or sell any fictitious stamp, or knowingly use for any postal purpose any fictitious stamp; or (*b*) have in his possession, unless he shows a lawful excuse, any fictitious stamp; or (*c*) make, or unless he shows a lawful excuse have in his possession, any die, plate, instrument, or materials for making any fictitious stamp.

Any person who acts in contravention of this section shall be liable on summary conviction on a prosecution by order of the Commissioners of Inland Revenue to a fine not exceeding £20, subject to the like right of appeal as in the case of a penalty under the Acts relating to the excise.

Any stamp, die, plate, instrument, or materials found in the possession of any person in contravention of this section may be seized, and shall be forfeited.

For the purposes of this section "fictitious stamps means any facsimile or imitation or representation, whether on paper or otherwise, of any stamp for denoting any rate of postage, including any stamp for denoting a rate of postage of any of her Majesty's colonies or of any foreign country."

The respondent was a newspaper proprietor and printer carrying on business at the offices of a newspaper known as the *Bazaar, Exchange, and Mart*. On the 8th of June, 1895 (and previously) he had in his possession a die or instrument received by him from one Van Hoytema, who had received it from the Continent of Europe. The respondent had ordered the die to be made for him for use in illustrating the "Philatelist Supplement" of the *Bazaar, Exchange, and Mart* newspaper, and it had been made and delivered accordingly. With the said die or instrument imitations or representations of a 2½d. Cape of Good Hope current postage stamp could be produced. It was, however, proved to the satisfaction of the magistrate or admitted that the only purpose for which the respondent had ordered and had in his possession the said die was for making upon the pages of an illustrated stamp catalogue or newspaper illustrations in black and white, and not in the colours of the Cape of Good Hope stamp in question; that such illustrations were intended to appear thereon together with illustrations of other stamps; and that such catalogues were intended for sale only to stamp collectors and others, and as part of a newspaper published for the instruction and amusement of persons buying such paper.

It was contended on behalf of the appellant that the possession of the die or instrument without licence or authority from the Crown was a contravention of the statute, and that the purpose for which the respondent had the die in his possession did not constitute a lawful excuse within the meaning of the statute. It was contended on behalf of the respondent that inasmuch as it had been proved or admitted that the die was only used and intended to be used only for the purpose aforesaid the respondent had shown a lawful excuse for its possession.

The learned magistrate found (*a*) that the

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-Law.

respondent had in his possession a die or instrument capable of making a fictitious stamp; (*b*) that there were facts which showed absolute *bonâ fides* in the respondent, and that there was a certainty that the respondent would not use the die for any improper purpose. He thought this was evidence of lawful excuse, and found as a fact that there was lawful excuse, and dismissed the information.

The question for the court was whether it appeared on the evidence as a matter of law that there was no lawful excuse, and that consequently the learned magistrate was not entitled to find as a fact that there was a lawful excuse.

Sir R. B. Finlay, S.G. (*Danckwerts* with him), for the appellant.—The decision is wrong. The magistrate has treated "without lawful excuse" as meaning "with guilty knowledge"; but the words "lawful excuse" are intended to apply to the case of a Custom House officer or constable seizing a fictitious die.

C. W. Mathews, for the respondent.—This is a question of fact, and therefore the magistrate's decision is final; but assuming it involves a question of law it is right. "Lawful excuse" cannot be construed in the limited sense given to it by the appellant, for "excuse" is not the same as "authority." The two terms are used in this Act in contra distinction, see section 6. The contention of the appellant would involve the committing of an offence by an innocent stamp collector if he has a single fictitious stamp in his collection. That cannot have been intended, therefore the words of the section must mean that innocent possession is a good defence.

Counsel referred to the use of the words "lawful excuse" and "lawful authority" in 2 & 3 Will. 4, c. 34, s. 10; 11 Geo. 4 and 1 Will. 4, c. 66, s. 19; 24 & 25 Vict. c. 99, s. 24; and 33 & 34 Vict. c. 58, s. 5.

Sir R. B. Finlay, S.G., in reply.—In the case of an innocent stamp collector there might be a lawful excuse; but this is a very different case. The making of this die was an offence, and the respondent had it made to his order, therefore he cannot have had a reasonable belief that his possession was lawful.

He referred to *Reg.* v. *Harvey*, 19 W. R. 446, L. R. 1 C. C. R. 284.

GRANTHAM, J.—In my judgment the respondent has failed to uphold the decision of the magistrate. The case is one of some importance, and therefore it required, and has had, careful argument. I have come to the conclusion that the magistrate has mistaken the meaning of the words "lawful excuse." He has decided, in effect, that as the respondent thought that he was not doing wrong in having this die in his possession, there was a lawful excuse within the meaning of the section. The Legislature has said that a die for making a fictitious stamp shall not be made, and a person contravening that section is liable to a penalty. In this case the respondent had the die made abroad for the very purpose of avoiding that penalty. I think he might have been made liable to a penalty for making the die, but, however that may be, it seems to me very difficult to see how his possession can now be said to be innocent. He has it in his possession for the purpose of showing to the purchasers of the paper what the stamp was like, and for that purpose he made a representation of the stamp, though not in colours. I do not think that is a lawful excuse, for it was wrong for him to have the die in his possession at all.

I do not quite follow the argument of the respondent's counsel as to the inference to be drawn from the use of the word "excuse" and not "authority" in this sub-section, especially as in the present case no "authority" has been, or possibly could be, given. But although a person might be liable to a penalty for making a die without authority, still cases can be imagined in which it would be very hard for persons to be punished for being in possession of that which they did not know to be illegal. In the case of a person buying a fictitious stamp, if he had no means of knowing whether it was good or bad, I think there would be a lawful excuse, not because he thought he had authority to have it in his possession, but simply on the ground that he believed the stamp to be genuine, or did not know it was fictitious. But how can it be said here that the respondent had no knowledge, when he sent abroad for the die because he knew he could not lawfully get it made here? In my opinion the absence of any provision in section 7 as to making "by lawful authority" shows that a strict construction must be put upon the words "lawful excuse."

For these reasons I am of opinion that the appeal must be allowed.

COLLINS, J.—I am of the same opinion. I think that the act done by the respondent is clearly within the mischief which the statute strikes at. It is obvious that the object is to make it as difficult as possible to do that which by the policy of the law can only be done by the Crown. [His lordship read the section.] In the case of making there is an absolute prohibition, but with regard to uttering it must be done knowingly, because it might possibly be done innocently. Sub-section (*b*) runs: "Have in his possession, unless he shows a lawful excuse, any fictitious stamp." It seems to me that there again there must be a conscious act, and that what is struck at is a person having a fictitious stamp consciously in his possession, and therefore to make an excuse; but I do not think that it is necessary to deal with the ingenious argument of the respondent's counsel on this point, for even if the fictitious stamp originally came into a person's possession unconsciously, that would be no defence to his retaining it after the fact had been brought to his knowledge. Then we come to sub-section (*c*), under which the charge is made. It is difficult to imagine a case in which a person unconsciously obtained a die for making a fictitious stamp, and if it is not making a fictitious stamp the offence is not committed. But supposing that a man could buy a die for making a fictitious stamp without knowing that it was fictitious, then comes the moment when the Executive ask him to give it up. If he retains it after that, he commits an offence unless he has a lawful excuse. The excuse set up here is that the respondent wanted for his own purposes to print the stamp in his paper. I do not think that that is a lawful excuse. It is not a question of guilty motive, but the act is one which the Act cannot tolerate, and which is distinctly within the mischief aimed at. I entirely concur in the opinion of my learned brother, and agree that the appeal must be allowed.

Appeal allowed.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitors for the respondent, *Powell & Skues.*

Court of Appeal.

From Chan. Div. (Lindley, Kay, & A. L. Smith, L.JJ.) — Feb. 20, 21, 22, 24, 25; March 31.

POWELL *v.* BIRMINGHAM VINEGAR BREWERY CO. (LIMITED). (*a.*)

Trade name — Injunction — "Yorkshire Relish" — Probability of deception—Passing off.

Where a man has long been the sole maker of a particular kind of article which he has always called by some name by which his goods are known and usually called by ordinary buyers, if it is impossible for a rival manufacturer profitably to use the old name and at the same time so to distinguish the two classes of goods as to prevent the goods of the rival manufacturer from being mistaken for those of the original manufacturer, the latter will be entitled to protection, and it is not necessary for him to prove fraudulent conduct on the part of the rival manufacturer.

The plaintiff had for a number of years sold a sauce under the name of "Yorkshire Relish," though his trade-mark consisting of those words had been expunged from the register. The defendants began selling, under the name of "Yorkshire Relish," a sauce of their own manufacture which, though not identical with the plaintiff's sauce, was very similar to it. There were considerable differences between the labels on the plaintiff's and defendants' bottles, but the evidence showed that in spite of these differences the defendants' sauce could be and was easily mistaken by ordinary purchasers for the plaintiff's.

Held, affirming the decision of Stirling, J., *that the plaintiff was entitled to an injunction restraining the defendants from selling their sauce without better distinguishing it from the plaintiff's sauce.*

This was an appeal by the defendants from the decision of Stirling, J., granting a perpetual injunction restraining the defendants from selling a sauce made by them under the name of "Yorkshire Relish" without clearly distinguishing such sauce from sauce made and sold by the plaintiff.

An interlocutory injunction had been granted by Stirling, J., whose decision was affirmed by the Court of Appeal: [1894] 3 Ch. 449, 43 W. R. Dig. 180.

The plaintiff, trading under the name of Goodall, Backhouse, & Co., of Leeds, had for thirty-four years manufactured, under a secret recipe, a sauce which he called "Yorkshire Relish." Other persons during that period had attempted to use the same name for their sauces, but had always been prevented by the plaintiff.

The plaintiff sold his sauce in bottles of one shape in three different sizes.

On the 22nd of April, 1884, the plaintiff registered the words "Yorkshire Relish" by themselves without any addition.

In February, 1893, the defendants took proceedings to remove this mark from the register, and on the 15th of April, 1893, it was removed by Chitty, J., whose decision was affirmed on the 21st of April by the Court of Appeal, and on the 23rd of November by the House of Lords: 41 W. R. 627, [1893] 2 Ch. 388, 399, and [1894] A. C. 8. The ground for this removal was that the plaintiff had not used these words alone as a trade-mark.

There was evidence that the plaintiff's Yorkshire Relish had obtained a large sale all over the world, about six million bottles having been sold by him annually.

Ordinary retail purchasers often asked simply for "Yorkshire Relish" when they wished to buy the plaintiff's sauce.

After the removal of the words "Yorkshire Relish" from the register the defendants, being large makers of sauces under various names, began to use the name of "Yorkshire Relish" for a sauce made by them.

The defendants' sauce closely resembled that of the plaintiff's in appearance, in chemical ingredients, and in flavour, and was described by one of the chemical experts who gave evidence as "a wonderful match," but, as the defendants did not know the recipe of the plaintiff, nor the manner in which the ingredients were compounded, the two sauces were not identical.

The plaintiff's label had a red ground with two blue curved bands across it at the top and bottom, on which were the words "Yorkshire Relish," "Goodall, Backhouse, & Co.," in white, in large letters. Between these was a willow-pattern plate, and there were other words on the label in smaller type stating, amongst other things, that Goodall, Backhouse, & Co. were the makers.

The defendants put on their bottles, which were of the same shape and sizes as the plaintiff's, a white label, with the words "Yorkshire Relish" in a curve like the plaintiff's in gilt letters. Under this were in smaller letters the words "Manufactured by"; then a gilt disc the same size as the plate on the plaintiff's label, and, underneath, the words "Holbrook & Co.," in white letters on a gilt band which is straight, not curved like the plaintiff's.

The plaintiff enclosed his bottles in white wrappers, on the outside of which was printed a willow-pattern plate, with, underneath, in straight lines, "The celebrated Yorkshire Relish, Goodall, Backhouse, & Co." The defendants wrapped their bottles in white, and sometimes in pink paper, outside which was printed the same label which was put on their bottles.

The defendants sent out to retail traders who dealt with them show cards to put in their shops or windows with a red ground, on which were the words "Yorkshire Relish" in a curve, a circle in the middle with the price marked in it in large characters, and, below, "Holbrook & Co., London and Birmingham," but no statement as to who were the manufacturers. Their price lists were headed with the defendants' name and "Sole makers and proprietors of Holbrook & Co.'s sauces and pickles." "Yorkshire Relish" was afterwards printed in large type without any indication there whose make was referred to. The defendants sold their sauce for a less price per dozen than the plaintiff, and it was proved that some grocers, at any rate, retailed it at the same price which they got for the plaintiff's.

Moulton, Q.C., Buckley, Q.C., and *Waggett*, for the appellants.—The words "Yorkshire Relish" are simply the name of a sauce with a distinctive flavour, and we are entitled to sell such a sauce by that name: *Reddaway* v. *Banham*, 43 W. R. 294, [1895] 1 Q. B. 286. The effect of the decision in *In re Powell's Trade-Mark* is that it is open to us to use the words "Yorkshire Relish" in some way, and the way in which we have used them is such as clearly to distinguish our goods from those of the plaintiffs'. The two articles are, as commercial articles, substantially the same for all practical purposes. The defendants merely wish to be competitors of the plaintiffs in Yorkshire Relish, not to be taken for the plaintiffs'. The plaintiffs have no monopoly in the article or in the name.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

They referred to *Linoleum Manufacturing Co.* v. *Nairn*, 26 W. R. 463, 7 Ch. D. 834; *Wotherspoon* v. *Currie*, 18 W. R. 562, 942, L. R. 5 H. L. 508, 21 W. R. 118; *Thompson* v. *Montgomery*, 37 W. R. 637, [1891] A. C. 217, 39 W. R. 235; *Reddaway* v. *Banham*, [1892] 2 Q. B. 639, 41 W. R. Dig. 253.

Graham Hastings, *Q.C.*, *J. Cutler*, and *Hampson*, for the respondents.—The defendants, by their way of putting their sauce on the market, intend to pass it off or enable others to pass it off as the plaintiffs'. *Reddaway* v. *Banham* will not stand, but at any rate it turned on the defendant's statement being true. Here the defendants' statement is not true. They cannot go further than saying that their sauce is a "wonderful match."

They referred to *Braham* v. *Bustard*, 11 W. R. 1061, 1 H. & M. 447, and *Grezier* v. *Autran*, 13 Pat. Rep. 1.

Buckley, *Q.C.*, replied.

Cur. adv. vult.

LINDLEY, L.J.—This is an appeal by the defendants from an injunction restraining them from selling a sauce made by them under the name of "Yorkshire Relish" without better distinguishing it from sauce of the same name sold by the plaintiffs. A full report of the case and a careful and accurate summary of the evidence will be found in 12 Pat. Rep., p. 496. The plaintiffs do not complain of the infringement of any registered trade-mark. They rely exclusively on their common law right to prevent other people from making and selling goods which can be and are passed off and mistaken for goods made by them under the name of "Yorkshire Relish." The case is one of very great importance, not only to the parties concerned, but to traders and the public generally.

I will state what I conceive to be the law applicable to such cases generally, and I will then consider the facts of this case in particular. Before there was any legislation on the subject of trade-marks it was well settled that when anyone adopted a mark so closely resembling the trade-mark of the plaintiff as to be likely to be mistaken for it the plaintiff was entitled to injunction to restrain the use of such mark. Fraud on the public to the detriment of the plaintiff was the foundation of the right to damages at common law (per Lord Blackburn in *Singer Manufacturing Co.* v. *Loog*, 29 W. R. 699, 8 App. Cas. 15, but as long ago as 1833 it was decided in *Millington* v. *Fox*, 3 Myl. and Cr. 338, that intentional deceit was not essential to warrant the court in granting an injunction. The court will interfere to protect a plaintiff if ordinary or unwary purchasers are likely to be misled and to mistake the defendant's goods for the plaintiff's. Nothing can be more emphatic on this point than Lord Cairns' judgment in *Singer Manufacturing Co.* v. *Wilson*, 26 W. R. 664, 3 App. Cas. 376 at pp. 391 and 392. [His lordship read the passage referred to, and continued:] In cases of this description the probability of misleading, not experts or persons who know the real facts, but ordinary or unwary customers is the mischief to be guarded against. This point was settled as long ago as 1824 in *Sykes* v. *Sykes*, 3 B. and C. 541, and has been recognized ever since. See *inter alia* in *Singer Manufacturing Co.* v. *Loog*, by Lord Selborne, when commenting on the brass plate at one time used by the defendant in that case. Persons may be misled and may mistake one class of goods for another, although they do not know the names of the makers of either. A person whose name is not known but whose mark is imitated is just as much injured in his trade as if his name were known as well as his mark. His mark as used by him has given a reputation to his goods. His trade depends greatly on such reputation. His mark sells his goods. A rival who imitates his mark can hardly help deceiving buyers and injuring him; and for such injury, if proved, he can obtain redress. *Siegert* v. *Findlater* (the *Angostura Bitters case*), 26 W. R. 459, 7 Ch. D. 801, illustrates this, see at p. 807. But it must never be forgotten that a trade-mark only confers on the person whose mark it is a right to say, "Do not imitate my mark in connection with goods like mine so that yours may be mistaken for mine." There is no exclusive right to the mark except in connection with such goods and to prevent deception or mistake. Still less does a trade-mark confer any exclusive right to make or sell the kind of goods denoted by the mark. Unless a person has a patent for his goods, similar goods may be made and sold by anyone; and they may be better or worse, dearer or cheaper, than those denoted by the mark. The mark is only a protection against mistakes in taking one person's goods for another's, and the right conferred by a trade-mark is only to prevent its use if its use deceives or misleads, or is proved to be calculated so to do. The sense in which, and in which alone, a person entitled to a trade-mark has a property in it was fully exlained in the *Singer Manufacturing Co.* v. *Loog*, by Lord Selborne at p. 27, by Lord Blackburn at pp. 32, 33, and 37, and by Lord Watson at pp. 38 and 39. [His lordship read these passages, and continued:—] Precisely the same principles are applicable to the use of words as to the use of marks for the designation of particular goods. This is shown by such cases as the *Angostura Bitters case*, the *Glenfield Starch case*, the *Stone Ale case*, the *Excelsior White Soft Soap case*, *Braham* v. *Bustard*, *Seixo* v. *Provezende*, 14 W. R. 357, 1 Ch. App. 192. But the exclusive right to the use of words is much more burdensome to other people than the exclusive right to the use of a mark. A person who designs or adopts a mark to denote his goods imposes no unreasonable burden on rivals in trade by forbidding them from using the same mark to denote similar goods if the public are thereby misled. But to monopolize the use of words imposes a much more serious burden. Consequently limits have been put to the right to complain of the use of words which have not been put to the right to complain of the use of marks. For example, if a man uses his own name to denote his own goods, it would be intolerable to confer upon him the right to prevent other people of the same name from honestly using their own name to denote their own goods, even although they might be of the same kind as his and be undistinguishable from them: *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Turton* v. *Turton*, 38 W. R. 22, 42 Ch. D. 128. Again, if a person uses words which simply describe the kind of goods he makes or sells—*e.g.*, leather boots—it would be intolerable to confer upon him the right to prevent other persons from honestly using the same words to describe what they make or sell. Although, however, a person by using his own name or a merely descriptive word to denote a particular article cannot prevent other *bonâ fide* traders of the same name from using it, or prevent other *bonâ fide* traders making or selling the same sort of goods from using the same descriptive word, yet, even in such a case, if the descriptive name is proved to mean the goods of the plaintiff, and if deception is also proved, a person may be restrained from using such name or word without taking such steps as will render mistakes unlikely to occur. The following are well-known instances: *Holloway* v. *Holloway*, 13 Beav. 209; *Seixo* v. *Provezende*, *Wotherspoon* v. *Currie* (*Glenfield Starch*); *Siegert* v. *Findlater* (*Angostura Bitters*); *Thompson* v. *Montgomery* (*Stone Ale*). The leading case on this point is *Reddaway* v.

Banham, *ante*, p. 638, [1896] A. C. 199. In that case the plaintiffs had made and sold camel's hair belting; the defendants also made and sold camel's hair belting. Both beltings were really made of camel's hair. But it was proved that in the trade camel's hair belting meant camel's hair belting of the plaintiffs' manufacture, and that the defendants' goods were, in fact, sold for the plaintiff's. The Court of Appeal held that the plaintiff was not entitled to an injunction, 43 W. R. 294, [1895] 1 Q. B. 286; but the House of Lords took a different view. Lord Herschell said: "The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this, I think he would, on well established principles, be entitled to an injunction. In my opinion, the doctrine on which the judgment of the Court of Appeal was based—that where a manufacturer has used as his trade-mark a descriptive word he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are the goods of the manufacturer who has therefore employed it as his trade-mark—is not supported by authority, and cannot be defended on principle. I am unable to see why a man should be allowed in this way, more than in any other, to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival." And again Lord Herschell said: "What right, it was asked, can an individual have to restrain another from using a common English word because he has chosen to employ it as his trade-mark? I answer, he has no such right; but he has a right to insist that it shall not be used without any explanation or qualification if such a use would be an instrument of fraud." Lord Macnaghten said: "The appellants concede—they cannot indeed any longer dispute—that everybody who makes belting of camel hair is entitled to describe his belting as camel-hair belting, provided he does so fairly. But they contend, and I think with reason, that neither Banham nor anybody else is entitled to steal Reddaway's trade under colour of imparting accurate, and possibly interesting, information. Practically the only difference which the unexpected turn in the evidence has made is this—the case now comes under the second branch of the proposition laid down by James, L.J., in a passage cited from *Singer Manufacturing Co.* v. *Loog*. If camel-hair belting had kept its place as a fanciful term, it would have fallen under the first. The learned counsel for the respondents maintained that the expression 'camel-hair belting' used by Banham was 'the simple truth.' Their proposition was that 'where a man is simply telling the truth as to the way in which his goods are made, or as to the materials of which they are composed, he cannot be held liable for mistakes which the public may make.' That seems to me to be rather begging the question. Can it be said that the description 'camel-hair belting' as used by Banham is the simple truth? I will not call it an abuse of language to say so, but certainly it is not altogether a happy expression. The whole merit of that description, its one virtue for Banham's purposes, lies in its duplicity. It means two things. At Banham's works, where it cannot mean Reddaway's belting, it may be construed to mean belting made of camel's hair; abroad, to the German manufacturer, to the Bombay mill-owner, to the up-country native, it must mean Reddaway's belting; it can mean nothing else. I venture to think that a statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it; it is not sterling coin; it has no right to the genuine stamp and impress of truth." Again, if a person makes or sells an article and calls it by a particular name, the use of that particular name by others for the same sort of goods is not necessarily an infringement of his rights, even if the name is not obviously descriptive. If the article is a patented article, sold by the patentee under the name in question, then when the patent expires anyone is at liberty to make and sell the article and to sell it under the name by which it has become known in the market; and if nothing more is done, the patentee has no redress. This was decided in *Cheavin* v. *Walker*, 5 Ch. D. 850, 25 W. R. Dig. 294, and *Linoleum Manufacturing Co.* v. *Nairn*, 26 W. R. 463, 7 Ch. D. 834. Again, if a person makes an article not patented and gives it a certain name by which the article comes to be known in the market, any one who can make the same kind of article can call it by the name by which it is known, if he can in fact do so without passing off his goods for those of the original makers; see *Siegert* v. *Findlater* (the *Angostura Bitters case*); and *Leonard* v. *Ellis's Trade-Mark*, 32 W. R. 530, 26 Ch. D. 288 (the *Valvoline case*). But no case has yet decided that the name of an article, whether patented or unpatented, can be used in such a way as to pass off his goods for those made by another. In *Cheavin* v. *Walker*, in the *Linoleum case*, and in the *Valvoline case* there was no deception, and no injunction was granted. In the *Angostura Bitters case* there was deception, and an injunction was granted; and although there the defendant's bitters differed from the plaintiff's, this only made the deception easier of proof. *Braham* v. *Bustard* (the *Excelsior White Soft Soap case*) is another illustration of the same principle. So is the *Camel-Hair Belting case* already referred to. There is another way in which a name originally a good trade name may lose its character and become *publici juris*—*i.e.*, where the first person using the name does not claim the right to prevent others from using it, and allows other persons to use it without complaint. The name then comes to denote the article and nothing more; the name becomes *publici juris*, and anyone who is at liberty to make the article can call it by the name by which it is usually known. *Ford* v. *Foster*, 20 W. R. 311, 818, L. R. 7 Ch. App. 611, is the leading authority on this head. No name, however, can become *publici juris* in this way so long as the person originally entitled to the use of the name asserts his rights in that respect. Moreover, it is for those who assert that a trade name has become *publici juris* to prove it (per Lord Cairns in *Singer Manufacturing Co.* v. *Wilson*. A more difficult case arises where a man has long been the sole maker of a particular kind of article which he has always called by some name by which his goods are known, by which, in fact, they are usually called by ordinary buyers. A rival trader cannot, of course, adopt the trade name and make up his own articles so as to make them look like or pass for the other's. But if he can avoid doing this there is no law to prevent him from making and selling goods of the same sort as the other's, nor from

calling them by the name by which alone they are known in the market. If it be impossible profitably to use the old name and at the same time so to distinguish the two classes of goods as to prevent the rival goods from being mistaken for others, what is to be done? Is the name to be protected and rivalry prevented, or is the rival to be at liberty to use the name and destroy the trade of the old trader? Both principle and authority clearly appear to be in favour of the old trader, if he can prove that the name denotes his goods and that his rival's are in fact mistaken for his. The *Excelsior White Soft Soap case* and the *Angostura Bitters case* go far to show this. In the *Stone Ale case* the difficulty to which I am alluding was commented on by several of the Lords. It was there decided that a brewer at Stone, who had long called his ale "Stone Ale," was entitled to protection against a rival who also brewed ale at Stone and called it "Stone Ale." Whatever doubt there might have been on this matter is now removed by the decision of the House of Lords in *Reddaway* v. *Banham*, to which I have already referred, for it was admitted there that camel's hair belting truly described the articles so called. This decision settles the question I am considering in favour of the old trader, if he can succeed in proving his case, which, however, may often be very difficult for him to do. This doctrine, however, is said to lead to this curious result—viz., that an inventor of an unpatented article, to which he gives a name, may be able practically to enjoy a longer monopoly in the name than an inventor of a patented article. But there is nothing anomalous in this. If a man has a secret invention by which he can make an article better or cheaper than other people, he practically has a monopoly in that article until his secret is discovered, or someone else can make a better or cheaper article. There is no limit to the duration of this monopoly. As regards name, when his secret is discovered he is in the same position as a patentee whose patent has expired. In both cases the article can be made and sold under the name by which it is known; but in neither case can such use be made of it as to enable a rival to pass off his goods as those of the original maker. If the use of the name alone renders this unavoidable, the name I apprehend must not be used.

Having now endeavoured to explain the principle applicable to the present case, I pass to the evidence adduced in it. For thirty-five years or more the plaintiffs have made and sold a sauce which they have called "Yorkshire Relish." This term does not describe the nature of the sauce; the words convey no information whatever of its make or qualities. "Yorkshire Relish" is a non-descriptive trade name, and it is very important to bear this in mind. The composition of the sauce and the mode of making it are known only to the plaintiffs and their workpeople, perhaps not even to any one workman. "Yorkshire Relish" has always been sold by the plaintiffs in ordinary round glass bottles of three or four sizes, on which blue and red labels have been fastened. The names of the plaintiffs have always been on these labels, and the words "Yorkshire Relish" have been conspicuously printed on the labels in a curve. The words "Yorkshire Relish" are also impressed into the glass of the bottles in which the sauce is sold. The bottles are sold in wrappers made of white paper, on which "Yorkshire Relish" is printed in large letters. The plaintiffs' trade in "Yorkshire Relish" is very large, and is said to be very profitable. They have spent some £400,000 during the last thirty years in advertising it, but whether alone or with other articles made by the plaintiffs I do not know, nor is it material. They have more than one trade-mark—viz., the label to which I have alluded, and a drawing of an old-fashioned round blue china plate, which is also impressed on the label. Some years ago the plaintiffs registered the words "Yorkshire Relish" as an old trade-mark of their own; but after a long litigation with the defendants these words were expunged from the register on the ground that, although the plaintiffs had long called their sauce by that name, the name alone had not been used by the plaintiffs to denote their goods (41 W. R. 627, [1893] 2 Ch. 388, [1894] A. C. 8). The words "Yorkshire Relish" are not therefore, *per se*, a registered trade-mark. They remain, however, as they always have been, the most conspicuous and important words on the plaintiffs' labels and wrappers. The plaintiffs have invariably taken proceedings to prevent other persons from using the words "Yorkshire Relish" to denote any sauce made by them, and the plaintiffs have hitherto succeeded in preventing other people from using that name. The term "Yorkshire Relish" cannot therefore be said to have yet become *publici juris* within the meaning of that expression as applied to trade names, and explained in *Ford* v. *Foster*. The evidence plainly shows the value to the plaintiffs of the name of "Yorkshire Relish." The name not only denotes a particular kind of sauce, but it denotes the sauce which the plaintiffs and they alone have hitherto made. Those persons who are in the trade or who read all that is on the labels know that "Yorkshire Relish" is the sauce made by the plaintiffs for which they are famous. At the same time it is true that great numbers of ordinary retail buyers are guided by the words "Yorkshire Relish"; such persons do not attend to anything else on the labels. So long as "Yorkshire Relish" are the conspicuous words, an alteration in the label does not attract the attention of the great majority of buyers, or give rise to any suspicion that the sauce with the altered label is not the same or does not come from the same maker as that which they are accustomed to buy or have been told to ask for. The evidence on this point is very strong; so strong that I doubt the possibility of anyone putting sauce in ordinary round glass sauce bottles with "Yorkshire Relish" conspicuous upon them without misleading the public and seriously injuring the plaintiffs. What might happen if a rival maker of "Yorkshire Relish" sold it in bottles unlike ordinary glass sauce bottles, or in some other vessel wholly unlike the bottles used by the plaintiffs, or at prices so dissimilar as to attract attention, there is no evidence to show. Perhaps it would not be worth anybody's while to attempt to create a trade in "Yorkshire Relish" under such conditions. The defendants having succeeded in removing from the register the words "Yorkshire Relish" as a separate trade-mark, have determined to try and make a sauce like "Yorkshire Relish" and to sell it under that name. They have succeeded in making a sauce so like in appearance, taste, and smell to the plaintiffs' sauce that it is difficult to distinguish the one from the other. But still the defendants have not discovered the plaintiffs' secret, and the sauce made by the defendants is not the same as that sold by the plaintiffs; it is not made from their recipe; and it is not in all respects like the plaintiffs' sauce. The defendants have taken care not to imitate the plaintiffs' label nor their trade-mark of a plate. Moreover, the defendants print their own names in conspicuous letters on their own label, and they now sell their own sauce in pink, and not white, wrappers. They have a round gilt disc instead of a round blue plate. In short, when both the plaintiffs' and the defendants' sauces are looked at as they are sold, the differences between the two are apparent enough to anyone whose attention is drawn to them.

But the resemblances are as conspicuous as the differences. The round disc used by the defendants is a substitute for the plaintiffs' round plate. The bottles themselves are alike in shape, size, and appearance, and the words "Yorkshire Relish" are impressed into the glass. The prices at which the defendants sell to grocers are lower than the plaintiffs' price, but the price paid by the customers to retail grocers is the same—viz., 4½d. for the small bottles. But, above all, the words "Yorkshire Relish" are as conspicuous on the defendants' bottles as on the plaintiffs'. The consequence is that, notwithstanding the differences to which I have alluded, the evidence proves that the defendants' sauce can be, and in fact is, easily mistaken by ordinary buyers for the sauce which the plaintiffs have long made and sold, and still make and sell, under the name of "Yorkshire Relish." This fact is undeniable. I pass over the defendants' price lists and show cards, for, although they are of considerable importance, there is other evidence far stronger which proves the statement I have made. [His lordship referred to the evidence, and continued:—] I cannot, therefore, say that the differences between the bottles as sold are sufficient to prevent mistakes. They do not. What is the legal consequence? It follows from what I have stated in the earlier part of my judgment that the plaintiffs are entitled to be protected. The case falls within the principles acted upon in the *Glenfield Starch case*, the *Excelsior White Soft Soap case*, *Seixo* v. *Provezende*, *Angostura Bitters case*, and the *Stone Ale case* and *Reddaway* v. *Banham* in the House of Lords. In most, if not in all, of these cases the defendants took care to put their own names on the goods they sold. So did the defendants in the *Singer Manufacturing Co.* v. *Loog*, on the brass plate which they were restrained from using. Great reliance was placed by Mr. Moulton on what Fry, L.J., said in the *Angostura Bitters case*, *Siegert* v. *Findlater*; but the learned judge was there considering whether the defendant could be restained from using those words absolutely, and he came to the conclusion that he could not. This was quite right; for to have granted an injunction to restrain the use of those words simply would have been to go too far. In that very case, however, an injunction was granted, as already stated.

The defendants say that they do not want to pass their goods off for the plaintiffs'; but they do in fact cause them to be so passed off, and, although I have no doubt the defendants do not want to transgress the law, yet they do want to trade on a reputation which does not belong to them and which has been earned by and belongs to the plaintiffs. This is, to say the least, very unfair. It follows from what I have said in the earlier part of the judgment that the plaintiffs are entitled to be protected from what the defendants are doing. Stirling, J., has so decided, and has granted an injunction which is, in effect, an injunction not to restrain the defendants from selling their sauce as "Yorkshire Relish" without any qualification, but to restrain them from doing so without better distinguishing their sauce from the sauce made and sold by the plaintiffs. For the reasons I have already given, my opinion is that the judgment appealed from is right, and that the appeal must be dismissed with costs. I do not shrink from the conclusion that the defendants may find it practically impossible profitably to compete with the plaintiffs in their trade. I do not see the injustice of such a conclusion, nor do I see that the public will greatly, if at all, suffer by it. After all, the defendants' sauce is not what has hitherto been known as "Yorkshire Relish," although the defendants do all they think they safely can to lead people to suppose it is. The defendants can make and sell their sauce as much as they please; they may even sell it under the name of "Yorkshire Relish," if they can do so without misleading buyers and so injuring the plaintiffs. If that is done, the plaintiffs may lose their trade, but no right of theirs will be infringed. But if it is impossible to comply with such conditions and yet profitably compete with the plaintiffs (as probably it is), the defendants must drop the name. Such a possible result was distinctly pointed out by Bowen, L.J., and by myself when this case was formerly before the court: 41 W. R. 627, [1893] 2 Ch. 388, at p. 401. The defendants have had full warning of the difficulties in their way and of the risk they would run if they attempted to do what they have in fact done. They have deliberately tried an experiment, and it has failed.

KAY, L.J.—The defendants appeal from a judgment granting a perpetual injunction to restrain them "from using the words 'Yorkshire Relish,' as descriptive of or in connection with any sauce or relish manufactured by them, or sauce or relish (not being of the plaintiff's manufacture) sold, or offered for sale by them, without clearly distinguishing such sauce or relish from the sauce or relish of the plaintiff," and an account of profits and costs.

The law relating to this subject may be stated in a few propositions: (1) It is unlawful for a trader to pass off his goods as the goods of another. (2) Even if this is done innocently it will be restrained: *Millington* v. *Fox*. (3) *A fortiori* if done designedly, for that is a fraud. (4) Although the first purchaser is not deceived, if the article is so delivered to him as to be calculated to deceive a purchaser from him, that is illegal: *Sykes* v. *Sykes*. (5) One apparent exception is that where a man has been describing his goods by his own name another man having the same name cannot be prevented from using it, though this may have the effect of deceiving purchasers: *Burgess* v. *Burgess* and *Turton* v. *Turton*. (6) But this exception does not go far. A man may so use his own name as to infringe the rules of law. "It is a question of evidence in each case whether there is false representation or not," per Turner, L.J., in *Burgess* v. *Burgess*, 3 D. M. & G. at p. 905. So he may be restrained if he associates another man with him, so that under their joint names he may pass off goods as the goods of another firm: *Croft* v. *Day*, 7 Beav. 84; *Clayton* v. *Day*, 26 SOLICITORS' JOURNAL 43; *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 Pat. Rep. 215. (7) Another apparent exception is where a man has under a patent had a monopoly for fourteen years, and has given the article a descriptive name, he cannot when the patent has expired prevent another from selling it under that name: *Young* v. *Macrae*, 9 Jur. N. S. 322, 11 W. R. Ch. Dig. 111; *Linoleum Co.* v. *Nairn*. (8) I am not sure that this would be so if the name so used were the name of the patentee, or even a purely fanciful name not descriptive. (9) Certainly where there has not been a patent and an article has been made and sold under a fanciful name not descriptive, so that the article as made by one person has acquired reputation under that name, another trader will not be permitted to use the name for a similar article made by him: *Braham* v. *Bustard*, *Cochrane* v. *Macknish & Son* (February 29, 1896, see *Times* March 2, 1896). (10) To this last proposition there is again a limitation. If the first maker has slept upon his rights and allowed the name to be used by others until it has become *publici juris*, the court will not interfere. Many of these rules of law and exceptions have been referred to in the present case, and the question is whether it comes within the

rules which give protection, or within some one of the exceptions. [His lordship stated the facts relating to the plaintiff's sauce and to the defendants' use of the words "Yorkshire Relish."] They (the defendants) had been warned, especially by the judgment of BOWEN, L.J. (1893, 2 Ch. p. 407), that there would be some risk in doing this, Bowen, L.J., saying: "In this particular case it is perfectly true that 'Yorkshire Relish' denotes the article which is made by and has been made for many years by the appellant's firm, and it looks extremely unlikely that any person, even the respondents, could now use the term 'Yorkshire Relish' without running great risks." [His lordship, after alluding to the evidence and stating that "the resemblances and differences between the two (*i.e.*, the plaintiff's and defendants' labels) seem to me to show plainly that the defendants tried to make such a general similarity between their label and the plaintiff's as might lead an incautious purchaser to suppose, if he noticed them at all, that the plaintiff had made a modification of his label," continued:—] Counsel for the defendants avowed with a candour that was startling that the defendants' object was to obtain a share in the trade in Yorkshire Relish. What in 1893 and 1894 was that trade? It was an enormous sale by the plaintiff alone of his sauce by that name. No one else sold Yorkshire Relish, or, except in the instances which the plaintiff put a stop to, as I have mentioned, had ever done so. Therefore to obtain a share of that trade could only be by selling something which purchasers would believe to be the plaintiff's sauce. The learned judge in the court below seems to have acquitted the defendants of any dishonest intention. I confess I come to the conclusion that the defendants have made a deliberate, careful, and elaborate attempt to pass off their sauce as that of the plaintiff, and to reserve to themselves the usual defence that no one would be deceived who laid the bottles side by side and attentively studied the labels on each. The defendants seem to me to have traded on the well-known fact that the ordinary purchaser never does this. He asks for an article like this by the name "Yorkshire Relish," and probably never notices the name of the maker at all.

Mr. Moulton argued that if the defendants' trading was calculated to pass their goods off as those of the plaintiff they would be restrained even if the sauces were identical, and therefore it was not material whether they were the same or not. I altogether disagree. If, as I think, the defendants intended to pass off their sauce as that of the plaintiff, their conduct is more inexcusable seeing that the two sauces are not the same.

Such trading is in my opinion fraudulent, and ought to be restrained on that ground.

But, supposing there was not such a design as I infer, could the court, acting according to its well-settled rules, allow the defendants to continue to trade in this manner?

The defendants argue that the plaintiff has no right to the exclusive use of the words "Yorkshire Relish," and that to prevent the defendants from using them as they are doing would in effect be to give the plaintiff the exclusive use of those words. That argument has been answered in the words which I have quoted from Bowen, L.J.'s judgment.

In *Montgomery* v. *Thompson* Lord Herschell said: "The respondents are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name."

There is evidence in this case that retail traders, when asked for Yorkshire Relish without more, do in many cases—I think eleven instances are given—supply the defendants' sauce, and at the same retail price as is given for the plaintiff's. Moreover, there is evidence that *bonâ fide* purchasers wanting the plaintiff's sauce have been deceived, and have discovered—in one instance, at least, from the taste—that they have received the defendants' sauce for the plaintiff's. Without this evidence I should have inferred that what the defendants are doing would be calculated to deceive. This evidence confirms that view. Therefore on this ground, if there were no suspicion of fraudulent intention, the plaintiff would be entitled to an injunction.

It was argued that the plaintiff had nothing to do with the deception of the public. The answer is obvious. Every person who, intending to buy a bottle of the plaintiff's sauce, gets instead a bottle of the defendants', is a customer taken from the plaintiff by this deceit, and if this is extensively done the damage to the plaintiff's trade would be serious.

Then does this case come within any of the exceptions to the general rule? The words "Yorkshire Relish" are not descriptive in any sense. They do not relate to the character or quality or geographical origin of the goods. Except that the plaintiff has a manufactory at Leeds which may have suggested the use of the word "Yorkshire," it does not appear why that word was used if not to indicate a peculiar sauce of the plaintiff's manufacture.

The plaintiff never had a patent for this sauce. The exception established in the case of a patentee who had used a descriptive name which has become the name of the patented article during his monopoly has no application here.

It was sought to bring the case within that class where a man has been allowed to use his own name even though the use of it might be calculated to deceive, and reference was made to a decision of the Court of Appeal in *Reddaway* v. *Banham*, where a manufacturer of belting for driving machinery composed partly of camel's hair mixed with other materials, called his manufacture "camel-hair belting." Another manufacturer, who made similar belting, adopted the same name, and the court held that he was entitled to do so, because by doing so he was telling the exact truth, his belting being made "substantially" of camel's hair. One difficulty in that case is shown by the word "substantially." "Camel-hair belting" was not an accurate description of either the plaintiff's or the defendant's manufacture. Each contained a proportion of camel's hair, but each might quite as accurately have been called by the name of any other of the substances woven into the belting, and as the plaintiff's belting had become known by a name which did not perfectly describe it, such name might be considered an arbitrary name which could not well be used by a rival manufacturer without passing off his goods as those of the plaintiff. The case was appealed to the House of Lords, and has been reversed, the Lord Chancellor holding that although the name was descriptive the use of it enabled the defendant, according to the evidence, to pass off his manufacture as that of the plaintiffs, and that therefore an injunction should be granted.

None of the exceptions to the general rules of law that no one should trade so as to pass off his goods as those of another person seems to me to apply to this case.

The authority most nearly in point is *Braham* v. *Bustard*. The plaintiff there had manufactured a new article to which he gave the name of "Excelsior

White Soft Soap." It was proved to the satisfaction of the court that the plaintiff's goods, and their goods only, were known in the market by that name from December to June, about six months, and the defendant was restrained from using the same name for soap manufactured by him. The Vice-Chancellor distinguished *Young* v. *Macrae*, because it was proved that paraffin oil was and had long been known as the scientific name of the article. This has been followed in the Privy Council on the 29th of February, 1896, in *Cochrane* v. *MacNish & Son*, where in an appeal from Jamaica the use of the words "Club Soda" was restrained where the plaintiff had used those words since 1887 for soda water manufactured by him in Ireland and sold in Jamaica.

The form of the injunction in this case follows that approved in the House of Lords in *Johnston* v. *Orr Ewing*, 28 W. R. 330, 30 *Ibid.* 417, 7 App. Cas. 219.

For the reasons which I have given I think that this appeal should be dismissed, with costs.

A. L. SMITH, L.J.—This is an appeal from a judgment of my brother Stirling, who granted a perpetual injunction restraining the defendants from using the words "Yorkshire Relish" as descriptive of, or in connection with, any sauce or relish manufactured by them without clearly distinguishing such sauce or relish from the sauce or relish of the plaintiff.

In my judgment the real question to be decided in this case is one of fact, which is, Has the plaintiff established that the defendants have been passing or attempting to pass off, or enabling others to pass off, their goods in such a way as to be calculated to lead purchasers to believe that when purchasing the defendants' goods they were purchasing the plaintiff's? If this be proved, the plaintiff, in my judgment, is entitled to the injunction he has obtained.

The proved facts are these. Some thirty-four years prior to the year 1894 the plaintiff commenced making, from a secret recipe, a sauce which he called by the name of "Yorkshire Relish." This was a name which he invented for the occasion. It described no ingredient nor peculiarity of the sauce, nor indicated the maker's name, it was nondescriptive of the sauce, and was, in my opinion, purely a fancy name given to the sauce which the plaintiff was then about to bring out and place upon the market. The plaintiff has ever since continued to make and sell his sauce under this name, and has expended in advertising the sum of £400,000 in the thirty-four years; and by this and other means he has built up a trade of great repute and of enormous dimensions throughout the world, having sold in the year 1893, which was the last year before the defendants began their present operations in Yorkshire Relish, no less than six millions of bottles. For the last thirty-four years the plaintiff has alone made sauce composed of his secret recipe which was known to the public as "Yorkshire Relish." The plaintiff has always printed upon the wrappers of his bottles in large type, "The Celebrated Yorkshire Relish—Goodall, Backhouse, & Co., Leeds," which last was the name under which he traded, with a medallion of a willow plate thereover; and also upon the labels upon his bottles, "The Celebrated Yorkshire Relish, prepared and sold wholesale by Goodall, Backhouse, & Co., Leeds." There was also a like medallion upon the label, which was upon a blue and red ground.

In the year 1884 the plaintiff registered the words "Yorkshire Relish" as a trade-mark, but this registration was in the year 1893 expunged from the register at the instance of the defendants. They had not at this time sought to make a sauce in competition with the plaintiff, but it was held that they were "parties aggrieved" within the meaning of the statute, and also that the trade-mark registered by the plaintiff was invalid. It is not necessary to refer to the reasons, for they are immaterial to this case. It is sufficient to say that the case went to the House of Lords, which affirmed this court, which had affirmed Chitty, J., in so holding. It is not suggested by the plaintiff that he has any right under any statute to the exclusive use of the words "Yorkshire Relish," nor that he has any right at law to a monopoly in the words; but what he asserts is that the defendants have been passing and are attempting to pass off, and enabling others to pass off, the defendants' sauce as the sauce of the plaintiff, under such circumstances as are calculated to deceive purchasers.

It was well known to all connected with the sauce trade that "Yorkshire Relish" denoted sauce manufactured by the plaintiff. What the defendants have done is this. In the year 1894 they commenced making a sauce, which appears from the evidence to be as regards taste, when used upon food, about as like to the plaintiff's sauce as they could well make it without knowing the plaintiff's secret recipe; but the evidence shows that it certainly is not the same sauce, but a different sauce from the plaintiff's. Not one of the defendants' witnesses could say that it was the same sauce, one saying that it was "a wonderful match," and this I take to be the truth. The defendants put their sauce into bottles of similar size and make to that of the plaintiff's bottles, and upon the wrappers and labels of their bottles they printed in large type the words "Yorkshire Relish," and underneath, "Manufactured by the Birmingham Vinegar Brewery Co., successors to Holbrook & Co.," with a medallion in the centre; and then they altered it to Holbrook's Yorkshire Relish, with a medallion above, "Manufactured by the Birmingham Vinegar Brewery Co." This wrapper of the defendants is now made of pink paper; at first it was made of white paper. The plaintiff's wrappers are of white paper. The label upon the defendants' bottles has a white ground, the plaintiff's label has a blue and red ground. It appears from the evidence given, as also from the evidence afforded by the eye (which upon such a matter I prefer to other evidence, except that of pointing out the similarities or dissimilarities), that the bottles of the defendants are similar to the bottles of the plaintiff, but that the wrappers and labels of the defendants, excepting for the words "Yorkshire Relish" printed thereon in large letters, are unlike the wrappers and labels of the plaintiff. There are also other differences; for instance, the stoppers of the defendants' bottles and labels thereover are dissimilar. The medallion upon the defendants' wrapper and label was said to be like to the willow pattern plate medallion upon the plaintiff's, though I do not think it is; but I need not refer further to these dissimilarities or similarities, for in my judgment this is not the point upon which the case has to be determined. If it had been, I may say that I agree with the evidence obtained out of the plaintiff's own witnesses upon cross-examination, that if all purchasers of "Yorkshire Relish" sauce looked at the wrappers or labels of the defendants they would see that what they were buying was Holbrook's "Yorkshire Relish," and not Goodall, Backhouse, & Co.'s "Yorkshire Relish."

But although this is so, it is said by the plaintiff that the evidence shows that large numbers of those who purchase "Yorkshire Relish" sauce were not only likely to be deceived, but in fact many had been deceived, by what the defendants were doing, and I will deal with this evidence hereafter.

It is not denied that for thirty-four years down to 1894 the plaintiff was the sole maker of the sauce

known as "Yorkshire Relish," excepting upon occasions when others sought to imitate it and to sell their imitations under such circumstances that they were promptly stopped by injunctions obtained by the plaintiff. There is no pretence for saying that the name had become *publici juris*.

Mr. Moulton, when asked what it was that prompted his clients to take for their sauce the name of "Yorkshire Relish," and to give the name such prominence upon their wrappers and labels, and why they were not content to call their sauce either "Holbrook's Sauce" or "Holbrook's Relish," or by the name of any other relish they might choose other than "Yorkshire Relish" (and there are many other relishes known in commerce), at once boldly stated that the defendants' object was (and indeed it was obvious without his statement) to compete with the plaintiff in his sale of "Yorkshire Relish"; and he said that by law the defendants were entitled to do so, for the only right which the plaintiff had was that no one should sell his sauce as the sauce of the plaintiff, and that what the defendants were doing was to trade, not in Goodall, Backhouse, & Co.'s "Yorkshire Relish," but in Holbrook's "Yorkshire Relish," and thus to do a service to the public.

I agree that fair and honest competition in itself is lawful and beneficial to the public; but when a trader avows that his object in taking an old well-known fancy name of an article of high repute and of vast value is to cut into the established trade of another and undersell him if possible, which is in fact what the defendants are attempting to do in the present case, he must be careful when he so acts to the injury of the other that it cannot with truth be said that he is attempting to pass off his goods as the goods of the other.

As I have already said, in my opinion, the wrappers and labels of the defendants are in themselves distinct from the wrappers and labels of the plaintiff, but the defendants have throughout taken and given great prominence to the words "Yorkshire Relish" for reasons which can easily be surmised, and the question is, can they by law do so?

There is good evidence in this case, looking to the way the defendants have acted, the closeness with which they have throughout been sailing to the wind, by which I mean going as near to the plaintiff's wrappers and labels as they dared to go, and then giving way and resorting to other devices, to their price lists and their show cards, to the fact that they have taken the well-known fancy name by which the plaintiff's sauce has ever been known; there is good evidence, I say, from which a judge if so minded would have been well warranted in finding that the defendants in what they have done intended to pass off their goods as the goods of the plaintiff. I cannot doubt that this is so.

I do not, however, recapitulate this evidence which Mr. Graham Hastings called our attention to, for the learned judge has not based his judgment upon the ground of intention to deceive, but upon the ground that the defendants' acts were calculated to deceive; which, of itself, is sufficient to support the injunction, irrespective of whether there was an intention to deceive or not.

Now, as to whether the defendants' acts were calculated to mislead purchasers, the evidence in my judgment is irresistible.

It establishes first of all, as above stated, that during thirty-four years prior to 1894 the name "Yorkshire Relish" denoted the sauce which during that period had been manufactured by the plaintiff and by no one else. It establishes that a large class of consumers of "Yorkshire Relish," as well as many retail dealers, for many years have been accustomed to purchase the plaintiff's sauce by the name it was so well known to them all by—viz., "Yorkshire Relish," wholly irrespective of wrappers or labels, and in many cases of the name of the maker. It establishes that "Yorkshire Relish" is what they have asked for, and the plaintiff's "Yorkshire Relish" is what they have been always theretofore supplied with until the defendants put their substitute upon the market, when the consumers got the defendants' manufacture in the place of the plaintiff's manufacture. It was established that the defendants' methods not only were likely to deceive purchasers, but proof was given of actual deception. [His lordship referred to cases of actual deception, and continued:—] These cases the learned judge believed, and I do not doubt he was right when he did so. In each of these cases "Yorkshire Relish" was what was asked for, obviously meaning the old well-known condiment, and the applicants got in its place the new sauce made by the defendants. It was also proved that grocers in numerous cases (some ten uncontradicted test cases), when asked to supply over the counter "Yorkshire Relish," supplied the defendants' sauce; and it may be added that by so doing they made a larger profit than they would have done had they supplied the plaintiff's sauce, inasmuch as the defendants supplied their sauce, which they called "Yorkshire Relish," to the grocers at 3s. per dozen, the plaintiff's "Yorkshire Relish" being invoiced to the grocer at 4s. 3d. per dozen, the same price in each case being charged to the customer.

Mr. Buckley sought to evade the mass of evidence which was given upon these heads, not by contradiction, for the evidence was really all one way; but by arguing that the purchaser was not deceived, because he did not purchase "Yorkshire Relish" as being made by the plaintiff, but only "Yorkshire Relish" of a particular taste, or, as he said, as being the name of a particular article which tickled the palate in a particular way, and that was all the purchaser cared for, and that was what he got when supplied with the defendants' sauce; and he also said that, as to taste, the defendants' "Yorkshire Relish" was similar to, if not identical with, the plaintiff's "Yorkshire Relish," and therefore the purchaser, having got what he had asked for, was not deceived.

In my judgment, the facts do not warrant this argument, for what the purchasers in truth asked for was either the old "Yorkshire Relish" made by the plaintiff, which they had been accustomed to buy, or, if they did not know the plaintiff made it, then for "Yorkshire Relish" made by the same maker, whoever he might be; and instead thereof they got the new manufacture of the defendants. Every bottle so supplied was a loss to the plaintiff.

Whether the taste of the defendants' sauce was the same as the taste of the plaintiff's sauce I very much doubt, and indeed to my mind there is good evidence that it was not; and I say that the weight of the evidence showed that the defendants' sauce was more salt than the plaintiff's, though I have no doubt the defendants made their sauce as like the plaintiff's as they possibly could without knowing his secret recipe. In many cases it passed muster, in others it did not. That the acts of the defendants were calculated to deceive purchasers has, in my judgment, been clearly established. But it was argued by Mr. Moulton that the defendants used the words "Yorkshire Relish" in the least objectionable way possible, and that as the plaintiff had at law no monopoly in the words, the defendants were entitled to take them and use them as they have done. This is not, I would point out, the case of a man making the identical article which another has made and called by a fancy

name, but it is the case of a man making another article and calling it by the same fancy name.

Whether in the first case he could do so if it tended to mislead, I have not now to decide, but I very much doubt it, and I think he could not. The question here is whether in the second case he could do so.

Suppose that the words "Yorkshire Relish" have obtained such a significance in the market that it is impossible, either by dressing them up or by coupling them with other words, to render them innocuous and incapable of misleading buyers, what then? Are the defendants entitled to take and use this well-known fancy name, denoting the plaintiff's goods, and thereby filch from the plaintiff his old-established trade, or must they leave the fancy name alone? This, in my judgment, is the point in this case. Mr. Moulton says that even so the defendants may take the name, but I am of opinion that this is not so, and that they must leave the name alone if they cannot render it otherwise than misleading to purchasers. It may be that the result of such a state of things is that it gives to the plaintiff a practical monopoly in the words which otherwise he would not have, and it appears to me, so far as the evidence as to this in the present case goes, that this is so.

Whether it is possible to mask the words "Yorkshire Relish" so that they will become innocuous, such as by selling "Yorkshire Relish" in jars or tins or barrels, I do not know, but it would seem that if this be possible, and it be done so that the words do not mislead, then the object which I have no doubt the defendants have in using the words will be thereby frustrated.

It is said that this puts the plaintiff in the same position as if he had a registered trade-mark or a patent unexpired, but this point was dealt with by three of the learned lords in the House of Lords in the *Stone Ale case* (*Montgomery* v. *Thompson*). In that case, as in the present, the plaintiff had no monopoly in the words "Stone Ales." Lord Herschell said: "The respondents (*i.e.*, the plaintiffs) are entitled to ask that a rival manufacturer shall be prevented from selling his ale under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so, because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name"; and Lord Watson doubted the possibility of the words "Stone Ales" in that case (which had a history very similar to the words "Yorkshire Relish" in this) being taken, and Lord Macnaghten pointed out that "it would have been impossible for the defendant to have called his ales 'Stone Ales,' and to have distinguished his ales from those of the plaintiff's. Any attempt to distinguish the two, even if honestly meant, would have been perfectly idle."

The difficulty the defendants now find themselves in, in attempting as they are doing to obtain the benefit of the well-known fancy name of the plaintiff, "Yorkshire Relish," for their "Yorkshire Relish," was clearly pointed out to them by Bowen, L.J., when they were applying to have the plaintiff's trade-mark expunged. Bowen, L.J., then said: "In this particular case it is perfectly true that 'Yorkshire Relish' denotes the article which is made by, and has been made for many years by, the appellant's firm, and it looks extremely unlikely that any person, even the respondents, could now use the term 'Yorkshire Relish' without running great risks. But if 'Yorkshire Relish' is not a term to which the appellant has the exclusive right, it is conceivable that the respondents or any other persons in the trade might, by an honest and strong endeavour, carried out effectually, so distinguish the sale of the article which they are selling from the sales of the appellant's sauce, or so distinguish the manufacture of the article which they manufacture from the manufacture of the appellant's sauce, as to prevent the possibility of an outside customer being deceived. It is impossible for a court of law to say that it might not be done, and if it can be done the trade have a right to have that door left open to them."

The door was thus left open to the defendants with this warning, and it appears to me clear, upon the evidence which has been given in this case, that the defendants, although they have used all sorts of contrivances by which to use the words "Yorkshire Relish" so as to be of use to them, yet have not, by what they have done, prevented the public from being deceived, for the large body of evidence given upon this point, which the learned judge has rightly believed, shows that it is otherwise, and that the defendants, by what they have been doing, have caused their goods to be sold as the goods of the plaintiff.

Since writing this judgment the case of *Reddaway* v. *Banham* has been decided in the House of Lords. The present is an *a fortiori* case, for in *Reddaway* v. *Banham* the words "camel's hair belting" were admitted to be descriptive of the article sold, and not a mere fancy name given to an article by which it has become known to the public, and yet it was held that a rival in trade could not use the name if by so doing he represented his goods as the goods of another.

This appeal must be dismissed with costs.

Appeal dismissed.

Solicitors, *Thorowgood, Tabor, & Hardcastle*, for *Cooper & Co.*, Newcastle-under-Lyme; *J. S. Salaman.*

Overruled 1897, 2 Ch. 371
1897, 2 Ch. 131.

From Q. B. Div. (Chambers).
(A. L. Smith and Rigby, L.JJ.) July 17.

SEAWARD v. DENNINGTON. (a.)

Practice—Discovery of documents—Landlord and tenant—Demise—Forfeiture—Action to recover possession of demised premises.

The defendant in an action to recover possession of demised premises on a forfeiture for breach of covenant may be ordered to make an affidavit of documents, but he may refuse to disclose any documents which would establish the case of forfeiture against him.

Appeal of the defendant from an order of Bruce, J., at chambers.

The action was brought by a lessor against a lessee to recover possession of the demised premises on a forfeiture for breach of covenant. The plaintiff also claimed mesne profits and damages.

The master ordered the defendant to make the common form affidavit of documents.

On appeal, Bruce, J., affirmed the master.

The defendant appealed.

Beddall, for the defendant.—This is an action for ejectment founded on forfeiture. Such an action is, with regard to discovery of documents, on the same footing as an action for a penalty (see per Bowen, L.J., in *Redfern* v. *Redfern*, 39 W. R. 212, [1891] P. 139), and therefore the defendant cannot be ordered to make an affidavit of documents.

He cited *Pye* v. *Butterfield*, 13 W. R. 178, 5 B. & S.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

829; *Jones* v. *Jones*, 37 W. R. 479, 22 Q. B. D. 425; *Hobbs* v. *Hudson*, 38 W. R. 682, 25 Q. B. D. 232.

T. Willes Chitty, for the plaintiff, was not called upon.

A. L. SMITH, L.J.—The defendant's contention is a novel one to me. I agree that it has been the practice ever since the time of Lord Hardwicke that in an action for penalties the court will not assist the plaintiff by ordering the defendant to make discovery.

This case, however, is not an action for a penalty, but is an action to recover possession of demised premises after a breach of covenant; and though the defendant is not bound to disclose to the plaintiff circumstances which will enable the plaintiff to make out a case of forfeiture, nevertheless the defendant is bound to make an affidavit of documents. But when he does so he can protect himself by covering particular documents. That was decided in *Pye* v. *Butterfield*, where it was attempted without success to make the defendant answer an interrogatory which might subject him to a forfeiture of his interest as lessee.

RIGBY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the plaintiff, *Proudfoot & Chaplin.*

Solicitors for the defendant, *Colyer & Colyer.*

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith, L.J.) July 14.

REG. *v.* VESTRY OF ST. MATTHEW'S, BETHNAL-GREEN. (*a.*)

Metropolis management—Sewer—Drain—Liability to repair—Combined system of drainage—Drain made without order of vestry—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 250.

The fact that a sewer has been unlawfully made does not prevent it vesting in the vestry or district board of works under section 68 *of the Metropolis Management Act*, 1855, *so as to become repairable by them under section* 69.

A drain for draining a group of houses by a combined operation was made without an order of the vestry;

Held, that the drain so made was a "sewer" within the definition in section 250 *of the Metropolis Management Act*, 1855, *so as to vest in and be repairable by the vestry.*

Decision of the Divisional Court, ante, *p.* 559, *affirmed.*

Appeal from the judgment of a Divisional Court (Lord Russell of Killowen, C.J., and Wright, J.) making absolute a rule *nisi* for a *mandamus* (reported *ante*, p. 559, [1896] 2 Q. B. 95).

In 1894 the London School Board acquired certain land with houses on it in the defendants' district. In 1866 a system of drainage was laid down by the owner of these houses, the sewage from the houses being carried by a pipe into a sewer in an adjoining street. It did not appear that the previous approval of the Metropolitan Board of Works or of the Vestry had been obtained for its construction. The Vestry having declined to repair this pipe on the ground that it was not a sewer vested in them, the court, on the application of the School Board, made absolute a rule for a *mandamus*, directing the Vestry to repair the pipe.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Sir Edward Clarke, Q.C., and *Jelf, Q.C.*, (*Beven* with them), for the appellants.—No person can make a sewer without the consent of the Vestry and of the Metropolitan Board of Works: sections 47 and 48 of the Metropolis Management Act, 1862. This pipe is either a sewer wrongfully made because not made with the sanction of the Vestry, and therefore does not vest in the Vestry; or it is a drain for draining a group of houses by a combined operation, and, as it must be assumed that it was done lawfully, the court will infer that it was done under the order of the Vestry, and is therefore a "drain" within the definition in section 250 of the Metropolis Management Act, 1855: *Bateman* v. *Poplar District Board of Works*, 33 Ch. D. 360, 35 W. R. Dig. 131.

R. Cunningham Glen, for the respondents, referred to *Kershaw* v. *Taylor*, *ante*, p. 28, [1895] 2 Q. B. 471; *St. Martin's Vestry* v. *Bird*, 43 W. R. 194, [1895] 1 Q. B. 428.

Lord ESHER, M.R.—It seems to me that this case raises a question of fact and a question of law. The question of fact must be what is the proper inference from certain circumstances. In my opinion the facts and circumstances in this case do not admit of the inference that this pipe was lawfully laid down. It is much more likely that it was done unlawfully. I cannot doubt that in real truth the builder who laid out this land laid down this pipe without any lawful authority. That is the question of fact. I come now to the question of law, the construction of the sections of the Act. I must first begin with section 250 of the Metropolis Management Act, 1855, and see what this contrivance is to be called. That section defines what is to be called a drain and what is to be called a sewer. Is this contrivance a drain or a sewer? It drains more than one house. It is said that it is a drain for draining a group of houses by a combined operation, and is therefore not a sewer. But the section goes on to provide that in such a case it is to be a drain if it is done under the order of the vestry. The section then provides that "sewer" shall mean and include sewers and drains of every other description. If, then, this pipe is not a drain as defined by that section, it is a sewer. It must be one or the other. Therefore this pipe is a sewer unless it was laid under an order of the Vestry. This, again, is a question of fact. Can we say that it was so done? The pipe has been in existence for thirty years, and if we had to consider that fact alone we might perhaps infer an order. But there is no minute of any such order. If there had been such an order, something would be known of it. It would be contrary to the truth to say that there was an order. Therefore this combination drain dealing with the sewage of more than one house without an order of the Vestry for that purpose is a sewer, and not a drain. The builder made this sewer. If he had laid the plan of it before the Vestry for their sanction, there would be some record of it. It is clear that he never laid any plan before the Vestry, and he thereby contravened section 47 of the Metropolis Management Act, 1862. He did what was wrong, but he made a sewer as defined by section 250 of the Act of 1855. The Vestry must have known of this sewer and of its connection with their principal sewer, and they allowed it to remain for thirty years. Therefore this sewer was made by a private person contrary to section 47 of the Act of 1862, and therefore wrongfully made, and allowed to remain without objection by the Vestry. Does that sewer vest in the Vestry under section 68 of the Act of 1855? That section says that "all" sewers shall vest. Therefore this sewer, though wrongfully made, vested in the Vestry, and they must repair it. The judgment of

the Divisional Court was therefore right, and this appeal must be dismissed.

A. L. SMITH, L.J.—We are again involved in the intricacies of those statutes relating to drains and sewers. The application is for a *mandamus* to the Vestry to maintain and repair the sewer. The first answer is that it is not a sewer. The reply to that is that it is a sewer, because the pipe takes the sewage of more than one house, and comes therefore within the definition of a sewer in section 250 of the Metropolis Management Act, 1855, and that therefore the case comes within the decisions in *Vestry of St. Martin-in-the-Fields* v. *Bird* and *Kershaw* v. *Taylor*. As against that it is said, "No, it is not a sewer; it is a drain for draining the group of houses by a combined operation within section 250." The answer made to that contention is that in order to make it a drain for draining a group of houses by a combined operation it must have been done under an order of the Vestry, and there is no such order here. Is this a combination drain? It lies on the parish to show that it is. *Primâ facie* it is a sewer within the definition in section 250. There must be an order of the Vestry to make it a combination drain. No such order can be produced, and I cannot infer one, because it seems to me much more likely that a builder thirty years ago would lay this pipe without any order at all than go through all the formalities required by sections 47 and 48 of the Metropolis Management Act, 1862. Another point struck me somewhat forcibly at first—namely, that this case is differentiated from *Kershaw* v. *Taylor*, because the attention of the court was not called in that case to the proviso in section 69 of the Metropolis Management Act, 1855. I do not agree with that contention. Section 68 vests all sewers in the vestry or district board of works, except certain sewers which are vested in the Metropolitan Board of Works, and it provides that all sewers made and to be made within any such parish or district, except sewers vested or to be vested in the Metropolitan Board of Works, shall be vested in such vestry and board respectively. Made by whom? There is no limitation. The section does not limit it to sewers made by the vestry or district board. When a person has made a sewer, though he has not gone through the formalities required by the Act of 1862, that sewer, whether lawfully made or not, vests in the vestry or district board. Section 69 requires the vestry or district board to repair all sewers vested in them, and to make new ones, and then comes the proviso that no new sewer shall be made without the previous approval of the Metropolitan Board of Works. Made by whom? The proviso deals entirely with sewers made by the vestry or district board, and not with those made by any other person, which even now can be made by that other person if the requisite consents are obtained. Therefore I think that the point taken, that this case is differentiated from *Kershaw* v. *Taylor*, is not a good one. In my opinion this pipe is a sewer within section 250 of the Act of 1855.

Appeal dismissed.

Solicitor for the Vestry, *R. Voss.*

Solicitor for the London School Board, *C. E. Mortimer.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) June 24.

WHITWHAM v. WESTMINSTER BRYMBO COKE AND COAL CO. (LIMITED). (*a.*)

Damages—Measure of damages—Trespass—Injury to land—Deposit of spoil on land.

The defendants, who were colliery owners, had committed a trespass on the plaintiffs' land by tipping or depositing spoil thereon from their colliery for a number of years. Further tipping having been restrained by injunction, and an inquiry as to damages having been directed,

Held, that the true measure of damages was the value of the land to the trespasser for the purposes for which he had used it.

The principle of the wayleave cases—Jegon v. Vivian, 19 *W. R.* 365, *L. R.* 6 *Ch. App.* 742; Livingstone v. Rawyards Coal Co., 28 *W. R.* 357, 5 *App. Cas.* 25; *and* Phillips v. Homfray, *L. R.* 6 *Ch. App.* 770, 20 *W. R. Dig.* 121—*applied.*

Decision of Chitty, J., ante, *p.* 459, [1896] 1 *Ch.* 894, *affirmed.*

Appeal from Chitty, J. (reported *ante*, p. 459, [1896] 1 Ch. 894).

The defendants, who were colliery owners, claimed to be entitled to certain land near their colliery by virtue of an alleged agreement, which agreement was held in fact not to have existed.

By the judgment it was declared that the land belonged to the plaintiffs, who were the trustees of Mr. Benjamin Piercy, the former owner, who died in March, 1888. It was also held that the defendants had committed a trespass upon the land by tipping or depositing thereon spoil from their colliery. An injunction was granted to restrain any further deposit. The defendants were ordered to give up possession to the plaintiffs, and an inquiry as to the damages to be paid by the defendants was directed. The form of the inquiry left open the question of the measure of damages.

In answer to the inquiry the official referee made a special report. He found, first, that the sum proper to be paid by way of damages was £200; secondly, that the defendants had by their trespasses rendered land belonging to the plaintiffs, 1a. 3r. 9p. in extent, valueless for any but tipping purposes; and, thirdly, that in assessing the £200 he had taken as the measure of damage the diminished value of the plaintiffs' land, in extent 1a. 3r. 9p., caused by the defendants' trespass. In arriving at the £200 the referee appeared to have taken the land at its agricultural value. The plaintiffs had contended that the proper measure was the reasonable value of the land for tipping purposes, those being the purposes for which the defendants actually used the land. The referee found that, if the proper measure of damages was that for which the plaintiffs had contended, the sum to be paid was £963 and £141 5s. for interest, making together £1,104 5s.

The plaintiffs' land was situate in a long, narrow valley to the north of the defendants' colliery, which was a short distance off. There was no other land on the north of the colliery within a reasonable distance which the defendants could have procured for tipping purposes. The sum of £963 was arrived at by treating the tipping value at £500 an acre, the value of land in the neighbourhood for building. Of the total area of the land 3r. 20p. had been covered

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

by the defendants with spoil; the remaining portion, 3r. 29p., was still available for tipping purposes, but for no other purpose. The question was whether the official referee ought to have taken into consideration the value of the land to the defendants for tipping purposes.

Chitty, J., held that the plaintiffs were entitled to damages on the basis of the value of the land to the defendants for tipping purposes in respect of so much of the land as was actually used by the defendants for tipping, and as to the rest of the land on the basis of its ordinary value, but without any interest.

Assuming that Chitty, J., had laid down the correct principle, the counsel for the parties had agreed that the proper sum to be paid by the defendants to the plaintiffs would be £550.

The defendants appealed.

The arguments used were the same as those in the court below.

C. A. Russell, for the appellants.

F. Thompson, for the respondents.

LINDLEY, L.J.—We are all agreed as to the principle which ought to be applied, and we are of opinion that that upon which Chitty, J., acted is the right one. In order to make it plain, let us see what the defendants have done. They have done two things. First of all, they have so used the plaintiffs' land as to diminish its value by £200, and their counsel admits that they must pay that sum at least, but he contends that they need pay no more. That leaves out of sight what the defendants have done in addition. Besides diminishing the value of the land, they have also been using it for years. Why should not the plaintiffs be entitled to compensation in respect of that user? They have been injured in two respects; they have had the value of the land diminished, and they have lost the use of the land, whilst the defendants have had the use of it.

If we arrive at that point, it does appear to me to be unjust to leave out of sight the use which the defendants have made of this land for their own purposes; and that lies at the bottom of what are called the wayleave cases. What is the principle of those cases? It is this—that where one person has, without leave, been using the land of another for his own purposes he must pay for it. The law is now settled by *Jegon* v. *Vivian*, 19 W. R. 365, L. R. 6 Ch. App. 742, which was approved of in *Livingstone* v. *Rawyards Coal Co.*, 28 W. R. 357, 5 App. Cas. 25. Those cases proceed on the principle stated by Lord Hatherley in *Phillips* v. *Homfray*, L. R. 6 Ch. App. 770, 20 W. R. Dig. 121, where he says: "I at first felt some doubt as to compensation for wayleave"—it had done no pecuniary damage, of course—"but on further consideration I think that, on principle, it ought to be given, whether the cases have as yet gone that length or not. Here is a man doing a surreptitious act, which cannot be discovered except through the medium of a bill. Under the old practice there would have been a bill for the discovery of the thing, and then an action for damages in respect of it would have been brought; but this court has now the power to grant compensation in respect of a continuously accruing damage *de die in diem* arising from a continuous trespass underground, which can only be stopped by injunction restraining any further conveyance of coal through the respondents' property. These damages cannot be better assessed than by an inquiry what is fit and proper to be paid for wayleave for the coals carried through the property." If we apply that principle to this case, upon what principle of justice can we say that these defendants are to use the plaintiffs' land for years for their own purposes, and to pay nothing for it? And, in addition to that, they have done them an injury. Chitty, J., has proceeded on that principle, and it is right. The principle being right, the figures are agreed, and the appeal must be dismissed.

LOPES, L.J.—I am also of opinion that the decision of Chitty, J., is correct. I do not think that we are departing from the established and uniform rule that the plaintiff in an action for trespass is to be paid for the injury which he has sustained from the wrongful act of the defendant, and that any benefit to the defendant is not an element to be taken into consideration. If we apply that rule here, what do we find that the plaintiffs have suffered in consequence of the wrongful act of the defendants? The value of their land has been diminished. We have only to decide the question of principle; we have nothing to do with figures. The value of the land unquestionably has been diminished, and the defendants' counsel admits that the plaintiffs are entitled to be paid for that. But there is something more in respect of which the plaintiffs are, in my opinion, entitled to compensation—that is, the use that the defendants have made of their land for eight years. That is the principle applied by Chitty, J., and I think it is right. This is a peculiar case, and may be said to be a mixed case, something between wayleave and trespass, and there is no authority which can be said to have a strict bearing upon it.

RIGBY, L.J.—I am of the same opinion. We have only to deal with the principle upon which the judgment of Chitty, J., was based, and which I consider to be right. Independently of permanent damage done, there has been user of the plaintiffs' land. We cannot take an account of the profits made by the defendants; no one suggests that. In fact, it is a matter of indifference whether the defendants made a profit or a loss. They did use the land for the purpose of carrying over it spoil, which they ultimately deposited on the plaintiffs' land, and it appears to me that is entirely within the principle of *Jegon* v. *Vivian* and the other cases of that kind.

There is nothing special in the nature of a wayleave; there is nothing special for this purpose in underground workings. The principle is this—that a trespasser shall not be allowed to make use of another person's land without in some way accounting to that person for so doing. Very often the convenient way is an inquiry "what is fit and proper to be paid for wayleave," but it is only a convenient way. Very often there is in a locality a customary wayleave which gives the measure of damages. But the principle is that in some way or other—if you can do nothing better, then, I suppose, by rule of thumb—you must charge a trespassing defendant for the use of the land. In this case we are relieved from all difficulty as to figures by the agreement of counsel; and all we have to say is that Chitty, J., was right, with the consequence that the damages will be £550, and the appeal must be dismissed.

Appeal dismissed.

Solicitors, *Norris, Allen, & Chapman*, for *J. B. Pollitt*, Manchester; *Field, Roscoe, & Co.*, for *Evan Morris & Co.*, Wrexham.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) May 12, 13, 19.

In re CAREW.
CAREW *v.* CAREW. (*a.*)

Will—Construction—Reversionary interest—"Legal disability" preventing legatee from taking for his own benefit—Bankruptcy, subsequently annulled.

A testator gave the income of his residuary estate to his wife for life, and subject thereto gave a moiety of such estate to his son; but in case the son should at the time of the wife's death be "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit," then the testator gave the same over to the son's wife and children.

During the widow's lifetime the son, who was one of the executors of the testator, was ordered to pay a sum of £5,188 to the estate, such sum being assets received by the son in the administration of the estate, and his reversionary interest under the will was declared liable to make good such sum. The son had also mortgaged his reversionary interest.

On the day of the death of the tenant for life, but before the death, the son was, on his own application, adjudicated bankrupt; but the order of adjudication was shortly afterwards annulled on the ground that it ought never to have been made.

Held, that the words "legal disability" as used in the will indicated a disability imposed by act of law rather than a disability arising simply from the voluntary act of the legatee, and that therefore, on the above facts, no such legal disability arose as would cause the gift over to take effect; further, the bankruptcy, being a mere device on the part of the son, ought not to be regarded.

Decision of Stirling, J., ante, *p.* 296, [1896] 1 *Ch.* 527, *affirmed.*

Appeal from Stirling, J. (reported *ante*, p. 296, [1896] 1 Ch. 527).

By his will, dated the 11th of January, 1886, George Carew, a solicitor, gave his wife specific and pecuniary legacies, and the income of his estate to her for her life, and subject thereto one equal moiety to his granddaughter Jessie Carew. "And as to the other equal moiety thereof, and in case of the death (under age) of my said granddaughter, then as to the entirety of my said worldly estate and property I give the same, subject as aforesaid, to my son Henry George Carew; but if he should predecease either my said wife or me, or in case of his being at the time of the death of the survivor of my said wife and me under any legal disability, in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit," then over.

By the chief clerk's certificate made in the action on the 29th of July, 1894, a sum of £5,188 16s. 10d. was found due to the testator's estate from H. G. Carew, and by an order on further consideration on the 30th of January, 1895, H. G. Carew was ordered to pay the said sum to the trustees of the will.

On the 16th of March, 1895, the testator's widow died. On the same day, but before the death of Mrs. Carew, a receiving order and an order of adjudication in bankruptcy were, on his own application, made against H. G. Carew. On the 4th of April such bankruptcy proceedings were annulled, on the ground that the orders ought never to have been made. By mortgage deeds of various dates H. G. Carew alone, and he and his wife jointly, mortgaged their interests under the testator's will to several mortgagees to secure various sums of money, and H. G. Carew by deed assigned all his interest under the will to a trustee upon trust to raise £2,500 for the benefit of his wife and children, and, subject thereto, upon trust for himself.

A summons having been taken out for a declaration as to who, upon the true construction of the will, were entitled to the moiety of the testator's estate bequeathed to H. G. Carew, Stirling, J., held that H. G. Carew was not, at the date of the death of the testator's widow, under any "legal disability" within the meaning of those words as used in the will, and consequently that H. G. Carew, or those claiming under him, were entitled (see the report, *ante*, p. 296).

The wife and children of H. G. Carew, who would be the persons entitled in the event of the gift over having taken effect, appealed.

Grosvenor Woods, *Q.C.*, and *Philpotts*, for the appellants.—Disability used with reference to a legatee must mean a disability to receive. "Legal" may be opposed to "physical." It is equally a legal disability, whether caused by the acts of the legatee or by those of others. The letter must, according to the cases, yield to the spirit of such provisoes: see *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722, 15 W. R. Ch. Dig. 42; *Trappes* v. *Meredith*, L. R. 9 Eq. 229, 18 W. R. Ch. Dig. 152; *Ex parte Eyston*, 26 W. R. 181, 7 Ch. D. 145; *Samuel* v. *Samuel*, 12 Ch. D. 152, 28 W. R. Dig. 250; *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1, 40 W. R. Dig. 280. The words "legal disability" should be construed so as to secure personal enjoyment. Here the intention is clear, and the words have no fixed meaning which would prevent the court giving effect to them.

They also referred to *In re Brown*, *Dixon* v. *Brown*, 32 Ch. D. 597, 34 W. R. Dig. 18; *Barnett* v. *Sheffield*, 1 De. G. M. & G. 371; *Morris* v. *Livie*, 1 Y. & C. Ch. 380.

Hastings, *Q.C.*, and *Rawlins*, *Q.C.*, for the respondent, Mrs. Jessie Weston (*née* Carew).

Henry Fellows, *Ribton*, *Elgood*, and *W. C. Fooks*, for various incumbrancers.

C. E. Bovill, for the trustees of the will.

Grosvenor Woods, *Q.C.*, in reply.—Bankruptcy is not a change of status. I submit that an operation of law does here prevent H. G. Carew taking for his own benefit. "Legal" must mean some act or rule of law.

Cur. adv. vult.

May 19.—LINDLEY, L.J.—The question raised by this appeal turns on the true construction of a clause in the will of a solicitor. [His lordship referred to the will, to the bankruptcy of the son, and to the order declaring the sum found due from him to be a charge on his share of his father's property.]

There are two ways of construing the clause in the will relating to the son's share. One is that on the death of his mother the son is to be entitled to one-half of the residuary estate, unless he is at that time under some legal disability which prevents him from taking and enjoying such half for his own personal and exclusive benefit. The other is that on the death of his mother the son is to be entitled to one-half of the residuary estate unless something has occurred which legally prevents him from taking and enjoying such half for his own personal and exclusive benefit.

There is no context to show more precisely than the clause itself shows what the testator really meant. The first of the above constructions is the more liberal of the two; but it is open to the objection that the

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meaning of being "under a legal disability" is not free from ambiguity. Such words have no precise technical meaning; but the explanations given of "ability" in Comyns' Digest and "disability" in Jacobs & Tomline's Law Dictionaries lead me to infer that legal disability would include bankruptcy, conviction for felony, attainder for treason, and lunacy. Infancy need not be considered, as the son was over twenty-one when the will was made. An alienation would not create a legal disability; still less would a mortgage or charge. In this case the son had procured himself to be made bankrupt, but the bankruptcy was annulled as being a mere device and trick, and it ought to be disregarded accordingly. The son was at his mother's death *sui juris* in all respects, he was under no legal disability of any kind; and if the first construction is the right one, he became entitled to one-half the property, subject to the payment of the amounts charged upon it.

The second of the above constructions is open to the objection that it departs more than the first from the words of the clause; and further, that this construction leads to results which it is difficult to suppose the testator really intended. The clause is not so worded as to amount to a gift to the son until alienation, and then to his wife and children; and it can hardly be supposed that the testator meant that his son was not to have anything if he alienated or charged his half before his mother's death, but was to be at liberty to alienate or charge it as soon as she was dead. The words do not warrant the inference that a mere incumbrance by the son, existing at his mother's death, was to deprive him of all benefit under the will. Inability to pay off a debt charged upon property may prevent the owner from ever actually personally enjoying the property; but such inability can hardly be described as a "legal disability" from enjoying it. On these grounds I am of opinion that the first construction is the sounder of the two. The appeal therefore must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. I think the limitations in this will are alternative limitations, and the important words are "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal exclusive benefit." The governing words there are, in my judgment, "legal disability." What did the testator mean by legal disability? I think he meant a disability by act of law, and not a disability created by Carew himself; a personal disability imposed on him by the law, not voluntarily created, but imposed *in invitum*, such for instance as bankruptcy, or conviction for felony, or attainder for treason, and in my judgment also lunacy. I cannot think, having regard to the words used in the will, that the testator ever intended that those words should include a mortgage or a charge, or that he ever thought of those being such a disability as he was dealing with. If that were the legal conclusion, any small charge made a week before the mother's death would bring the case within the words—a small charge which he could pay off a fortnight afterwards. I cannot think the testator ever intended a disability arising from mere impecuniosity, to take effect. I therefore am of opinion that the learned judge in the court below was perfectly right in the view he took of the true construction of this will, and that the appeal must be dismissed.

KAY, L.J.—This appeal raises a question of construction of the will of George Carew, who was a solicitor. [His lordship stated the clause in the will, and continued:—] The son Henry G. Carew mortgaged his interest under the will. He, as executor of the testator, received assets of the testator to the amount of £5,188, and that sum is still due from him. When the testator's widow was at the point of death he, for the purpose of causing the alternative gift in favour of his own wife and children to take effect, procured himself to be adjudicated bankrupt on his own petition. On the 16th of March, 1895, the testator's widow died. The bankruptcy was annulled on the 4th of April on the ground of its being a device. On the 30th of January, 1895, an order was made on the further consideration of a suit for administration of the estate by which Henry was ordered to pay the £5,188, and it was declared that any interest coming to him under the will was liable to make it good, and that sum and the costs of the action which he was ordered to pay were declared a charge upon his interest, if any.

The question is whether, under these circumstances, the alternative gift to the wife and children of Henry has taken effect. This limitation is not in any of the forms which use has rendered familiar. It does not contain any words referring to voluntary alienation. I am clearly of opinion that neither the mortgages made by Henry nor his pretended bankruptcy, although existing at the death of the widow, which is the point of time referred to in the alternative limitation, caused the gift in favour of Henry's wife and children to take effect.

The difficulty is to determine what was the consequence of his liability to pay to the trustees £5,188 and the order making this sum a charge upon his interest, if any. It was argued that this did create a legal disability in consequence whereof he was hindered in taking his share for his own personal and exclusive benefit. But does this create a legal disability? Legal disability must be a disability of the person referred to occasioned by act of law.

It was ingeniously argued that even without this order of the court there is a rule of law which prevented Henry from taking anything under the will until his liability to the estate as a trustee or executor was satisfied. That is quite true, but is that the legal disability contemplated by this clause? At any rate, it is urged that if that would not do, the order of the court which was made during the life of the tenant for life, and remained unsatisfied at her death, created a disability by act of law.

I confess I think this question of the effect of Henry's indebtedness and of the order one of some difficulty. I agree that in order to arrive at a true solution of it the general intention and scheme of the will must be considered. The best mode of putting the case for the appellant seems to me to be to treat disability as meaning disability of Henry to take for his own personal and exclusive benefit. If such disability is occasioned by act of law, the alternative gift takes effect. Any proceeding in a court of law *in invitum*, although brought about by Henry's own act or default, is a legal disability within the meaning of this provision.

But that would be reading the clause as though it were written, "If Henry is prevented from taking for his own benefit by the judgment or order of any court, the property shall go to his wife and children." The object of the testator does not seem to have been to prevent Henry from alienating or charging his interest. If a charge created by the act of the legatee was not to make the alternative limitation take effect, it is difficult to suppose that the testator intended that a charge imposed by a rule of law or by an order of the court was to have that consequence. Moreover, if that was so, a judgment for a small amount, £10 or £5, and execution unsatisfied at the time specified, would cause the property to go over. If that were the clear meaning of the words,

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Held, that the words "legal disability" as used in the will indicated a disability imposed by act of law rather than a disability arising simply from the voluntary act of the legatee, and that therefore, on the above facts, no such legal disability arose as would cause the gift over to take effect; further, the bankruptcy, being a mere device on the part of the son, ought not to be regarded.

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A summons having been taken out for a declaration as to who, upon the true construction of the will, were entitled to the moiety of the testator's estate bequeathed to H. G. Carew, Stirling, J., held that H. G. Carew was not, at the date of the death of the testator's widow, under any "legal disability" within the meaning of those words as used in the will, and consequently that H. G. Carew, or those claiming under him, were entitled (see the report, *ante*, p. 296).

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The second of the above constructions is open to the objection that it departs more than the first from the words of the clause; and further, that this construction leads to results which it is difficult to suppose the testator really intended. The clause is not so worded as to amount to a gift to the son until alienation, and then to his wife and children; and it can hardly be supposed that the testator meant that his son was not to have anything if he alienated or charged his half before his mother's death, but was to be at liberty to alienate or charge it as soon as she was dead. The words do not warrant the inference that a mere incumbrance by the son, existing at his mother's death, was to deprive him of all benefit under the will. Inability to pay off a debt charged upon property may prevent the owner from ever actually personally enjoying the property; but such inability can hardly be described as a "legal disability" from enjoying it. On these grounds I am of opinion that the first construction is the sounder of the two. The appeal therefore must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. I think the limitations in this will are alternative limitations, and the important words are "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal exclusive benefit." The governing words there are, in my judgment, "legal disability." What did the testator mean by legal disability? I think he meant a disability by act of law, and not a disability created by Carew himself; a personal disability imposed on him by the law, not voluntarily created, but imposed *in invitum*, such for instance as bankruptcy, or conviction for felony, or attainder for treason, and in my judgment also lunacy. I cannot think, having regard to the words used in the will, that the testator ever intended that those words should include a mortgage or a charge, or that he ever thought of those being such a disability as he was dealing with. If that were the legal conclusion, any small charge made a week before the mother's death would bring the case within the words—a small charge which he could pay off a fortnight afterwards. I cannot think the testator ever intended a disability arising from mere impecuniosity, to take effect. I therefore am of opinion that the learned judge in the court below was perfectly right in the view he took of the true construction of this will, and that the appeal must be dismissed.

KAY, L.J.—This appeal raises a question of construction of the will of George Carew, who was a solicitor. [His lordship stated the clause in the will, and continued:—] The son Henry G. Carew mortgaged his interest under the will. He, as executor of the testator, received assets of the testator to the amount of £5,188, and that sum is still due from him. When the testator's widow was at the point of death he, for the purpose of causing the alternative gift in favour of his own wife and children to take effect, procured himself to be adjudicated bankrupt on his own petition. On the 16th of March, 1895, the testator's widow died. The bankruptcy was annulled on the 4th of April on the ground of its being a device. On the 30th of January, 1895, an order was made on the further consideration of a suit for administration of the estate by which Henry was ordered to pay the £5,188, and it was declared that any interest coming to him under the will was liable to make it good, and that sum and the costs of the action which he was ordered to pay were declared a charge upon his interest, if any.

The question is whether, under these circumstances, the alternative gift to the wife and children of Henry has taken effect. This limitation is not in any of the forms which use has rendered familiar. It does not contain any words referring to voluntary alienation. I am clearly of opinion that neither the mortgages made by Henry nor his pretended bankruptcy, although existing at the death of the widow, which is the point of time referred to in the alternative limitation, caused the gift in favour of Henry's wife and children to take effect.

The difficulty is to determine what was the consequence of his liability to pay to the trustees £5,188 and the order making this sum a charge upon his interest, if any. It was argued that this did create a legal disability in consequence whereof he was hindered in taking his share for his own personal and exclusive benefit. But does this create a legal disability? Legal disability must be a disability of the person referred to occasioned by act of law.

It was ingeniously argued that even without this order of the court there is a rule of law which prevented Henry from taking anything under the will until his liability to the estate as a trustee or executor was satisfied. That is quite true, but is that the legal disability contemplated by this clause? At any rate, it is urged that if that would not do, the order of the court which was made during the life of the tenant for life, and remained unsatisfied at her death, created a disability by act of law.

I confess I think this question of the effect of Henry's indebtedness and of the order one of some difficulty. I agree that in order to arrive at a true solution of it the general intention and scheme of the will must be considered. The best mode of putting the case for the appellant seems to me to be to treat disability as meaning disability of Henry to take for his own personal and exclusive benefit. If such disability is occasioned by act of law, the alternative gift takes effect. Any proceeding in a court of law *in invitum*, although brought about by Henry's own act or default, is a legal disability within the meaning of this provision.

But that would be reading the clause as though it were written, "If Henry is prevented from taking for his own benefit by the judgment or order of any court, the property shall go to his wife and children." The object of the testator does not seem to have been to prevent Henry from alienating or charging his interest. If a charge created by the act of the legatee was not to make the alternative limitation take effect, it is difficult to suppose that the testator intended that a charge imposed by a rule of law or by an order of the court was to have that consequence. Moreover, if that was so, a judgment for a small amount, £10 or £5, and execution unsatisfied at the time specified, would cause the property to go over. If that were the clear meaning of the words,

of course the court must enforce it; but if it is doubtful, these considerations are important.

Then, further, in a case where the meaning is dubious the consequence of either construction may and ought to be considered. If this property has gone over to Henry's wife and children, not only are all the charges made by him upon it defeated, but Jessie will lose half of the £5,188, which is her share of Henry's debt to the estate, and he will have had all that money, besides what he has raised upon his share by mortgages, which I understand he cannot redeem. If the limitation in favour of Henry's wife and children has not taken effect, Jessie will recover her full share of the estate, and there will be something for the mortgagees of Henry. His wife and other children will get nothing. The latter of these two constructions will occasion less injustice than the other.

On the whole I think the words "legal disability" mean a bankruptcy, or possibly a felony, some condition of the legatee in consequence of which the law deprives him of his property; not a mere charge created by judgment and execution, or imposed by decree of a court. Either of these he might get rid of by paying the amount, and in this respect a charge imposed by the judgment of a court is no more a disability than a charge created by his own voluntary act. For these reasons I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors, *Busk & Mellor; E. Vernor Miles; Rye & Eyre; E. H. Goddard; Mear & Fowler; Elgood & Moyle; Routh, Stacey, & Castle.*

High Court of Justice.

Chan. Div. | June 17.
Stirling, J. |

ROBINSON *v.* HARKIN. (*a.*)

Trustee—Employment of outside broker—Negligence—Contribution—Statute of Limitations—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8, *sub-section* 1 (a) (b).

The employment by a trustee of an outside broker is not in itself a departure from his duty as a trustee. The right to contribution between co-trustees is governed by the same principles as regulate the right to contribution between co-sureties. The principle laid down as regards co-sureties in Wolmershausen *v.* Gullick, [1893] 2 *Ch.* 514, 41 *W. R. Dig.* 193, *accordingly applies to the case of a trustee suing a co-trustee for contribution in respect of a liability incurred from loss occasioned to the trust estate by their joint default; and the Statute of Limitations does not begin to run as between the co-trustees until the claim of the* cestui que trust *is established against the trustee claiming contribution.*

This was a summons by one trustee of a settlement made in 1884 on the marriage of Mr. and Mrs. Keegan, and by the three infant children of the marriage, against the other trustee of the settlement, seeking to make him liable for a loss of about £1,000 caused by his negligence.

The defendant denied the negligence, and claimed contribution from the plaintiff trustee.

The loss was incurred as follows.

By the settlement £2,500 was covenanted to be settled by Mrs. Keegan's father.

The trustees of the settlement were the plaintiff Robinson, who was at the date of the settlement a medical student, aged 23, and is now a medical practitioner in the country, and the defendant Harkin, who is a wine merchant. The latter had commenced business in 1881 along with a fellow clerk, and the evidence showed that in 1884 the business of the firm was very small.

Neither the plaintiff nor the defendant had at the date of the settlement any private banking account; but the defendant's firm had one.

The £2,500 covenanted to be paid was paid in July, 1885, by a cheque to order, which was brought to the plaintiff Robinson, endorsed by him, and then forwarded to the defendant.

On the 14th of January, 1885, the husband Keegan wrote to the defendant that he and his wife wished the money to be invested in North-Eastern Railway Four per Cent. Preference Shares, adding that if the defendant had a stockbroker on his books he should employ him.

The defendant acted on this suggestion, and entrusted the money to a customer of his named Record, who was a stockbroker, though not a member of the Stock Exchange.

The defendant received the following acknowledgment, dated the 14th of July, 1885, for the money from Record: "I beg to acknowledge receipt of cheque for £2,500, the amount, less commission, to be invested in such stocks and in such names as might be hereafter advised."

Record duly invested a portion of the stock.

On the representation of Mr. Keegan, who complained of Record not having invested the whole sum, the defendant saw Record and obtained from him a contract note, purporting to be for the purchase of £400 Great Eastern Four per Cent. Preference Stock and £480 Manchester, Sheffield, & Lincolnshire Four per Cent. Preference Stock. If these purchases had been made the investment of the £2,500 would have been complete; but no delivery of any such stock was ever made, and, in fact, the balance of £1,000 was never invested at all.

Record was insolvent, so that nothing could be gained by an action against him, and in September, 1888, the money was irretrievably lost.

The money that had been invested was invested in the name of the defendant only, but there was no allegation of any bad faith on his part.

The plaintiff Robinson had simply left the whole matter in the hands of the defendant, and had no intimation that there was anything wrong till October, 1888.

Graham Hastings, Q.C., and *C. E. Bovill*, for the plaintiff Robinson and the infant co-plaintiffs.—If a man accepts a trust, he undertakes by such acceptance to exercise ordinary prudence. A trust is implied at law to invest in the names of the trustees, and it is no defence that he invested in his own name. As to the counterclaim, where there has been no fraud or improper conduct, a right to contribution can only be established where it is proved that the act which caused the loss was the act of the person who is sought to be made liable or the joint act of the two. Here the loss was caused by employing Record and putting the money in his hands, which was not a joint act. The only joint act was for the sake of conformity: *Lingard* v. *Bromley*, 1 V. & B. 114. The defendant cannot claim contribution under the circumstances.

They also referred to *Speight* v. *Gaunt*, 31 W. R. 401, 32 W. R. 435, 22 Ch. D. 727, 9 App. Cas. 1; *Lewis* v. *Nobbs*, 26 W. R. 631, 8 Ch. D. 591; *Bahin* v. *Hughes*, 34 W. R. 311, 31 Ch. D. 390.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Grosvenor Woods, Q.C., and *Curtis Price*, for the defendant Harkin.—Mr. Record persuaded the defendant that he was acting in good faith, and the defendant ought not to be charged with wilful default because he trusted in these representations. The defendant has got no benefit from this trust, and if he is liable the plaintiff is equally so.

They referred to the Trustee Act, 1893, s. 24; *Speight* v. *Gaunt*, *Lewis* v. *Nobbs*, *Bahin* v. *Hughes*, and *Chillingworth* v. *Chambers*, *ante*, pp. 32 and 388, [1896] 1 Ch. 685.

Graham Hastings, Q.C., in reply.—The step of employing Record was the cause of the loss, and this was not a joint act of the trustees. As to the defendant's claim for contribution, we have a defence under section 8 of the Trustee Act, 1888, and ask leave to amend in order to plead it.

Curtis Price replied as to the defence under the Trustee Act, 1888.

Cur. adv. vult.

June 17.—STIRLING, J., after stating the facts, said:—The question which I have to decide reduces itself to this: whether the defendant, either alone or jointly with the plaintiff Robinson, is liable for the loss of the trust money. The duty of trustees with reference to the investment of trust moneys was considered in *Speight* v. *Gaunt*, 31 W. R. 401, 32 W. R. 435, 22 Ch. D. 727, 9 App. Cas. 1. [His lordship then read extracts from the judgment of Jessel, M.R., in 22 Ch. D., at p. 739, "It seems to me that on general principles . . . it does not appear to me in that case that the trustee can be liable"; and from those of Lord Selborne, 9 App. Cas., at p. 5, "Neither the statute, however, . . . they may properly have recourse"; and Lord Blackburne, at p. 19, "The authorities cited by the late Master of the Rolls, . . . and is a breach of trust," and continued:—] It is by the principles laid down in that case that the liability of the trustees in the present instance is to be determined. First, then, as to the defendant's liability. He entrusted to Record £2,500 on the terms of the letter of the 14th of July, 1885. Was he justified in so doing? What was the position of Record? He was a stockbroker, but not a member of the Stock Exchange. It is a matter of common knowledge that outside brokers do not enjoy so high a reputation as members of the Stock Exchange; still the evidence does not show that there may not be outside brokers who are of good repute in the City of London, and I do not decide the case on that ground alone. The defendant states that he did not at that time know the difference between outside and inside brokers. What he did know of Record was this. He became acquainted with him through his partner, who had known him, he says, for many years. He was also introduced as a customer by Mr. Maynard, an accountant and a mutual friend. Defendant had never previously spoken to him, being, as he was, a customer of his partner; he paid his bills promptly when sent in. The defendant went to his office at Warneford-court, and "formed the idea he was worth about £10,000 from the look of his clerks (four or five), and the business going on."

The defendant's partner was not called. Mr. Maynard was. The latter stated that he introduced the defendant to Mr. Record; he did not tell the defendant that he was an outside broker; the introduction had nothing to do with the Stock Exchange. He declined in the most marked way to express any opinion with regard to Record's financial position in 1885, but said that he had employed him as a broker and he had carried out the business satisfactorily. This is the whole of the evidence on this head, and it seems to me to come to little more than this: that Record appeared to carry on business as an outside broker and was regarded as a good customer by a firm of wine merchants in a small way of business. It certainly does not establish the allegation in the defendant's statement of defence that Record "was a person of good credit in the City of London as a broker." I think that the defendant failed to exercise proper care in the selection of a broker, and further that he departed from the usual course of business in depositing with the person selected so large a sum as £2,500 on the terms of the letter of the 14th of July, 1885. In my judgment he has failed to justify the handing over of this sum to Record, and is liable for the loss thereby occasioned. What was the plaintiff Robinson's position between the 10th of July, 1885, and the 25th of September, 1888? He says: "I left the matter of the trust in the hands of the defendant; I judged him to be a man of experience in business matters." So his first step was to hand over the money to the defendant and make him sole judge of the investment and the broker. I think this was a departure from his duty. The plaintiff in the course of his cross-examination stated that he made inquiries by letter from time to time between July, 1885, and September, 1888. He had kept no copies of these letters or of the defendant's replies. He was aware that no railway stock had been transferred into his name. The only answer to his inquiries that he could remember was that the defendant was seeking favourable opportunities to buy Great Eastern shares. The defendant denies these statements. He says: "If the plaintiff Robinson wrote to me between 1885 and October, 1888, I never received the letters, and certainly did not answer them." The defendant does not allege that he kept the plaintiff informed of what was being done with reference to the investments. Both plaintiff and defendant were perfectly honest witnesses, and the memory of one or the other must be at fault. My opinion is that more probably the plaintiff is mistaken than the defendant. However that may be, it seems plain on his own admission that he was satisfied with the most general answer to his inquiries, and for a period of three years left the whole matter in the hands of his co-trustee. Making every allowance for his youth and inexperience, I cannot hold that in reference to this trust he took the same precautions as an ordinary prudent man of business would have taken with regard to his own affairs, and in my judgment the plaintiff Robinson is as between himself and the infant co-plaintiffs liable in respect of the loss no less than the defendant.

The question then arises whether the defendant is entitled to contribution from the plaintiff. This subject has been considered by the Court of Appeal in the recent case of *Chillingworth* v. *Chambers*, *ante*, pp. 32 and 388, [1896] 1 Ch. 685. In that case Smith, L.J., said: "As between two trustees who are *in pari delicto*, the one who has made good a loss occasioned by a breach of trust for which two are jointly and severally liable may obtain contribution to that loss from the other." And Lindley, L.J. said: "The plaintiff and the defendant being *in pari delicto*, the plaintiff's right as trustee to contribution from the defendant as co-trustee is established by a long series of authorities, of which it is only necessary to mention *Lingard* v. *Bromley* and *Bahin* v. *Hughes*. Both these cases thus referred to, and particularly the latter, show that for the purposes of the rule one trustee is to be treated as *in pari delicto* with his co-trustee, although he may have taken the more active part in the conduct of the business which led to the loss." [His lordship then read the head-

notes to *Lingard* v. *Bromley* and *Bahin* v. *Hughes* and extracts from the judgments of Cotton, L.J., at page 396 of 31 Ch. D., "Miss Hughes was the active trustee. . . . All the trustees were in the wrong, and every one is equally liable to indemnify the beneficiaries"; and of Fry, L.J., at page 398, "Upon the second part I also agree with my brother Cotton, L.J. . . . Such a doctrine would be against the policy of the court in relation to trusts."] Having regard to the principles there laid down, I come to the conclusion that the plaintiff Robinson has not made out any case for throwing the entire liability on the defendant. That being so, the general right of the defendant to contribution remains.

It was then said in argument that there was a defence under the Statute of Limitations, and in particular under the Trustee Act, 1888, s. 8. This defence is not pleaded as it ought to have been, and I was asked to give leave to amend by pleading it. This application was met by another on the part of the defendant, that he might be at liberty to amend by pleading the same statute as against the plaintiff Robinson; of course, these statutes would be of no avail against the infant co-plaintiffs. Having regard to the late period at which this defence was first suggested, I confess I feel considerable difficulty in acceding to the application for leave to amend, and if I did accede to it I should certainly give the defendant leave to amend also. I have, however, considered the question on its merits, and am of opinion that the Statutes of Limitation afford no defence. It was laid down in *Dering* v. *Winchilsea* (*Earl*), 1 Cox. 318: "Contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it. . . ." "The reason given in the books is that in *æquali jure* the law requires equality, one shall not have the burden in ease of the rest; and the law is grounded on great equity. Contract is never mentioned." The law was in that case applied between co-sureties; but the principles laid down apply equally to contribution between co-trustees, and it has been held that such right to contribution gives rise to a debt in some cases in the nature of a specialty, in others of a simple contract: see *Lockhart* v. *Reilly*, 1 De G. & J. 464, 6 W. R. Ch. Dig. 90; *Priestman* v. *Tindall*, 24 Beav. 244, 6 W. R. Ch. Dig. 92. In the former case one of two trustees was held entitled to the benefit of section 5 of the Mercantile Law Amendment Act. The Statutes of Limitation applicable to the recovery of such debts would therefore have been defences to claims in right of contribution prior to 1888, and consequently it seems to me the case is not governed by sub-section 1 (*b*) of section 8 of the Act of 1888, but by sub-section 1 (*a*). It was held in *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, 41 W. R. Dig. 193, that in a case of contribution between two co-sureties time did not begin to run under the Statutes of Limitation until the liability of one of the sureties was established, that is, until the claim of the principal creditor was established against the surety. I think the like principle applies here, and that time does not begin to run as between the plaintiff Robinson and the defendant Harkin until the claim of the infant *cestuis que trust* was established against the latter, and consequently that time only begins to run as between them from the date of the present judgment.

Judgment accordingly.

Solicitors, *Fenton & Co.*; *W. Sanders Fiske.*

[THE END.]

THE

WEEKLY REPORTER

DIGEST

OF ALL THE

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WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

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FROM THE 24TH OF OCTOBER, 1895, TO THE 12TH OF AUGUST, 1896.

VOL. XLIV.

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1896.

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*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; Q.B.D., the Queen's Bench Division; BKCY., the Queen's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved; C.A. (Ir.), the Court of Appeal in Ireland; M.R. (Ir.), the Master of the Rolls in Ireland; V.C. (Ir.), the Vice-Chancellor of Ireland; Q.B.D. (Ir.), the Queen's Bench Division, Ireland; P.D. & AD.D. (Ir.), the Probate and Matrimonial Division, Ireland.

*** *This Digest contains a Tabular Index of the Names of all Cases Reported up to the end of August,* 1896, *as well in this Volume* (44) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports will be found in the Tabular Index to the Names of Cases.*

ACCUMULATIONS.—See TRUSTEE, 10.

ADMINISTRATION:—

1. *Costs—Real and personal estate.*—Where the costs of an administration are increased by the administration of real estate, such increased costs must be borne by the real estate.—*Copland, Re, Mitchell* v. *Bain,* CH.D. NORTH, J., 94.

2. *Insolvent estate—Annuity—Right of retainer—Judicature Act,* 1875, *s.* 10.—An administratrix is not entitled to retain out of the estate when insolvent the estimated value of an annuity covenanted to be paid to her by the deceased. Her only right is to prove with the other creditors. Arrears due at the death can be retained.—*Beeman, Re, Fowler* v. *James,* CH.D. NORTH, J., 247.

3. *Insolvent estate—Married woman—Loan to husband—Claim against deceased husband's estate—Practice—Judicature Act,* 1875, *s.* 10—*Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 3.—In an action for the administration of the estate of an insolvent testator the testator's widow claimed as a creditor in respect of a loan made by her to the deceased out of her separate estate during coverture.

Held, that the claim of the widow was not to be postponed to the claims of the other creditors by the joint operation of section 10 of the Judicature Act (England), 1875 (s. 28, sub-section (1) Irish Judicature Act, 1877), and of the Married Women's Property Act, 1882, s. 3.—*Moore* v. *Smith,* C.A. (Ir).

4. *Insolvent estate — Married woman—Right of retainer as administratrix of deceased husband—Practice—Judicature Act,* 1875, *s.* 10—*Married Women's Property Act,* 1882, *s.* 3.—Neither the

Judicature Act, 1875, s. 10, nor the Married Women's Property Act, 1882, s. 3, nor both combined, has made any change in the common law right of retainer.

Crawford v. *May*, 38 W. R. 765, 45 Ch. D. 499, followed.

A personal representative does not waive the right of retainer by claiming a debt due by the deceased to him for the purpose of having its existence and amount certified by the chief clerk; it is on the hearing on further consideration that the right of retainer is usually and properly claimed.—*Simpson, Re*, V.C. (Ir.).

5. *Insolvent estate—Transfer to Bankruptcy Court of Chancery administration action.*—The beneficiaries under a will commenced an action in the Chancery Division against the acting trustee and executor, who was a partner in the deceased testator's business, claiming a declaration that the assets of the business formed part of the estate of the testator; that an account might be taken of the partnership dealings, and that the affairs of the partnership might be wound up; that the defendant might be removed from being a trustee, and that new trustees might be appointed; and administration of the testator's estate. A receiver was then appointed to get in the testator's estate and the debts and assets of the partnership business. Shortly afterwards the defendant was adjudicated a bankrupt. Thereupon his trustee in bankruptcy applied to the Chancery Division that the receiver might be discharged and the action handed over to the Bankruptcy Court so far as related to the debts and assets of the partnership business. It was decided by Kekewich, J., that the Chancery Division having seisin of the action it would not be proper to hand it over to the Bankruptcy Court, nor to divide the administration into two parts. On appeal:

Held, that the application was wrongly made, the right procedure being to apply to the judge of the Bankruptcy Court under section 102, subsection 4, of the Bankruptcy Act, 1883, to order a transfer to himself of the action pending in the Chancery Division.

Held, therefore, that on this ground the appeal must be dismissed.—*Somes, Re, Stewart* v. *Somes*, C.A.

6. *Insolvency in India*—11 & 12 *Vict. c.* 21, *s.* 7—*Fund in court—Payment out.*—Administration need not be taken out in England to the estate of an insolvent who died intestate in India. Administration having been taken out in India to such intestate's estate, the official assignee of the Insolvent Court of Bombay, in whom the property of the insolvent had vested under the insolvency, held entitled to payment out of a fund in court in England standing to the credit of the deceased.

In re Davidson's Settlement Trusts, 21 W. R. 452, L. R. 15 Eq. 383, followed.—*Lawson's Trusts, Re*, CH.D. NORTH, J., 280.

7. *Intestacy—Will subsequently found—Grant of administration revoked—Will proved—Infant next of kin shares paid into court under the Trustee Relief Act—Petition by executors for payment out.*—A sum of money paid into court under the Trustee Relief Act by the administrator of a supposed intestate, to meet shares of infants under the intestacy, was ordered to be paid out to the executor of a subsequently found will, after revocation of the grant of administration.—*Hood's Trusts, Re*, CH.D. NORTH, J., 382.

8. *Leasehold—Specific devise of—Covenant to keep in repair—Breach of covenant by testator in lifetime—Cost of repairs—Liability as between specific legatee and testator's residuary estate.*—As between a tenant for life of a leasehold specifically bequeathed and the general assets of the testator, there is no equity in favour of the latter to throw on the former the costs of putting the leasehold premises, which were dilapidated at the time of testator's death, into repair.—*Brereton* v. *Day*, M.R. (Ir.)

9. *Retainer — Debt under covenant — Surety — Specialty and simple contract creditors.*—By an indenture of mortgage A., the mortgagor, covenanted with B., a surety, to duly pay all moneys secured by the mortgage, and to keep indemnified property mortgaged by B. against all such moneys, and in case B. should pay any money for redemption forthwith to repay such money with interest. A. died, and B. was appointed A.'s administratrix. The day named in the mortgage for repayment of the principal was past, but no part thereof was paid. On an application by specialty creditors of A. under an indenture of lease for payment of their debt,

Held, on the authority of *Lethbridge* v. *Mytton*, 2 B. & Ad. 772, and *Loosemore* v. *Radford*, 9 M. & W. 657, that if B. had not been administratrix B. could have sued on the first branch of the above covenant for the whole of the moneys secured by the mortgage and recovered the same as damages at law, and therefore that B. was entitled to retain to that extent as against the applicants.

Ferguson v. *Gibson*, L. R. 14 Eq. 379, 21 W. R. Dig. 6, distinguished.—*Allen, Re, Adcock* v. *Evans*, CH.D. CHITTY, J., 644.

10. *Statute-barred debt—Fund in court—Creditor administrator of debtor—Right of retainer—Payment out.*—By an order made in the presence of A. as legal personal representative of B., a fund of B. in court was carried to the credit of the separate account of B.'s personal representative, and inquiries were directed as to the persons entitled to the fund. A. was also in the position of a statute-barred creditor of B. While the inquiries directed by the order were pending A. applied to have the fund paid out to him as the legal personal representative of B., in order that he might be in a position to retain thereout the statute-barred debt. B. had other creditors whose debts were not statute-barred. The fund did not exceed the amount of the statute-barred debt.

Held, upon these facts, that the court would not order payment out of the fund to A.—*Trevor* v. *Hutchins*, APP. 417.

See also AUTRE VIE; BANKRUPTCY, 6, 11; COUNTY COURT, 3; EXECUTOR, 2, 3, 4, 5, 6; PRACTICE, 7.

ADMIRALTY:—

1. *Co-ownership action—Claim against managing owners — Partnership—Reopening accounts—Statute of Limitations.*—The relations between co-owners of a vessel engaged in foreign voyages and her managing owners are, in the absence of any evidence to show that each voyage is a separate trading transaction, to be treated, in relation to the profit and loss on her voyages, as a continuous partnership or agency, as the case may be. Consequently the rule as to partnership accounts applies, the accounts may be gone into without any limit as to time, and the Statute of Limitations does not apply so long as the partnership or agency is continuous.—*Pongola, The*, P.D. & AD.D.

2. *County court—Jurisdiction—Subjects or objects of salvage—Ship—Gas float—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 458, 476—*County*

Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3.—The subjects or objects in respect of the saving of which the High Court of Admiralty has jurisdiction by the common law are confined to a ship, her apparel, her cargo, including flotsam, jetsam, and lagan, or the wreck of them, and to freight in danger and saved by reason of the saving of the ship or cargo; and the subjects or objects of salvage are not enlarged by the Merchant Shipping Act, 1854, or by any of the preceding statutes, or by the County Courts Admiralty Jurisdiction Act, 1868, with the sole exception that the saving of lives of persons in danger from being on board ship have been added to the list of such subjects or objects.

The plaintiffs claimed a salvage award in a county court having Admiralty jurisdiction for services rendered to a gas float adrift in the tidal waters of the Upper Humber. The structure was of iron, boat shaped, and contained gas, which supplied the light raised above it.

Held, that the gas float was not a "ship" or a "wreck" within the meaning of sections 2 and 458 of the Merchant Shipping Act, 1854, and could not be the subject of salvage.—*Gas Float Whitton, The*, C.A., 263.

3. *Practice — Parties — Action* in rem—*Addition of defendant to claim* in personam—*Convenience.*—Where an action *in rem* has been commenced against a ship and her owners for damage by collision, and the plaintiffs apply for an order to join the pilot as a defendant to the action, the judge ought to exercise his discretion by refusing to make such order on the ground of inconvenience.—*Germanic, The*, C.A., 394.

4. *Practice—Parties—Joinder of plaintiffs—Salvage—Causes of action—R. S. C.*, 1883, *ord.* 16, *r.* 1.—Separate salvors are entitled, under the practice of the Admiralty Court, to join their claims in one action, and this right is not affected by the decision of the House of Lords in *Smurthwaite* v. *Hannay*, 71 L. T. 157, 7 Asp. Mar. Law Cas. 485, [1894] A. C. 494.—*Maréchal Suchet, The*, P.D. & AD.D.

5. *Practice—Parties—Joinder of defendants—Shipowner—Freight—Declaration of lien—Action against consignees — Joinder of shippers — Counter-claim — R. S. C., ord.* 16, *r.* 11—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 493-496.—The owners of a cargo of timber shipped it under a bill of lading for consignment to agents for sale. The shipowner warehoused the cargo with a dock company under the provisions of the Merchant Shipping Act, 1894, with a notice that it was to remain subject to a lien for freight. The consignees deposited the amount of freight claimed with the dock company, with a notice to retain it. The shipowner brought an action against the consignees claiming a declaration that he was entitled to a lien on the sum so deposited and an order that it should be paid to him. The shipowners were desirous of making a claim against the shipowner for damage to the cargo and for short delivery. The defendants (the consignees) and the shippers joined in an application that the shippers might be added as defendants under ord. 16, r. 11.

Held, that the shippers might be added as defendants.—*Montgomery* v. *Foy*, C.A.

6. *Practice — Parties — Third-party procedure — Action by shipowners against charterers—Contract of charterers with purchasers of cargo—Indemnity express or implied—R. S. C.*, 1883, *ord.* 16, *r.* 48.—By the terms of a charter-party entered into between the plaintiffs (the shipowners) and the defendants (the charterers) it was provided that the ship should be discharged at port of delivery as customary. The defendants subsequently sold to D. & Co. certain bones to be shipped in one or two vessels, at sellers' option, from the River Plate to Birkenhead as per charter-party; and by the contract it was agreed that the bones were to be weighed in the usual manner, and taken with all faults and defects by D. & Co. from over the ship's side as fast as the captain could deliver, failing which to be resold at the defendants' discretion, D. & Co. being liable for any loss, demurrage, or expenses arising therefrom.

The plaintiffs' ship arrived at the port of delivery with the bones on board, and D. & Co. took delivery thereof in fulfilment of their contract with the defendants.

The plaintiffs having brought an action against the defendants for not having discharged the ship pursuant to the terms of the charter-party, the defendants sought to bring in D. & Co. as third parties under ord. 16, r. 48.

Held, that the contract of D. & Co. with the defendants was not a contract of indemnity either express or implied; and therefore that, on the authority of *Speller* v. *Bristol Steam Navigation Co.*, 32 W. R. 670, 13 Q. B. D. 96, the defendants were not entitled to bring in D. & Co. as third parties.—*Constantine* v. *Warden*, C.A., 162.

7. *Practice—Restraint—Sale of ship against the consent of part owners having a majority in interest—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 8.—Where the owners of twenty sixty-fourth shares in a ship, having instituted an action of restraint against the ship, applied to the court for a sale of the ship under the 8th section of the Admiralty Court Act, 1861, and it appeared that thirty-eight sixty-fourth shares of the ship had, against the wishes of the applicants, been transferred to a limited liability company which opposed the sale, and that it was impossible that the ship could be profitably employed in the general interest of all the co-owners unless the whole ship belonged to the company, the court decreed a sale of the ship, but ordered the decree to lie in the registry for four days to give the company the opportunity of purchasing the share of the applicants.—*Hereward, The*, P.D. & AD.D. 288.

See also SHIP.

ADULTERATION:—

1. *Food—False warranty — Summons—Justices—Time for serving summons—Purchase for test purposes —Food and Drugs Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 10.—That part of section 10 of the Food and Drugs Act, 1879, which provides that in the case of the sale of a perishable article the summons shall be served within twenty-eight days of the purchase for test purposes does not apply where the purchase for test purposes was not made from the person charged with the offence.—*Cook* v. *White*, Q.B.D. 409

2. *Margarine — Exposure for sale — Restaurant keepers—Sale of margarine by retail—Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 4, 6.—The defendants were restaurant keepers, and supplied their customers with (*inter alia*) "slices" of bread and broiled haddocks, to be consumed on the premises. In the shop was a lump of margarine which was only used to spread upon the slices of bread, and small portions of it were also placed as a condiment upon the broiled haddocks. In both cases the price charged for the slices of bread and for the haddocks was the same whether a portion of

the margarine was supplied with them or not. The lump of margarine had no label upon it.

Upon an information laid by one of the customers the magistrate refused to convict the defendants of exposing for sale margarine not labelled as required by the 6th section of the Margarine Act, 1887.

Held, on appeal, that the magistrate was right, as there was evidence to show that the defendants did not sell margarine except in conjunction with some other article, and therefore that there was no "exposing for sale" by retail within the meaning of the section.—*Moore* v. *Pearce's Dining Rooms Co.*, Q.B.D., 94.

3. *Margarine—"Le Dansk"—False trade description—Place of manufacture—Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-section* 2; *s.* 3, *sub-section* 1 (e) (d).—At a factory in Paris margarine was manufactured, which was sent to a branch factory at Southampton. There the margarine went through a process in which 10 per cent. of Danish butter and milk were added. This compound was then sent to London, to a shop on the outside of which appeared the words "French Factory. Le Dansk," and was retailed to customers under the name of "Le Dansk."

Held, that the substance was of English manufacture, and that the selling of the compound in cardboard boxes on which the words "French Factory. Le Dansk" were printed was a false trade description calculated to deceive the public as to the place or country where the substance was manufactured.—*Bischop* v. *Toler*, Q.B.D. 189.

4. *Margarine — Penalty — Justices — Police— To whom penalty payable—Municipal Corporations Act*, 1835 (5 & 6 *Will.* 4, *c.* 76), *s.* 126—*Metropolitan Police Courts Act*, 1839 (2 & 3 *Vict. c.* 71), *ss.* 7, 47—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 12, 28—*Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 11, 12.—A penalty recovered before a metropolitan police magistrate under section 6 of the Margarine Act, 1887, in the case of a prosecution by an "officer, inspector, or constable of the authority who shall have appointed an analyst" within the meaning of section 26 of the Sale of Food and Drugs Act, 1875, must be paid to such officer, inspector, or constable, and not to the receiver of the metropolitan police district, in accordance with section 47 of the Metropolitan Police Courts Act, 1839.

The appropriation of penalties effected by section 26 of the Sale of Food and Drugs Act, 1875, is a "proceeding" within the meaning of section 12 of the Margarine Act, 1887.

Wray v. *Ellis*, 1 E. & E. 276, 28 L. J. M. C. 45, considered and distinguished.—*Reg.* v. *Titterton*, Q.B.D.

5. *Margarine—Sale contrary to section* 6—*Article not purchased for test purposes—Delivery to purchaser in borough—Jurisdiction of county justices—Time for service of summons—Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 6, 17, 12—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 12, 14, 20, 21, 28—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 10—*Poor Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 106), *s.* 27—*Municipal Corporations Act*, 1882 (45 & 45 *Vict. c.* 50), *s.* 154.—B. contracted to supply the Guardians of the Poor of the Louth Union with "good fresh butter," and on the 10th of December, 1894, delivered, under such contract, butter at the union workhouse. On the following day it was examined by the committee, and, in the absence of the defendant, one pound of it was divided into three parts, of which one part was sent to an analyst, one part was kept by the Guardians, and one part was taken to B.'s shop, and left there with a letter notifying what had been done. Both B. and the purchasers resided within the borough of Louth, which is one of the parishes in the Louth Union, and does not possess a separate court of quarter sessions.

The analyst to whom one part of the butter was sent certified that it contained 25 per cent. of margarine. An information was preferred against B. for selling margarine otherwise than as prescribed by section 6 of the Margarine Act, 1887. The case was heard and determined by the county justices, who convicted B.

Held, that as the article in question was not purchased "with the intention of submitting the same to analysis," but was sold and delivered for consumption under a contract, compliance with section 14 of the Sale of Food and Drugs Act, 1875, was not necessary as a condition precedent to the prosecution under the Margarine Act, 1887.

Held also, that the county justices had jurisdiction to hear and determine the case under 30 & 31 Vict. c. 106, s. 27, and 5 & 6 Will. 4, c. 76, s. 111 (now in substance section 154 of 45 & 46 Vict. c. 50); and that section 20 of the Food and Drugs Act, 1875, merely says that the person "may" take proceedings "in the place where the article or drug sold was actually delivered to the purchaser."

Held further, that as the justices had found as a fact that margarine is not a perishable article, and that it was not purchased for test purposes, it was not necessary that the summons should have been served under section 10 of the Food and Drugs Act, 1879, within twenty-eight days from the time of the purchase.

Parsons v. *Birmingham Dairy Co.*, 30 W. R. 748, 9 Q. B. D. 172, dissented from.

Guardians of Enniskillen v. *Hilliard*, 14 L. R. Ir. 214, approved.—*Buckler* v. *Wilson*, Q.B.D., 220.

6. *Milk—Abstraction of cream—Disclosure—Notice—Criminal intent—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 9, 25.—The appellants were charged under section 9 of the Sale of Food and Drugs Act, 1875, with having unlawfully sold milk from which the fat had been abstracted to the extent of 17 per cent. without disclosing such alteration. They were supplied with milk in a can under a contract which contained a warranty as to the purity of the milk. Part of this milk was poured into a churn, and in so doing a large proportion of the cream remained in the can. The prosecutor was served with a glass of milk from this churn, and on being submitted to analysis it was proved to be deficient in cream to the amount of 17 per cent. On the glass in which the milk was served it was stated that it was "not guaranteed as new or pure milk or with all its cream, see notice." The notice was to the effect that the milk was purchased by the appellants under a warranty, but that they were unable to guarantee it as with all its cream, and did not sell it as such.

Held, that the appellants had done all that was reasonable; that they had made a sufficient disclosure within the meaning of section 9, and had substantially complied with the statute. It is not necessary to establish a *mens rea* for the purpose of the offence under the section, and if the article is in fact altered and is sold without a disclosure, an offence under the section is committed.—*Spiers & Pond* v. *Bennett*, Q.B.D., 510.

7. *Milk—Added water—Certificate of analyst—*

Bare statement of result of analysis—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 18, 21—*Sale of Food and Drugs Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3.—In a prosecution under the Food and Drugs Act, 1875, for the adulteration of milk, the analyst certified that the sample "contained 5 per cent. of added water."

Held, that such certificate was insufficient evidence of adulteration, because, water being one of the natural constituents of milk, the certificate should have stated what standard of percentage of water in milk was adopted by the analyst in arriving at the excess of 5 per cent. which he stated was added.—*Fortune* v. *Hanson*, Q.B.D., 431.

8. *Milk—Evidence—Analyst's certificate—Evidence of the defendant—Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63, *s.* 21.—In proceedings under the Food and Drugs Act, 1875, the certificate of the analyst is not conclusive evidence of the facts therein stated, even when the defendant has not required the analyst to be called as a witness.—*Hewitt* v. *Taylor*, Q.B.D., 431.

See also JUSTICES, 3.

ADVANCEMENT.—See POWER, 1; TRUSTEE, 18; WILL, 3.

AGENT.—See BUILDING SOCIETY, 1; CANADA, LAW OF, 3; CARRIER; COMPANY, 12, 20, 31; CONTRACT, 3, 4; INLAND REVENUE, 12; NEGLIGENCE, 3; PARTNERSHIP, 5; PRINCIPAL AND AGENT; TRUSTEE, 3.

ALLOTMENTS ACT, 1887.—See LANDLORD AND TENANT, 2.

ANIMAL.—See CRIMINAL LAW, 4; DOG, 1; JUSTICES, 2.

ANNUITY. — See ADMINISTRATION, 2; INLAND REVENUE, 1, 22; WILL, 4.

APPOINTMENT.—See POWER, 1-3.

APPORTIONMENT:—

Tenant for life—Trust for distribution after death of tenant for life—Sale by order of the court—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *ss.* 2, 3, 4, 5.—Where stock is sold by trustees after the death of a tenant for life the Apportionment Act, 1870, will apply as to any dividend actually received by the trustees. But if the stock be sold *cum* dividend, so that no dividend actually comes to the hands of the trustees, the Apportionment Act, 1870, will not apply directly.

As a general rule the court will not order apportionment in respect of the increase of price caused by the prospect of a dividend, for the reasons laid down in *Scholefield* v. *Redfern*, 11 W. R. 453, 2 Dr. & Sm. 173, and *Freeman* v. *Whitbread*, 14 W. R. 188, L. R. 1 Eq. 266.

In special cases, however, apportionment will be directed. So where the court was of opinion that on the construction of the will the trust for distribution ought to have been performed by handing over the trust investments *in specie* on the death of the tenant for life, apportionment was directed in respect of the enhanced price of certain stock which had been sold *cum* dividend under order of the court.

Lord Londesborough v. *Somerville*, 19 Beav. 295, 3 W. R. Ch. Dig. 5; and *Bulkeley* v. *Stephens*, 3 N. R. 105, 10 L. T. N. S. 225, 12 W. R. Ch. Dig. 3, followed.—*Bulkeley* v. *Stephens*, CH.D. STIRLING, J., 490.

See also INTEREST, 1; WILL, 22, 23, 26, 27.

APPRENTICE.—See MASTER AND SERVANT, 1.

ARBITRATION:—

1. *Award—Reference to three arbitrators—Award signed by two only—Validity of award.*—Where a matter in dispute is referred to the decision of three arbitrators, all three must concur in the making of the award; an award made by two of them only is bad.

An agreement to refer disputes to arbitration provided for a reference to "the decision of one or of three disinterested arbitrators as mutually agreed," and that if three arbitrators were appointed one should be nominated by each of the parties, and the third by the two so nominated. Three arbitrators having been duly nominated and having entered upon the reference, two of them made an award from which the third dissented.

Held, that the award was invalid.—*United Kingdom Steamship Association* v. *Houston*, Q.B.D.

2. *Award—Setting aside award—Umpire—Misconduct—Bias.*—After the appointment of an umpire in an arbitration to determine the value of land compulsorily taken under the Lands Clauses Act, and before the reference, the umpire was retained to act as witness in another claim for one of the parties to the reference; and after the reference, but before the umpire had made his award, he gave evidence for such party as to the value of other land at some distance off taken for the same purposes and under the same Parliamentary powers.

Held, that the fact of the umpire appearing and giving evidence in another case for one of the parties, under the circumstances, did not entitle the other party to the reference to have the award set aside on the ground of misconduct or bias on the part of the umpire.—*Haigh and London and North-Western Railway Co.'s Arbitration, Re*, Q.B.D., 618.

3. *Stay of proceedings—"Step in proceedings"—Arbitration Act*, 1889, *s.* 4—*Practice—Appeal—Judicature Act*, 1894, *s.* 1—A defendant by taking out a summons for obtaining an order for an extension of time for delivery of defence takes a "step in the proceedings" within the meaning of section 4 of the Arbitration Act, 1889.

Decision of the Court of Appeal, 43 W. R. 453, [1895] 1 Q. B. 850, affirmed.

Section 1 of the Judicature Act, 1894, applies only to appeals from the High Court to the Court of Appeal.—*Ford's Hotel Co.* v. *Bartlett*, H.L., 241.

See also BANKRUPTCY, 1; LOCAL GOVERNMENT, 1, 2; PARTNERSHIP, 1; PRACTICE, 4; RAILWAY, 1.

ASSIGNMENT.—See BANKRUPTCY, 6, 7, 19, 25; BILL OF SALE, 2; COMPANY, 11, 12; CONTRACT, 7; COPYRIGHT, 1.

ATTACHMENT.—See PRACTICE, 23.

ATTORNMENT.—See PRACTICE, 53.

AUCTIONEER.—See BANKRUPTCY, 29; COUNTY COURT, 6; SOLICITOR, 8.

AUDITOR.—See COMPANY, 28, 29, 30.

AUSTRALIA (WESTERN), LAW of:—

Banker and customer—Forged cheques—Liability of bank—44 Vict. No. 10—*Rules and Orders, Order* 36, *No.* 10.—Order 36, No. 10, of the rules under 44 Vict. No. 10, does not empower the court to give judgment in disregard of findings of the jury not objected to, merely because it sets aside one or more findings which have been objected to.

Where the effect of the former was that certain entries debited by the bank to their customer were in respect of cheques forged by one of its servants,

that the customer was first informed thereof by the accredited agent of the bank who requested his silence, and that the customer in complying with that request acted honestly and with a view to what he believed to be the bank's interest,

Held, that the silence of the customer was not a legal wrong to the bank, and that he was not estopped from relying on the forgery.

M'Kenzie v. *British Linen Co.* (6 App. Cas. 82) distinguished.—*Ogilvie* v. *West Australian Mortgage and Agency Corporation*, P.C.

AUTRE VIE:—

Estate pur autre vie—*Special occupant—Devolution of estate—Wills Act* (1 *Vict.* c. 26), *s.* 6.—An estate *pur autre vie* was created by the conveyance of the appellant's life estate in lands to the appellant and the respondent to hold to the use of them and their heirs upon certain trusts, with a declaration that all the estates and interests conveyed to the respondent were conveyed to her as trustee for an infant.

Held, that the infant's equitable estate was not an estate to him and his heirs, and that there being no "special occupant" the infant's estate upon his death passed to his administratrix under section 6 of the Wills Act (1 Vict. c. 26).

The decision of the Court of Appeal in Ireland ([1895] 1 I. R. 44) affirmed.—*Mountcashell* (*Earl*) v. *More Smyth*, H.L.

BANKER:—

1. *Evidence—Bankers' Books Evidence Act*, 1879 (42 & 43 *Vict.* c. 11), *s.* 7.—The court will refuse an application, made under the Bankers' Books Evidence Act, 1879, for leave to inspect before trial bankers' books containing entries of the banking account of a party to the action, if that party swears in an affidavit that there is no item therein relevant to the matters in question, unless the applicant can show from some other document in the cause that such affidavit is inaccurate.

Semble, that the court has jurisdiction under that Act to give leave to inspect the banking account of a person not a party to the action, if items in it would be evidence at the trial against a party to the action; but the court will act in such an application with great caution, and will require evidence from the applicant that items of that nature are to be found in the banking account in question.

Per Kay, L.J.—An application for leave to inspect the banking account of a person not a party to the action should not be granted without his being heard in opposition.—*South Staffordshire Tramways Co.* v. *Ebbsmith*, C.A., 97.

2. *Evidence—Inspection of banker's book—Banker resident in Scotland—Jurisdiction—Bankers' Books Evidence Act*, 1879 (42 *Vict.* c. 11), *s.* 7.—The English court has jurisdiction under section 7 of the Bankers' Books Evidence Act, 1879, upon an application made in an English action, to order inspection of a banker's books where the banker is resident in Scotland.—*Kissam* v. *Link*, C.A., 452.

See also AUSTRALIA (WESTERN), LAW OF.

BANKRUPTCY:—

1. *Act of bankruptcy—Arbitration—Award on submission—Order of court to enforce award—Seizure of goods under* fi. fa.—"*Process in a civil proceeding*" *in High Court—Arbitration Act*, 1889 (52 & 53 *Vict.* c. 49), *s.* 12—*Bankruptcy Act*, 1890 (53 & 54 *Vict.* c. 71), *s.* 1.—Upon an application by originating summons under order 54, an order under section 12 of the Arbitration Act, 1889, was obtained to enforce an award in the same manner as a judgment or order to the same effect; and the goods of the debtor were seized and sold by the sheriff under a writ of *fieri facias*.

Held, that the summons was a "civil proceeding" in the High Court, and that the issue of the writ of *fi. fa.* was a "process in a civil proceeding," and that as the debtor's goods had been seized and sold thereunder by the sheriff, the debtor had committed an act of bankruptcy under section 1 of the Bankruptcy Act, 1890.—*Birch, Re, Caucasian Trading Corporation, Ex parte*, C.A., 439.

2. *Act of bankruptcy—Bankruptcy notice—Interpleader—Bankruptcy Act*, 1883 (*c.* 52), *s.* 4 (1) (*g*).—Where goods taken in execution under a judgment have been claimed by a third party before the sheriff has made a return, and an interpleader summons has been taken out and is pending, the judgment creditor cannot issue execution for the amount of the judgment debt, and therefore cannot serve a bankruptcy notice on the judgment debtor.—*Follows, Re, Follows, Ex parte*, BKCY.

3. *Act of bankruptcy—Non-trader—Letter to a creditor—Notice of intention to suspend payment—Bankruptcy Act*, 1883 (*c.* 52), *s.* 4, *sub-section* 1 (h).—Judgment creditors of H., who was in money difficulties, were pressing for payment. He offered them a second mortgage on certain estates, which would give them ample security. They declined, being under the impression that they could obtain payment by levying execution; and on the 4th of June, 1894, H.'s solicitors wrote the judgment creditors—"as promised we send you herewith statement showing income and expenditure and the amount of mortgages on the estates. We think it well to repeat what we stated to you at our interview that a receiving order will be applied for immediately execution is issued." On the 18th of July, 1894, execution was levied, and the next day H. presented his own petition, on which a receiving order was made and adjudication followed. Between the 4th of June and the 11th of July H.'s solicitors received about £3,000, rents of his estates, which under his instructions they *bonâ fide* paid away to various creditors. The trustee in bankruptcy claimed payment of the £3,000 from the solicitors on the ground that the letter of the 4th of June was an act of bankruptcy, and that his title related back to that date.

Held, that under the circumstances the letter was not equivalent to a notice by H. that he was about to suspend payment of his debts, and therefore it was not an act of bankruptcy.—*Hill* (*Trustees of*) v. *Rowlands*, BKCY.

4. *Act of bankruptcy—Oral notice of suspension of payment by non-trader—Banbruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 4, *sub-section* 1 (h).—A statement by a debtor who is not a trader that he is unable to pay his debts should not be construed as a notice of intention to suspend payment unless accompanied by a statement tending to show that the debtor proposes to deal with his creditors collectively.—*Scott, Re, Scott, Ex parte*, BKCY., 587.

5. *Assets—After-acquired property—Personal earnings—Estoppel by record of county court—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *ss.* 44, 53.—A bankrupt is only entitled to retain so much of his personal earnings as are reasonably necessary for the maintenance of himself and family, the remainder passes to his trustee.

The decision of a county court upon an issue between the bankrupt and the trustee, that certain weekly payments due to the bankrupt under an agreement are in the nature of personal earnings, estops the trustee from subsequently arguing in the

High Court, when farther weekly payments become due under the same agreement, that they are not in the nature of personal earnings.—*Graydon, Re, Official Receiver, Ex parte*, BKCY., 495.

6. *Assets—Assignment—Equitable chose in action—Assignment to trustees—Notice of assignment not given—Disclaimer by trustees—Bankruptcy of assignor "Possession, order, or disposition of bankrupt"—"Consent of true owner"—Infant beneficiaries—Incapacity to consent—Bankruptcy Act*, 1849 (12 & 13 *Vict. c.* 106), *ss.* 125, 141—*Bankruptcy Act*, 1883, *s.* 44, *sub-section* 3.—The owner of a reversionary interest under a will settled his interest upon his wife and children in the year 1861, and became bankrupt in the year 1865. The trustees of the settlement had no knowledge of its existence till after the settlor's bankruptcy, when they at once "rejected the trusts." Subsequently the reversionary interest fell into possession, when the trustees of the will, who, prior to the bankruptcy, had no notice of the settlement, paid the fund into court under the Trustees Relief Act. Some years afterwards the assignee in bankruptcy claimed the fund.

Held, that the assignee in bankruptcy had no title to the fund.

By Kekewich, J., on the ground that the trustees of the will had notice of the settlement before they paid the money into court and before they knew that the assignee in bankruptcy claimed the fund.

By the Court of Appeal, because the fund was not, at the date of the bankruptcy, in the "possession, order, or disposition" of the bankrupt settlor "with the consent of the true owner" within the meaning of the Bankruptcy Acts, the "true owners" being the beneficiaries, some of whom were infants, and therefore incapable of consenting.—*Mills Trusts, Re*, C.A., 21.

7. *Assets—Assignment of future payments—Bankruptcy of assignor—Title of trustee in bankruptcy to payments accruing after bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44.—An assignment for value by a trader of future weekly payments accruing to the trader under a contract for the hiring of property belonging to the trader is, as regards those payments accruing due after the bankruptcy of the trader, inoperative as against the trustee in the bankruptcy, and such assignment does not pass to the assignee the right to future payments accruing after the date of the bankruptcy.

Such future weekly payments accruing under such a contract are not "debts."—*Wilmot* v. *Alton*, Q.B.D.

8. *Assets—Realisation of—Bankrupt's duty—Property abroad—Refusal to execute power of attorney—Contempt—Committal—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 24, 168.—A bankrupt, whose only asset was land abroad, refused to execute a power of attorney to enable the trustee to sell the same at a fair price, on the ground that the power of attorney was informal, and the price offered for the land too small.

Held, that such refusal was under the circumstances unreasonable, and that an order of committal must be made, but not enforced, if within fourteen days the bankrupt executed a power of attorney in a form approved of by the registrar.—*Harris, Re*, BKCY.

9. *Bankruptcy notice—Address of creditor—Bankruptcy Act*, 1883 (*c.* 52), *s.* 4 (1) (*g*)—*Bankruptcy Rules*, 1886, *r.* 136, *Appendix, Part I., Form* 6.—A bankruptcy notice gave as the address of the creditor who issued the notice "White's Club, St. James' Square, S.W." The creditor did not reside at the club, and was in fact out of England during the whole of the seven days limited by the notice for payment of the debt. The evidence showed that if the debtor had gone to the club he would have been referred to the creditor's London solicitor who had power of attorney to receive payment of the debt.

Held, that an address at which the creditor could not be found but only heard of, was not such an address as was required by the Bankruptcy Act and Rules; and consequently that the notice was invalid, and that non-payment of the debt within the seven days did not constitute an act of bankruptcy.—*Leigh, Ex parte, Stogdon, Re*, C.A.

10. *Company—Conveyance with intent to defeat and delay creditors—Conversion of bankrupt's business into a limited company—Respective rights of creditors of the bankrupt and of the limited company.*—The bankrupt, when insolvent, had converted his business into a "one-man" company, limited.

Held, that the trustee in bankruptcy was entitled to a declaration that the conveyance of the bankrupt's business to the company was void against him, and that he was entitled to take the assets of the company; but that he must pay the new creditors of the company in full, in priority to the creditors of the bankrupt.—*Carey, Re, Jeffries, Ex parte*, C.A., 59.

11. *Composition—Secured creditor—Death of debtor—Administration action—Claim by mortgagee to prove—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-section* 11; *s.* 108—*Bankruptcy Rules*, 1886, *r.* 211.—A receiving order having been made against H. on his own petition, H. made a composition with his creditors under section 18 of the Bankruptcy Act, 1883, which provided for their being paid by instalments extending over a year, and died shortly after the expiration of the year. The instalments were not paid, and an action was commenced in the Chancery Division by a creditor to administer H.'s estate. Certain mortgagees of H., who had neither attended the creditors' meeting nor assented to the composition, took out a summons in the Chancery action to be admitted as creditors in that action in respect of the balance of the mortgage debt after deducting the assessed value of their security.

Held, on the principle of *Ex parte Sharp*, 34 W. R. 550, that under sections 108 and 18, sub-section 11, of the Bankruptcy Act, 1883, the Court of Bankruptcy would have jurisdiction to proceed notwithstanding H.'s death, and would apply its powers and exercise its jurisdiction in favour of the applicants; and the plaintiff in the Chancery action having submitted to take the opinion of the Chancery Court as to what would be the result of the applicant's proceeding in bankruptcy, the application of the mortgagees was consequently allowed.—*Hardy, Re, Hardy* v. *Farmer*, CH.D. CHITTY, J., 503.

12. *Costs—Security for costs—Bankruptcy Rules*, 1886, *r.* 131.—A debtor appealed against a receiving order made against him in the Swansea County Court, and, pursuant to rule 131 of the Bankruptcy Rules, 1886, paid into court £20 as security for the costs of the appeal. The petitioning creditor applied that the security might be increased to £50, on the ground that the cost of bringing up his witnesses from the country would alone exceed £20.

Held, that no special circumstances were shown for increasing the amount of the usual security for costs, and that the application must be dismissed.—*Phillips, Re, Treboeth Brick Co., Ex parte*, BKCY.

13. *Costs—Set off of costs of an appeal to a Divisional Court of the Queen's Bench Division against costs of an appeal to the Divisional Court in Bankruptcy—Bankruptcy Rules*, 1886, *r.* 353.—The costs of an appeal to a Divisional Court of the Queen's Bench Division cannot be set off against the costs of an appeal to the Divisional Court in Bankruptcy. —*Bassett, Re, Lewis, Ex parte*, BKCY., 240.

14. *Costs—Taxation of trustee's costs—Member of committee of inspection employed as solicitor—Profit derived from transaction arising out of the bankruptcy —Sanction of the court—Bankruptcy Rules*, 1886, *r.* 317.—By rule 317 of the Bankruptcy Rules, 1886, it is provided that "no member of a committee of inspection of an estate shall, except under and with the sanction of the court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the bankruptcy, or to receive out of the estate any payment for services rendered by him in connection with the administration of the estate, or for any goods supplied by him to the trustee for or on account of the estate."

Held, that such "sanction of the court" must be given before the transaction from which the profit is to be derived is undertaken, and cannot be given after the profit is derived.

Held also, that the "profit" derived by a solicitor is the amount of his costs less disbursements out of pocket, and no allowance can be made in respect of office expenses.

Per Lord Esher, M.R.—It is not a proper practice for a solicitor to accept a retainer from a committee of inspection, one of whom is a clerk to his firm, to act as solicitor to the trustee in bankruptcy; and if a solicitor is so retained, the court, on application, ought to set aside such retainer.—*Gallard, Re, Gallard, Ex parte*, C.A., 121.

15. *Costs—Taxation—Right of official receiver to be present at taxation—Bankruptcy Rules*, 1886, *rr.* 120-124.—The official receiver has no right to be present or to be heard at the taxation of the bill of the solicitors to the trustee, or of any other persons, but the court has power to order him to attend at the taxation, not as a litigant party, but merely to assist the taxing officer, or to enable himself to report efficiently to the Board of Trade, in case they should require the taxation to be reviewed.— *Nash, Re, Crofton, Ex parte*, BKCY., 112.

16. *Discharge subject to conditions—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 28 (2)—*Bankruptcy Act*, 1890 (53 & 54 *Vict.* c. 71), *s.* 8 (2).—Where an order of discharge has been granted subject to onerous conditions, and it appears that the creditors will benefit but slightly by the continuance of such conditions, while the bankrupt will be thereby unduly oppressed, the court will venture to disregard the interest of the creditors and grant the bankrupt an unconditional discharge.—*Durnford, Re, Durnford, Ex parte*, BKCY., 272.

17. *Execution—Money paid "under an execution" —"To avoid sale"—Payment to sheriff before seizure—Bankruptcy of debtor—Right of execution creditor—Bankruptcy Act*, 1890 (53 & 54 *Vict.* c. 71), *s.* 11, *sub-section* 2.—Where the amount of a judgment debt is paid to the sheriff, before the judgment debtor's goods have been seized in execution, in order to prevent a seizure, the money is not paid "under an execution in order to avoid sale" within the meaning of section 11, sub-section 2, of the Bankruptcy Act, 1890, and therefore the sheriff, upon a bankruptcy petition being presented against the debtor within fourteen days, is not justified in paying the money to the official receiver, but must pay it over to the execution creditor.—*Bower* v. *Hett*, C.A., 4.

18. *Landlord and tenant—Distress—"Rent accrued due prior to date of order of adjudication"—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 42 (1).—A landlord let premises at £200 a year, but agreed to take £100 a year for the first two years and £250 a year for the succeeding two years of the term. The tenants became bankrupt before the first two years had expired, and the landlord distrained for rent at the rate of £200 a year.

Held, that he was entitled to distrain for rent at that rate, for the agreement had not altered the rent, but only the mode of paying it, and was not such that the tenant could claim to enforce it if he were in default in the payments thereunder.—*Smith and Hartogs, Re, Official Receiver, Ex parte*, BKCY., 79.

19. *Order and disposition—Consent of true owner —Assignment of book debts—No notice by assignee to book debtors—Receiver appointed under Conveyancing Act*, 1881—*Extent of authority—Bankruptcy Act*, 1883, *s.* 44, *sub-section* 2 (3).—The general rule is that the assignee of a debt, in order to take it out of the order and disposition of the assignor, must give notice of the assignment to the debtor.

In the absence of such notice, and on the bankruptcy of the assignor, consent on the part of the true owner of the debt to the debt remaining in the order and disposition of the bankrupt is *primâ facie* to be inferred, but that inference may be rebutted if the true owner takes every possible step to obtain possession of the debt, or if the failure to obtain possession is not attributable to any fault of his own.

The appointment of a receiver under a mortgage deed, although subsequently confirmed by the court, is, however, not sufficient to rebut that inference.— *Rutter* v. *Everett*, CH.D. STIRLING, J., 104.

20. *Pension—Jurisdiction—Pension of native officer of Indian Army—Order of court to set aside part of pension—Discretion of the court—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 53, *sub-section* 2—*Indian Pensions Act*, 1871 (*Indian Act No. XXIII.*), *ss.* 11, 12.—Under section 53, sub-section 2, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the court has jurisdiction to order payment to the trustee in bankruptcy of a pension which, by the Pensions Act, 1871 (Indian Act No. XXIII.), ss. 11 and 12, is declared to be inalienable. The discretion of the court to make such an order is absolute, and there is no rule or canon of law that can in the least fetter the exercise of such discretion.

Dicta of Vaughan Williams and Kennedy, JJ., [1895] 2 Q. B., pp. 120, 122, that the court ought not to exercise its discretion by making an order under section 53 with regard to an Indian pension, overruled.—*Saunders, Re, Saunders, Ex parte*, C.A., 30.

21. *Petition—Inequitable proceeding—Debt payable at future time—Amount of debt for which petition should be presented—Rebate of interest—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 6, *sub-section* 1 (*b*); *s.* 7, *sub-section* 3.—A debt due on a promissory note at three months which are unexpired is a good petitioning creditor's debt, although the lender has given the borrower the option of renewing the note at the expiration of every three months on payment of forehand interest.

On presenting a petition for a debt payable in future the creditor must allow a rebate of interest.

It is not inequitable to take proceedings in bankruptcy upon a note not yet due, and given with

such option of renewal, in a case where the creditor has notice of an act of bankruptcy committed by the debtor.—*Barr, Re, Wolfe, Ex parte*, BKCY., 586.

22. *Petition—Practice—Attendance of petitioning creditor—Right of debtor to cross-examine—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7—*Bankruptcy Rules*, 1886, *rr.* 162, 164.—Upon the hearing of a petition the registrar refused to allow the petitioning creditor to be cross-examined, upon the grounds that, the debt being based upon a judgment and verified by affidavit, no right to cross-examine arose until evidence had been given to displace the judgment.

Held by the court, that the grounds of the registrar's decision was wrong.

By Vaughan Williams, J., that unless the petitioning creditor's attendance is dispensed with by the court under rule 164, he must be present at the hearing, whether he is a witness to any matter or not, and that the reason for such practice is that questions may be put to him.

By Wright, J., that it does not follow from the statute or the rules that the petitioning creditor need be present unless required as a witness, or that there is any right to cross-examine him unless he gives evidence.—*Purrett, Re, Purrett, Ex parte*, BKCY., 171

23. *Proof—Guarantee to bankers for whole account with limited liability—Proof by creditor after payment by surety—Admission of proof in full.*—A surety guaranteed the whole of the indebtedness of S. to a bank, but the total amount recoverable from him was not to exceed £300. Subsequently a receiving order was made against S. when his indebtedness to the bank amounted to over £700. The surety paid the £300 to the bank, after which they presented a proof for the whole debt.

Held, that they were entitled to prove for the whole of their debt, for, the guarantee being for the whole amount, the surety could not prove against the estate unless he paid the bank in full.—*Sass, Re, National Provincial Bank of England, Ex parte*, BKCY., 588.

24. *Protected transaction*—Bonâ fide *dealing with bankrupt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 49.—The protection afforded by section 49 of the Bankruptcy Act, 1883, to a *bonâ fide* transaction with a bankrupt entered into before the date of the receiving order extends to the case where the transaction in question constitutes the act of bankruptcy on which the receiving order was made.—*Shears* v. *Goddard*, C.A., 402.

25. *Protected transaction—Mortgage of chose in action—Notice of act of bankruptcy—Order and disposition—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 49.—The bankrupt had assigned a debt coming due to him to secure an advance of £30 in October, 1890. The mortgagee failed to give notice of this assignment. In June, 1892, after an act of bankruptcy, but without notice thereof, the mortgagee advanced a further sum to the bankrupt and took a fresh assignment of the same debt to cover both the loans of 1890 and 1892. Of this assignment the mortgagee gave due notice.

Held, that the notice given of the second assignment was equivalent to a taking possession of the subject matter thereof, and, coupled with the deed of June, 1892, was a dealing for valuable consideration and protected by section 49 of the Bankruptcy Act, 1883, and that the mortgagee having taken possession by this notice could then set up both the deeds of 1890 and 1892.—*Seaman, Re, Furness Finance Co., Ex parte*, BKCY., 496.

26. *Protected transaction—Notice of act of bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 4, *sub-section* 1 (h); *s.* 49, *sub-section* 2.—Knowledge by a creditor that the debtor's solicitor has instructions to prepare a notice that the debtor intends to suspend payment of his debts is not notice to such creditor that the debtor has committed an act of bankruptcy.—*Morgan, Re, Turner, Ex parte*, BKCY., 96.

27. *Receiving order—No assets—"Sufficient cause"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.—The mere fact that a debtor has apparently no assets is not a sufficient cause why a receiving order in bankruptcy should not be made against him.—*Leonard, Re, Leonard, Ex parte*, C.A., 438.

28. *Receiving order—Rescission—Money paid into court to meet claims of creditors who cannot be found—Statute of Limitations* (21 *Jac.* 1, *c.* 16), *s.* 3—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 35, 36.—When a debtor has paid money into court to meet the claims of creditors who cannot be found, the Statute of Limitations does not run against such claims, and the debtor is not entitled of right to have such money paid out to him after the expiration of six years during which no claim has been made to it.

The court may, however, as a matter of grace, allow the debtor to have the money paid out to him, upon his giving reasonable security to repay the same in the event of any creditors appearing to claim it.—*Dennis, Re, Dennis, Ex parte*, BKCY., 170.

29. *Sale of goods of bankrupt by auctioneer—Auctioneer's lien—"Giving of credit"—"Mutual dealings"—Section* 38 *of the Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52).—One L. instructed a firm of auctioneers to sell certain property, and a sum of money became due to them in respect of their charges in connection with such sale. Subsequently L. delivered to them certain goods as bailees with authority to sell them. L. became bankrupt, without having revoked the authority.

Held, that the credit given by the auctioneers to L. in respect of their charges, and the credit given by L. to the auctioneers in respect of the goods to be sold and the money to be realized by such sale was a giving of credit to the auctioneers, and constituted "mutual dealings" between them and L. within the meaning of section 38 of the Bankruptcy Act, 1883.—*Palmer* v. *Day*, Q.B.D., 14.

30. *Trustee—Appointment—Objection by Board of Trade—Notification to High Court—Discretion of High Court—Trustee an accounting party to the estate—Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 21.—When the Board of Trade notify an objection to the appointment of a trustee to the High Court, the court will not exercise any discretion, nor take into consideration the peculiar circumstances of the case, but will merely hear the facts alleged to constitute the objection, and decide as a question of law whether they constitute a valid objection or not.

An objection that the trustee appointed in the bankruptcy had been trustee under a deed of assignment executed by the debtor for the benefit of his creditors within three months of the presentation of the petition is a valid objection.—*Mardon, Re, Board of Trade, Ex parte*, BKCY., 111.

31. *Trustee—Liability to render account—Board of Trade—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 162, *sub-section* 2 (a) (b)—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.—The words "any such trustee or other person" contained in section 162, sub-

section 2 (*b*) of the Bankruptcy Act, 1888, apply to a trustee or any other person empowered to collect, receive, or distribute any funds or dividends under any of the four Acts of Parliament mentioned in the fourth schedule to that Act.

It is not necessary for the Board of Trade, on an application to enforce under sub-section 2 (*b*) against a trustee an account of the sums received and paid by him, to show that the trustee has had in his hands, since the passing of the Act of 1883, funds which he has not distributed.

Section 8 of the Trustee Act, 1888, which limits the claims upon trustees, does not apply to a trustee in bankruptcy.—*Cornish, Re, Board of Trade, Ex parte*, C.A., 161.

See also ADMINISTRATION, 4; COMPANY, 1, 11, 18, 39; CRIMINAL LAW, 5; INSURANCE, 2; LANDLORD AND TENANT, 10; LIMITATION, STATUTES OF, 1; LUNACY, 1-8; PRACTICE, 32; VENDOR AND PURCHASER, 1; WILL, 21.

BASTARDY:—

1. *Affiliation summons—Putative father leaves England before birth of child—Ceases "to reside in England within twelve months next after the birth"—Bastardy Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 3.—Where the alleged father of a bastard child born on the 30th of January, 1894, left England in December, 1893, and did not return until March, 1895,

Held, that he "ceased to reside in England within twelve months next after the birth of such child" within the meaning of section 3 of the Bastardy Act, 1872, so that the mother could take out an affiliation summons at any time within the twelve months next after his return to England.—*Reg.* v. *Evans*, Q.B.D., 271.

2. *Service of summons—"Last place of abode"—Validity of service—Jurisdiction of justices—Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.—A summons under section 4 of the Bastardy Laws Amendment Act, 1872, may be served at the "last place of abode" of the person summoned, although that person is out of the jurisdiction at the date of such service.

At the hearing of an application for an affiliation order it was proved that the summons had been served by being left at the house where the person summoned had resided up to a day seven days before the date of the service; and that on that day he left the house with the intention of proceeding to America. It was not proved that he had obtained a place of abode in America at the date of the service. He did not appear, and the justices, after hearing evidence, made an affiliation order against him.

Held, that the service was valid, and that the justices had jurisdiction to make the order.—*Dicta* of the Earl of Selborne, L.C., in *Berkley* v. *Thompson*, 33 W. R. 525, 10 App. Cas. 45, and of Kay, L.J., in *Reg.* v. *Farmer*, 40 W. R. 228, [1892] 1 Q. B. 637, considered.—*Reg.* v. *Webb*, Q.B.D., 527.

BETTING.—See CORPORATION, 1; GAMING, 1, 2, 4.

BILL of EXCHANGE:—

1. *Cheque—Payee a fictitious or non-existing person—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 7 (3).—A clerk in the plaintiff's employment, by means of a fraud, induced the plaintiffs to sign and issue cheques, the name of the payee of which was not the name of any real person.

Held, that the payee was a fictitious or non-existing person within the meaning of section 7 (3) of the Bills of Exchange Act, 1882, and that the plaintiffs were liable on the cheques, notwithstanding the payee was not fictitious to the knowledge of the plaintiffs.—*Clutton* v. *Attenborough*, C.A., 114.

2. *Foreign bill—Negotiation—Payment under a mistake of fact as to bill having been met—Action for repayment—Estoppel.*—A., the indorsee of a bill of exchange, resident abroad, indorsed it to the defendants, his agents in London, for the purpose of collection. The defendants indorsed the bill to the plaintiffs, and sent it to them for the same purpose, and they forwarded it to their agents.

The plaintiffs, under a misunderstanding, informed the defendants that the bill had been paid, and sent them a cheque for the amount. Thereupon the defendants intimated the same to A., and credited him with the amount of the bill.

It was decided by Mathew, J., on the authority of *Skyring* v. *Greenwood & Cox*, 4 B. & C. 281, that as the plaintiffs had wrongfully informed the defendants that the bill had been paid, they could not recover the amount of the bill when the defendants had nothing to do with the mistake of fact; and also that the plaintiffs were estopped by the representation which they had made to the defendants, and upon which the defendants had acted. On appeal:

Held (affirming the decision of Mathew, J.), that the action failed.—*Deutsche Bank* v. *Beriro*, C.A.

3. *Forged indorsement — Payment to* bonâ fide *holder — Right to recover money.* — When a bill becomes due and is presented for payment, and is paid in good faith and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries.—*London and River Plate Bank* v. *Bank of Liverpool*, Q.B.D.

4. *Promissory note—On demand—Maturity—Gift—Renunciation—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 62, 89.—A promissory note payable to a specified person without the words "order" or "bearer" is a negotiable instrument within the meaning of the Bills of Exchange Act, 1882. Such a note, when made payable "on demand," is "at maturity" as soon as it is made, and therefore, under sections 62 and 89 of the Act, if the holder of the note desire to renounce all rights in it, the renunciation must be in writing, unless the note is delivered to the acceptor in person, though possibly delivery to the acceptor's legal personal representative will suffice.

Accordingly, where the holder of a note made a parol renunciation of all rights in it and delivered the note to one of the devisees of the real estate of the acceptor, who by his will had charged his real estate with payment of his debts, the renunciation was held to be insufficient.—*Edwards* v. *Walters*, C.A., 547.

5. *Promissory note—Unnecessary provisions—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 83 (3).—A document provided for the payment of a certain sum by instalments, with interest, the whole to become due on default of one instalment, and that "no time given to, or security taken from, or composition arrangements entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party."

Held, that the document was not a promissory note.—*Kirkwood* v. *Smith*, Q.B.D., 480.

See also INLAND REVENUE, 23.

BILL of SALE:—

1. *Condition or defeasance—Book of "rules and*

regulations"—Payment of principal and interest by instalments—Form—Validity—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10 (3)—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *Schedule.*—The plaintiff, having borrowed £100 from the defendant, executed a bill of sale, which provided for the repayment of the sum by instalments. Upon paying the first instalment, about a month after the execution of the bill of sale, the plaintiff received from the defendant a book in which to enter receipts for instalments, and which contained upon the cover a "notice" and certain "rules and regulations which are strictly adhered to." The "notice" and the "rules and regulations" prejudicially affected the position of the plaintiff as borrower, and the defendant subsequently attempted to enforce the rules against him.

Held (reversing the decision of Kekewich, J.), that the "notice" and the "rules and regulations" were not in any way a part of the bargain, and could not be considered as a "condition or defeasance" so as to avoid the bill of sale under section 10 (3) of the Bills of Sale Act, 1878.

The bill of sale provided for the repayment of the £100 and interest as follows: "The sum of £6 on the 5th of December, 1894, on account of interest and principal, and a like sum of £6 on account, as aforesaid, on the 5th day of each and every succeeding month thereafter."

Held, that, upon the true construction of the bill of sale, instalments of £6 were to be paid until the last instalment, when, if less than £6 was found to be due, such less sum only was to be paid; that, though the calculation involved might be a little more difficult than in the case of the form in the schedule to the Bills of Sale Act, 1882, the bill of sale was not thereby rendered void; and that there was nothing in the form in the schedule which forbids a loan upon the terms that the principal and interest shall both be paid by equal instalments.

In re Bargen, [1894] 1 Q. B. 444, approved.—*Linfoot* v. *Pocket*, C.A., 66.

2. *Fraudulent assignment—Intent to defeat and delay creditors*—13 *Eliz. c.* 5.—The appellant made an advance of £600 in good faith to a man apparently solvent, but who afterwards became bankrupt, taking as security an assignment of the stock-in-trade, book debts, and other property of his debtor. It was arranged that the bill of sale was not to be registered, but there was no evidence that the assignment was made with intent to defeat or delay creditors. Possession was only taken by the appellant just before the bankruptcy, but in time to prevent the instrument being avoided under the Bills of Sale Act.

Held, that the title of the appellant was complete, and did not depend upon his taking possession, though, if he had not done so, the provisions of the Bills of Sale Act might, in certain events, have deprived him of his security.

In re Ash, 20 W. R. 849, L. R. 7 Ch. App. 636, distinguished.—*Morris* v. *Official Assignee of Cooke*, P.C., 65.

3. *Industrial and provident society—Debenture—Non-registration—Winding up—Incorporated company—Bills of Sale Acts*, 1878 (41 & 42 *Vict. c.* 31) *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 17.—Debentures issued by an industrial and provident society established under the Industrial and Provident Societies Act are not exempted from the provisions of the Bills of Sale Acts by section 17 of the Bills of Sale Act, 1882.—*Great Northern Railway Co.* v. *Coal Co-operative Society*, CH.D. VAUGHAN WILLIAMS, J., 252.

4. *Statutory form—Maintenance or defeasance of security—Attesting witness.*—A bill of sale was given to secure the repayment of money advanced by several creditors of the grantor, in order to enable him to pay a composition to them and to others of his creditors. It contained stipulations that the grantor, a trader, should not during the existence of the security obtain credit to the extent of £10 without the consent of one of the firms parties thereto, but this clause was not to apply to purchases of goods from any of those firms; that the grantor would give them the greater portion of his business, and that he would keep proper books of account of his business, and permit any of the firms or their agent to inspect the same.

Held, that the insertion of those stipulations rendered the bill of sale void, under section 9 of the Act of 1882, as not in accordance with the form in the schedule.

The sole attesting witness of the bill of sale was the agent and manager of one of the firms who were grantees. He had conducted the negotiations with respect to the giving of the bill of sale and the payment of the composition, and he had to see that such composition was paid to the creditors other than the grantees.

Held, the bill of sale was duly attested, because the attesting witness was not a "party thereto" within the meaning of section 10 of the Act of 1882.—*Peace* v. *Brooks*, Q.B.D.

See also COMPANY, 11; CRIMINAL LAW, 2.

BREAD:—

Sale otherwise than by weight—"French or fancy bread"—Usually so sold—3 *Geo.* 4, *c.* 106, *s.* 4; *and the Bread Act*, 1836 (6 & 7 *Will.* 4, *c.* 37), *s.* 4.—Bread, though it be made by a different process or of better materials than ordinary household bread, is not fancy bread within 6 & 7 Will. 4, c. 37, if it be similar in size, shape, and appearance to ordinary household bread as usually sold, and therefore it must be sold by weight.

The appellants manufactured a superior kind of bread. The chief difference between it and ordinary household bread was that a peculiar yeast, the nature of which was a trade secret, was used in its production. It was sold in loaves which, in size, shape, and appearance, resembled ordinary loaves of household bread. These loaves were not sold by weight. The respondent summoned the appellants before the justices for breach of section 4 of 3 Geo. 4, c. 106 (similar to section 4 of 6 & 7 Will. 4, c. 37), and the justices convicted, holding that the appellants' bread was not fancy bread, and should therefore be sold by weight. On appeal by special case:

Held, that the conviction was right.—*V. V. Bread Co.* v. *Stubbs*, Q.B.D.

BUILDING SOCIETY:—

1. *Instrument of dissolution—Signatures—Infants—Joint holders—Agents—Curing invalidity by adding names to duplicate instrument—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 32 (3), 38, 39.—In counting the three-fourths of the members required by section 32, sub-section 3, of the Building Societies Act, 1874, to consent to the dissolution of a building society (1) infants may be counted unless prohibited by the rules from assenting to the dissolution; (2) joint holders of shares must all sign, but only count as one; (3) *semble*, a member signing by his duly authorized agent may be counted.

An instrument of dissolution which is invalid through not containing the requisite number of signatures, and which has been registered, is not cured by adding names to the duplicate of the instrument returned to the society by the Registrar of Building Societies.—*Dennison* v. *Jeffs*, CH.D. NORTH, J., 476.

2. *Investing member — Withdrawal — Priorities — Notice of withdrawal—Surplus funds of society.*—In a building society, the rules of which provide that investing members may withdraw their shares upon giving a month's notice to the society, the stopping of the society's business, or the recognition of the necessity of stoppage by the officers of the society, and not the insolvency of the society, is the proper point at which to draw the line in determining the question whether a notice to withdraw operates so as to give the member giving such notice priority over other members.—*Ambition Investment Building Society, Re*, CH.D. VAUGHAN WILLIAMS, J., 141.

3. *Withdrawing member—Repayment of advances —Priorities — Instrument of dissolution — Building Societies Act*, 1874, *ss.* 18, 32.—The priorities, under the rules of a building society, of the withdrawing members over those who have given no notice of withdrawal cannot be varied by an instrument of dissolution executed under the Building Societies Act, 1874, unless such variation has been previously sanctioned by a special meeting of the society summoned and held in accordance with the rules of the society and the terms of section 18 of the Act.—*Botton* v. *City and Suburban Building Society*, CH.D. STIRLING, J., 12.

See also MORTGAGE, 1.

BURIAL:—

Metropolis—Land set apart for the purposes of interment—Sold under the authority of an Act of Parliament—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. cxxix.*)—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *ss.* 3, 5.—Land formerly used as a burial ground, situate in the City of London, was purchased by the Commissioners of Sewers under the provisions of Michael Angelo Taylor's Act, and was in part used by them for public purposes. The Commissioners sold the residue, and the purchasers proposed to erect buildings thereon. An action was brought to restrain this building.

Held, that the land in question had been sold or disposed of under the authority of an Act of Parliament within the meaning of section 5 of the Disused Burial Grounds Act, 1884, and might therefore be built upon.—*Attorney-General* v. *London Parochial Charities*, CH.D. STIRLING, J., 395.

BUSINESS.—See GAMING, 2; PARTNERSHIP, 3; WILL, 28.

BYE-LAW.—See CANADA, LAW OF, 2; CORPORATION, 1; LOCAL GOVERNMENT, 3-6; NEW SOUTH WALES, LAW OF, 1; TRAMWAY, 2.

CANADA, LAW of:—

1. *Nova Scotia—Revised statutes, 5th series, c.* 7, *s.* 95—*Licence—Renewal—Repeal of section authorizing renewal--Statute--Construction.*--The appellants having got a licence to work for two years under c. 7, s. 95, of the Revised Statutes, 5th series, afterwards applied under the same section for a renewal thereof; but in the meantime section 95 had been repealed by an amending Act of 1889.

Held, that at the date of the application to renew the licence the power to grant it was gone; for even if the amending Act were to be construed so as not to interfere with existing rights, the appellants only possessed a privilege, and not an accrued right, in reference to the renewal sought.

Main v. *Stark*, 15 App. Cas. 384, referred to.—*Reynolds* v. *Nova Scotia* (*Attorney-General*), P.C.

2. *Ontario — Bye-laws — Construction — Power to regulate a trade does not include power to prohibit—Ontario Revised Statutes*, 1887, *c.* 184, *s.* 495 (3).—A statutory power conferred upon a municipal council to make bye-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner.

So held, where, under c. 184 of Revised Statutes of Ontario, 1887, s. 495 (3), a municipal bye-law was passed prohibiting hawkers from plying their trade in an important part of the municipality, no question of apprehended nuisance having been raised.—*Toronto* (*Corporation of*) v. *Virgo*, P.C.

3. *Principal — Agent — Power of attorney* — Son procureur général et special—*Civil Code, Art.* 181.—Where, by a document indorsed "*procuration générale et speciale*, a wife, being sole owner, constituted her husband "*son procureur général et special*" to administer her affairs, specifying such acts as drawing bills of exchange and promissory notes,

Held, that the wife's liability extended to all promissory notes granted by the husband, and was not limited by Article 181 of the Civil Code to such notes as were required for the purposes of the administration.—*La Banque D'Hochelaga* v. *Jodoin*, P.C.

4. *Liquor Laws—Power of prohibition—Distribution of legislative powers—Canada Temperance Act*, 1886—*Ontario Act* (53 *Vict. c.* 56) *s.* 18.—The Canada Temperance Act, 1886, so far as purports to repeal the prohibitory clauses of the old provincial Act of 1864 (c. 18)

Held, *ultra vires* the Dominion Parliament. The prohibitory provisions of the former Act are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order, and good government of Canada; but not as regulating trade and commerce within section 91, sub-section 2, of the British North America Act, 1867.

Held also, that the local liquor prohibition authorized by the Ontario Act (53 Vict. c. 56), s. 18, are within the powers of the provincial Legislature; but they are inoperative in any locality which adopts the provisions of the Canada Temperance Act, 1886.—*Ontario* (*Attorney-General*) v. *Dominion* (*Attorney-General*), P.C.

CANAL:—

Special Act—Rochdale Canal Act, 1874 (34 *Geo.* 3, *c. lxxviii.*), *ss.* 39, 40—*Right to support for canal—Mines adjacent to canal—Right of action for injury to canal.*—Section 39 of the Rochdale Canal Act reserved to the owners of lands in, upon, or through which the canal was made the mines and minerals under the lands set out or made use of for the canal, and authorized the owners to work such minerals, not thereby injuring the canal. Section 40 provided that if the owner of any mine should in working such mine work near to or under the canal so as in the opinion of the canal company to endanger the canal, or in the opinion of owners of mines to endanger the further working of the mines, it should be lawful for the company to treat with the owner for all such minerals as might be near or

under the canal as should be thought proper to be left for the security of the canal.

Held, that an owner of mines adjacent to but not under the canal did not come within section 39, and was under no statutory liability towards the company in working his mines; consequently, that if the working of such mines near the canal would not endanger the further working of the mines, although it would cause some damage to the canal, the owner could not under section 40 insist, against the wish of the company, upon minerals being left for the security of the canal so as to receive satisfaction therefor from the company.

The decision of the Court of Appeal ([1894] 2 Q. B. 632) affirmed, on the ground that the appellants were not entitled to proceed under section 40, their mines being adjacent to, but not under, the canal.—*Chamber Colliery Co.* v. *Rochdale Canal Co.*, H.L.

CAPE of GOOD HOPE, LAW of:—

No. 3 of 1864, *Schedule* 17, *s.* 2, *B—Construction—Company—Authority to carry on business in colony—Licence.*—Where a company was authorized by its memorandum of association to carry on its business in any part of the world,

Held, not taxable under No. 3 of 1864, Schedule 17, s. 2, B, which on its true construction relates to companies some of whose dealings are specifically authorized "to be carried on in this colony."—*Marshall* v. *Orpen*, P.C.

CARRIER:—

Goods shipped without bill of lading—Negligence—Shipowner's liability.—The plaintiff bought wool in London and handed the delivery order to the defendant, who shipped the goods on his ship to G., and sent them on to the plaintiff by rail, charging a through rate including insurance. The defendant selected the underwriters.

Held, that the defendant insured the goods not as agent for the plaintiff, but to cover his own liability as a carrier, that he was exercising a public calling, and had taken on himself the liabilities of a common carrier, and had not stipulated for any limitation thereof, and was therefore liable without proof of negligence.—*Hill* v. *Scott*, C.A.

CHAMPERTY.—See CONTRACT, 5.

CHARITY:—

1. *Charitable bequest—"Respectable single women of good character above the age of sixty years"—Validity.*—A testator gave the remainder of his estate to trustees upon trust for conversion, and to pay the proceeds to the rector and churchwardens of a parish, who should invest the same and pay the income thereof "amongst respectable single women of good character above the age of sixty years, to be paid by monthly instalments, but so that no recipient shall receive more than £10 per annum."

Held, that the intention must be taken to have been the relief of distress, and that the gift was therefore good as a charitable bequest.

Attorney-General v. *Comber*, 2 Si. & St. 93, and *Thompson* v. *Corby*, 27 Beav. 629, followed.—*Dudgeon, Re, Truman* v. *Pope*, CH.D. STIRLING, J.

2. *Charitable purposes—Intention to benefit the community — Anti-vivisection societies.* — Institutions whose objects are lawful and intended to benefit the community may be charities, although the achievement of their objects might not in fact benefit, or tend to benefit, the community.

The "Victoria-street joined with the International Society for the Total Suppression of Vivisection" and "The London Anti-Vivisection Society, Sackville-street," are charities.—*Foveaux's Estate, Re, Cross* v. *London Anti-Vivisection Society*, CH.D. CHITTY, J.

3. *Deed of foundation—Sale by trustees under power—Consent of Charity Commissioners—"Scheme legally established"—Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.—The deed of foundation of a charity duly enrolled under 9 Geo. 2, c. 36, is not a "scheme legally established" within the meaning of section 29 of the Charitable Trusts Amendment Act, 1855. Consequently the trustees of such a charity in whom lands are vested cannot sell the lands under a power of sale contained in the deed without first obtaining the consent of the Charity Commissioners to the sale.

The trustees of a charity having a power of sale can only exercise their power of sale with the express authority of Parliament, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Charity Commissioners.

Decision of Stirling, J., (*ante*, p. 61), affirmed.—*Mason's Orphanage and London and North-Western Railway Co., Re*, C.A., 339.

4. *Endowed Schools Acts—Commissioners—Scheme—Excepted endowments—Compulsory application in aid of scheme*—Cy-près—*Jurisdiction of court—Endowed Schools Act*, 1869 (32 & 33 *Vict. c.* 56), *s.* 14 (1).—The effect of section 14 of the Endowed Schools Act, 1869, is to leave the governing body of a charity *in statu quo* as to the endowments thereby excepted, and no scheme affecting those excepted endowments can be forced on such governing body unless it could have been forced on them before the Act.

Where a governing body incorporated with full powers of management by Royal Charter and Act of Parliament are deprived of the bulk of their endowments by a scheme under the Endowed Schools Act, 1869, but nevertheless continue to apply the excepted endowments to proper legal objects, then, although those legal objects are only expressed in general terms in the Charter, the court cannot, under the guise of *cy-près* or otherwise, compel the governing body to apply the excepted endowments in aid of the scheme, however beneficial such application might be.—*Attorney-General* v. *Christ's Hospital*, CH.D. CHITTY, J., 379.

5. *Will—Bequest for charitable or philanthropic purposes — Validity.* — A testator by his will bequeathed a sum of money to be appropriated for some one or more purposes "charitable, philanthropic, or ."

Held, that this bequest was not invalid simply by reason of the blank; but

Held, further, that as the word "philanthropic" was wide enough to comprise purposes not within the technical meaning of "charitable," the gift was invalid.

Decision of Stirling, J. (*ante*, p. 344), affirmed.—*Macduff, Re, Macduff* v. *Macduff*, C.A.

6. *Will—Gift to "service of God."*—A gift by will for the "service of God" is a good charitable bequest.—*Darling, Re, Farquhar* v. *Darling*, CH.D. STIRLING, J., 75.

7. *Will—Impure personalty—Direction to trustees to submit proposal for distribution among charities of property included in gift.*—A testator gave his real and personal estate to trustees upon trust to sell and convert, and to apply one-tenth of his estate over and above £110,000 to such charitable institutions and objects as his trustees might determine.

He died in 1888, leaving realty and impure personalty as well as pure personal estate.

Held, that the gift to the charities carried realty and impure personalty, and was a gift of one-tenth of the testator's whole distributable estate over and above £110,000, not a gift of one-tenth of its value over and above £110,000 at the expiration of a year from the testator's death; and the trustees were directed to submit a proposal showing to what charitable institutions and objects, and in what sums they proposed to apply moneys available for distribution under the gift.—*Piercy, Re, Whitwham* v. *Piercy*, CH.D. NORTH, J.

See also COUNTY COURT, 8; PROBATE, 6; WILL, 10.

CHEQUE.—See BILL OF EXCHANGE, 1.

CHURCH BUILDING ACTS:—

Mortgage by vicar—Land taken compulsorily—Money in court—Payment out—3 & 4 *Vict. c.* 60, *s.* 19.—Section 19 of 3 & 4 Vict. c. 60 does not limit the application of surplus land originally given for a church site and not required, or of the money representing such land, to purposes from which the incumbents in succession shall have the benefit or derive income, but the Ecclesiastical Commissioners may apply such land or money to purposes from which the successive incumbents would not derive benefit or income.

Held, therefore, that the court would order payment out of a fund, representing such surplus land, to be applied in paying off a mortgage made by the vicar in order to provide a vicarage and in executing repairs to the church, the proposed application of the fund having been approved by the Ecclesiastical Commissioners.—*Christ Church, Greenwich, Vicar, Ex parte, London County Council, Re*, CH.D. NORTH, J., 520.

CLUB.—See BANKRUPTCY, 9; VOLUNTARY ASSOCIATION.

COAL.—See LOCAL GOVERNMENT, 3.

COMPANY:—

1. *Borrowing powers—Debenture—Issue of debentures in satisfaction of debt—Fraudulent preference—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164.—P., carrying on business as P. & Co., borrowed £150 from S. for the purposes of his business without security. S., not having been repaid, brought an action against P., and was in a position to sign judgment for the full amount. P. about this time formed a company to take over his business. The memorandum of association contained a clause authorizing the company to borrow or raise money by the issue of debentures and otherwise. The company was bound to indemnify P. against his debts and liabilities, as shown in the balance-sheet.

S. accepted, in discharge of his debt and interest, 7 per cent. first mortgage debentures of the company to the nominal value of £175. Proceedings were shortly afterwards taken to wind up the company, and S. commenced an action on behalf of himself and all other debenture-holders to enforce his security.

Held, that the directors were authorized and empowered to issue such debentures in satisfaction of the debt of P., and their validity was not affected because no money was actually raised or borrowed upon them. P. not being a bankrupt, the Bankruptcy Act and the doctrine of fraudulent preference cannot be applied in favour of his unpreferred creditors as such.

In re Inns of Court Hotel Co., L. R. 6 Eq. 82, 16 W. R. Ch. Dig. 65; and *Howard* v. *Patent Ivory Manufacturing Co.*, 36 W. R. 801, 38 Ch. D. 156, approved.—*Seligman* v. *Prince*, C.A., 6.

2. *Borrowing powers—No power of borrowing—Subrogation—Interest.*—A company which was formed for the purpose of buying and working a ship when the ship was ready for delivery requested J. W. (one of the directors) to advance the company £7,500 which was owing to the builders in respect of the price of the ship, in order that the company might obtain delivery of the ship. J. W. advanced the money to the company, to be repaid with interest at 7 per cent. The company paid off the builders therewith, and obtained possession of the ship. The memorandum of association of the company did not contain any power to borrow money for the purpose of paying for the ship or of providing capital for the undertaking. The company being wound up compulsorily, J. W. claimed the amount of his loan and interest at 7 per cent. per annum.

Held, that the company having no express power to borrow for the above purpose, the transaction with J. W. was *ultra vires* to the company as a loan; but that J. W. was entitled to repayment of the £7,500 as a creditor of the company by way of subrogation to the shipbuilders.

Held, also, that as there was no evidence that the shipbuilders were specifically entitled to interest in respect of the £7,500, J. W. was not entitled as an incident to the contract of subrogation to interest at 7 per cent. or any other agreed rate; but that the court could allow J. W. interest on the £7,500 at the court rate of 4 per cent.—*Lough Neagh Ship Co., Re*, M.R. (Ir.).

3. *Borrowing power—Mortgage of uncalled capital—Power to mortgage—Companies Act*, 1862, *s.* 50.—In the articles of a company limited by shares, incorporated in 1866, was a clause enabling the company "to borrow from time to time at interest upon mortgage of the freehold, copyhold, and leasehold hereditaments, machinery, works, and other property and effects for the time being of the company, or any of them, or any part thereof respectively, or upon bonds or debenture notes of the company, or in such other manner as the company may determine."

Held, that while, according to *Stanley's case*, 12 W. R. 894, 5 De G. J. & S. 407, and *In re Sankey Brook Co.*, 18 W. R. 914, L. R. 10 Eq. 381, the words in the first part of the clause did not authorize a charge on uncalled capital, yet reading the last part, and having regard to the wide meaning of the word "manner," on the proper construction of the clause as a whole such a charge was thereby authorized.

Held, also, that even if the clause in the articles did not comprise a power to charge uncalled capital, yet the company might, under section 50 of the Companies Act, 1862, by a special resolution, alter the clause so as to make it comprise an authority to charge uncalled capital.—*Jackson* v. *Rainford Coal Co.*, CH.D. CHITTY, J., 554.

4. *Capital—Appreciation of investments—Capital or income—Earnings made after liquidation.*—A company after liquidation cannot be treated as a going concern, and cannot therefore earn profits; earnings made after liquidation are capital, not income.

A company sunk part of its capital in the purchase at par of its own debentures. The debentures subsequently fell in value, and the amount of this fall was in the half-yearly accounts charged to revenue a depreciation." Upon the company

going into liquidation it was found that the debentures had again risen to par value; the liquidator in his accounts credited the sum representing the increase, to revenue as "appreciation."

Held, that this increase must be treated as income, and not as capital; it being in reality not an accretion of principal, but merely a restitution to profits of what had been previously taken away from profits.

In re Bridgewater Navigation Co., [1891] 2 Ch. D. 317, discussed.—*Bishop* v. *Smyrna and Cassaba Railway Co.* (No. 2), CH.D. KEKEWICH, J.

5. *Capital—Company formed to carry on financial operations—Assets—Investment—Surrender of part to improve remainder—Reduction of capital*—Ultra vires—*Memorandum of association—Companies Acts*, 1867 (30 & 31 *Vict. c.* 131), *s.* 9, *and* 1877 (40 & 41 *Vict. c.* 26), *s.* 3.—The surrender by a limited financial company of a part of a security, constituting one of its assets, for the purpose of improving the remainder, where the company is acting within the scope of its business as set forth in the memorandum of association, is not a reduction of capital within the Companies Acts, 1867 and 1877, requiring the sanction of the court.—*Thomson* v. *Trustees Insurance Corporation*, CH.D. KEKEWICH, J., 237.

6. *Capital—Reduction of capital—Founders' shares—Extinguishment—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 9.—The shares in a company were divided into ordinary, preference, and founders' shares. Under the memorandum and articles of association the ordinary and founders' shares ranked equally for dividend, but the founders' shares entitled the holders thereof only to such capital as should be paid up on them, except in the event of the winding up of the company, in which event the holders of founders' shares were to be entitled to one moiety of any surplus assets remaining after discharging all liabilities. The memorandum of association authorized the issue of preference shares upon such terms as the company should by special resolution determine. The directors issued and allotted shares preferred both as to capital and dividend, without any special resolution having been passed; but at general meetings afterwards held of all classes of shareholders resolutions adopting the terms under which the preference shares had been issued were adopted.

A large loss of capital had been sustained by the depreciation of investments, and there was no reasonable prospect of anything going to the holders of founders' shares in respect of dividend or capital. The company presented a petition for the confirmation of resolutions for reduction of capital involving the extinction of the founders' shares and throwing the rest of the loss upon the ordinary shares.

Held (1), that the issue of preference shares without the passing of a special resolution was capable of ratification by the company, and had been ratified.

Held, further, that the loss should, in the first instance, be thrown on the holders of founders' shares.—*London and New York Investment Corporation, Re*, CH.D. STIRLING, J., 137.

7. *Capital—Reduction of capital—List of creditors not to be dispensed with—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 13.—Where a company seeks the sanction of the court to a proposed reduction of capital, involving either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of paid-up capital, the court has no jurisdiction to dispense with the settlement of a list of creditors of the company or with the ascertainment of the names of such creditors in manner provided by the 13th section of the Companies Act, 1867.—*Lamson Store Service Co., Re, National Reversionary Co., Re*, CH.D. STIRLING, J., 42.

8. *Contract — Prospectus — Misrepresentation — Forfeiture—Companies Act*, 1867, *s.* 38.—Where a person is induced to apply for shares by a fraudulent misrepresentation contained in a prospectus, and his shares are afterwards forfeited by his failure to pay calls, he ceases to be a shareholder and becomes a debtor to the company; and if he has not affirmed his contract he may repudiate it and defend an action for calls on that ground.

A prospectus which merely specifies the names of the parties to, and the dates of, contracts, in compliance with section 38 of the Companies Act, 1867, does not thereby give notice of circumstances contained in the contracts which are material to be known, and the omission of which causes the prospectus to give a false impression.—*Aarons Reefs* v. *Twiss*, H.L.

9. *Contract — Prospectus — Misrepresentation — Intention to induce purchase of shares—Liability to purchaser—Publication of false statements confirming those of prospectus—Purchase of shares by person who had received prospectus—Liability of person causing publication.*—Where the object with which the prospectus of a company is issued is not merely to induce application for an allotment of shares, but also to induce persons to whom it is sent to purchase shares in the market, its function is not exhausted when the company has gone to allotment, and the person issuing the prospectus is responsible for the consequences of a false representation contained in it, and known to him at the time to be false, to any person to whom the prospectus has been sent who is induced by the false representation to purchase shares, and thereby sustains a loss.

Peek v. *Gurney* (L. R. 6 H. L. 377) distinguished.

Where a person who has issued the prospectus of a company, containing a false representation, known to him at the time to be false, subsequently causes to be published a false representation to the same effect as that of the prospectus, with the direct intent of inducing persons to purchase shares in the company, he is responsible for the consequences of so doing to anyone who, having received a prospectus, purchases shares on the faith of the false representation so published, and thereby sustains a loss.—*Andrews* v. *Mockford*, C.A.

10. *Debentures — Floating security — Condition allowing company to carry on business until default for certain period — Subsequent issue of bonds—Priority.*—A company issued debentures "by way of floating security," and subject to certain conditions, one of which was that, notwithstanding the charge, the company should be at liberty, for the purpose of its business, to deal with any part of its property until default should be made in payment of any interest thereby secured for a period of three months, or until the company should be compulsorily or voluntarily wound up. The company made default in payment of interest. More than three months after such default, but before the debenture-holders had taken any active steps to enforce their security, the company issued bonds covered by a trust deed, which recited the issue of the debentures and the fact that default had been made in the payment of interest.

Held, reversing the decision of North, J., that the bonds had priority over the debentures.

Governments Stock Investment Co. v. *Manila Railway Co.*, C.A., 166.

11. *Debentures—Receiver—Covering deed—Bills of*

Sale Acts, 1878 *and* 1882 (41 *&* 42 *Vict. c.* 31), *ss.* 14, 17 —*Poor rate—General district rate—Poor Relief Act*, 1601 (43 *Eliz. c.* 2) *s.* 2—*The Poor Rate Assessment and Collection Act*, 1869 (32 *&* 33 *Vict. c.* 41), *s.* 16—*The Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 5, 6, 211, *sub-section* (3)—*Conveyancing Act*, 1881 (44 *&* 45 *Vict. c.* 41), *ss.* 19, 24—*Preferential Payments in Bankruptcy Act*, 1888 (51 *&* 52 *Vict. c.* 62), *s.* 1 (*a*), *sub-section* (4).—A deed by which a company assigns as beneficial owner to a trustee all its property as security to cover debentures does not come within the Bills of Sale Acts.

Held, also on the facts, that although the powers of the receiver under the deed were wider than those conferred upon the receivers by the Conveyancing Act, 1881, s. 24, that Act did not affect their validity, and that on the receiver taking possession of the premises and carrying on the business there was a change of occupation such as was contemplated by section 16 of the Poor Rate Assessment and Collection Act, 1869, so that the receiver was not liable to pay the proportion of a rate incurred before he took possession.

The Preferential Payments in Bankruptcy Act, 1888, s. 1 (a), applies only to persons who hold in their hands assets in the winding up, but does not affect persons who are not claiming as creditors in the winding up, but who hold security upon property charged in their favour.

Semble, a "covering deed" may be a "debenture" within the meaning of the cases.

Semble also, that a general district rate made under the Public Health Act, 1875, is not a tax or parochial rate within the meaning of section 14 of the Bills of Sale Act, 1882.

Ross v. *The Army and Navy Hotel Co.*, 35 W. R. 40, 34 Ch. D. 43. considered.

Richards v. *Kidderminster* (*Overseers of*), CH. D. NORTH, J., 505.

12. *Debentures—Set off—Assignment of debt—Appointment of receiver—Time of assignment—Liquidated demand—Money had and received—Goods paid for but not delivered — Managing director — Acts within apparent authority.*—Debentures issued by a limited company, being a floating charge on its assets, do not take effect as a charge as from the date of their issue, but only from the date of the appointment of a receiver on behalf of the debenture-holders, and then subject to the existing equities. A trader dealing with the company in the ordinary course of its business has an inchoate right of set-off against debts owing by him to the company before such date, even though he has notice of the issue of the debentures.

Where there is a claim for goods paid for but not delivered, the property in the goods not having passed, the claim becomes one for money had and received, upon a failure of consideration, and becomes a liquidated demand, and is a proper subject for set-off.

A company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and strangers dealing *bonâ fide* with such persons have a right to assume that they have been duly appointed. — *Biggerstaffe* v. *Rowatt's Wharf*, C.A., 536.

13. *Directors—Expiration of term of office—No re-election — Authority — Estoppel — Companies Act*, 1862, *s.* 67.—The provisions of section 67 of the Companies Act, 1862, for curing defects in the appointment or qualification of directors do not operate to render good the authority of former directors, who without being re-elected continue after the expiration of their term of office to discharge the duties of directors, well knowing they have not been re-elected. And the receipt of payments made by these as directors by one aware of their true position does not estop that person from subsequently questioning their legal authority to demand as directors payments from him.—*Tyne Mutual SS. Insurance Association* v. *Brown*, Q.B.D.

14. *Directors—Meeting — Irregularity—Resolution to wind-up—Refusal of Court to interfere.*—The notices convening the meeting at which a special resolution to wind-up voluntarily was passed by the shareholders of a company were issued under the authority of a resolution passed at a meeting of the boards of directors at which a quorum was not present. Six months afterwards the shareholders sought to have the special resolution declared invalid.

Held, that the doctrine upon which the court had acted since *Foss* v. *Harbottle* (2 Hare, 461), as was explained in *Browne* v. *La Trinidad* (37 Ch. D. 17), was not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of could be set right at any moment; and that therefore, in the present case, the court would not interfere, especially as no application to the court had been made until six months had elapsed after the passing of the resolution.—*Southern Counties Deposit Bank* v. *Rider*, C.A.

15. *Directors—Meeting—Notice of business to be transacted — "Extraordinary" business—Name of company, Authority to use.*—In point of law directors of a company are not bound to give notice beforehand of extraordinary business which is to be transacted at a board meeting in order to render such business transactions valid.

S., a director of the M. Co., obtained the assent of five out of the seven subscribers to the memorandum of association of the company to the use of the name of the company as co-plaintiffs in an action brought by S. against his co-directors.

Held, that S. had no proper authority for the use of the name of the company. Such authority must be obtained either from the board of directors or from a meeting of the shareholders convened for that purpose.—*Mayville* (*La Compagnie de*) v. *Whitley*, C.A. 568.

16. *General meeting—Voting—Show of hands—Declaration of chairman—Evidence to contradict—Sufficiency of notice of meeting—Table A, clause* 42—*Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 51.—The provision in section 51 of the Companies Act, 1862, that the declaration of the chairman that a resolution has been carried shall be deemed conclusive evidence of the fact does not preclude the court from inquiring whether, in fact, the provisions of the Act have been complied with.—*Young* v. *South African Exploration Co.*, CH.D. KEKEWICH, J., 509.

17. *Private company—"Two men" company—Limited liability—Effect of registration under Companies Acts—Liability of corporators for company's debts.*—The use of the Companies Acts for the purpose of enabling two partners to carry on business with limited liability is an abuse of those Acts; but, nevertheless, a company created by registration under these Acts is an effectual company, though it be formed for this purpose; and the contracts of such a company are not the contracts of the partners, and the partners cannot be sued personally on them, though possibly, if the partners and the company were both before the court, the

creditors under the company's contracts might be held entitled to an indemnity from the partners personally.

Broderip v. *Salomon*, 43 W. R. 612, [1895] 2 Ch. 323, commented on and distinguished.—*Munkittrick* v. *Perryman*, Q.B.D.

18. *Receiver—Equitable execution—Secured creditor—Judicature Act*, 1875, *s.* 10—*Companies Act*, 1862, s. 163.—A judgment creditor of a company obtained *ex parte* an absolute order appointing him receiver over the beneficial interest of the company in a ship, subject to encumbrances. The creditor took no further step to enforce payment, and a winding-up order was afterwards made.

Held, that the receivership order did not make the judgment creditor a secured creditor of the company.

The expression secured creditor in section 10 of the Judicature Act, 1875, has the same meaning as regards a company in liquidation as it has under the Bankruptcy Act, 1883.—*Lough Neagh Ship Co., Re, Thompson, Ex parte*, M.R. (Ir.).

19. *Shares—Certificate—"Fully-paid" shares—Estoppel—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—A holder of shares in a company cannot relieve himself of his liability under section 25 of the Companies Act, 1867, by alleging estoppel on the ground that the company gave him a certificate representing that the shares were fully paid up, if the circumstances were such that he must have known that no cash had been paid for the shares.

The appellant was the registered holder of 16,000 shares, in respect of which he had received certificates that they were fully paid up. He had paid no cash for the shares, and knew that the shares belonged to the company; no contract under section section 25 of the Companies Act, 1867, had been registered before the issue of the shares.

Held, that, as under the circumstances of the case he must have known that nothing had been paid for the shares, he was liable to be put on the list of contributories for the full amount.—*Monnier (Veuve et fils), Re, Bloomenthal, Ex parte*, C.A., 577.

20. *Shares — Contract — Misrepresentation — Promoter—Rescission of contract.*—To make a company liable for misrepresentations inducing a contract to take shares, the shareholder must bring his case within one or other of the following heads: (1) Where the misrepresentations are made by the directors or other general agents entitled to act and acting on its behalf; (2) where the misrepresentations are made by a special agent of the company acting within the scope of his authority, and whether the company has originally authorized him or has subsequently ratified his acts; (3) where the company know before completion of the contract that it is induced by misrepresentation; or (4) where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of them were material and untrue.

A promoter of a company, but who was not either a director or agent of the company to make representations, induced the plaintiff to take shares on the faith of certain allegations he was alleged to have made, but of which the company had no knowledge, though the directors did know he was endeavouring to procure subscriptions for shares.

Held, that even if the representations were made (which was not proved), the company could not be held liable for such representations made by a promoter; and that the contract to take shares could not be set aside.—*Lynde* v. *Anglo-Italian Hemp Spinning Co.*, CH.D. ROMER, J., 359.

21. *Shares—Contract to take shares—Prospectus—Rescission—Non-disclosure of material facts.*—A person who has contracted to take shares in a company cannot avoid his contract on the ground that the prospectus did not set forth all the material facts *pro* and *con.* which might induce a person to apply or not apply for shares. A misstatement or concealment in a prospectus which will be sufficient to avoid the contract must be of such a character as to make the prospectus as it stands misleading.—*Mackeown* v. *Boudard Peveril Gear Co.*, CH.D. ROMER, J., 664.

22. *Shares—Dividends—Preference shares—Cumulative dividend—Payment out of net profits of each year.*—The memorandum of association of a company contained this clause: "The capital of the company is £150,000 divided into 10,000 ordinary shares of £10 each, and 5,000 preference shares of £10 each. The holders of preference shares shall be entitled out of the net profits of each year to a preference dividend at the rate of £10 per cent. per annum on the amounts for the time being paid up or deemed to be paid up thereon. After payment of such preferential dividend the holders of ordinary shares shall be entitled to a like dividend at the rate of £10 per cent. per annum on the amount paid or deemed to be paid on such ordinary shares. Subject as aforesaid, the preference and ordinary shares shall rank equally for dividend."

Held, that the preference shareholders were not entitled to a cumulative dividend of £10 per cent. so as to have the deficiency in one year paid out of the profits of a subsequent year before paying anything to the ordinary shareholders.—*Staples* v. *Eastman Photographic Materials Co.*, C.A.

23. *Shares — Dividends — Unclaimed dividends—Winding up—Statute of Limitations.*—The declaration of a dividend by a company on its shares constitutes a debt which becomes payable to the shareholder in respect of his dividend, and the Statute of Limitations begins to run immediately.

The mere declaration of a dividend will not make a company a trustee of the dividend for the shareholder to whom it is payable.

The reasons upon which the rule is founded that the Statute of Limitations does not run in respect of a claim between partners during the continuance of the partnership do not apply to a claim for unpaid dividends between a shareholder of an incorporated company and the company.—*Severn and Wye and Severn Bridge Railway Co., Re*, CH.D. ROMER, J., 347.

24. *Shares—Fully-paid shares—Contract duly made and filed—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—The A. company entered into a contract with a trustee for the B. company, a new company to be formed, that the A. company should sell to the new company certain patent rights in consideration of £2,550 in shares of the B. company or cash, and in consideration of the allotment and issue to each shareholder of the A. company who should apply for them, three shares of £1 each in the B. company, with 19s. credited as paid up on them, in respect of every two shares held by him in the A. company. The B. company was registered, and ratified this contract by a deed endorsed on it, and the contract with the indorsed deed were registered with the Registrar of Joint Stock Companies under section 25 of the Companies Act, 1867, and the patent rights assigned. Two persons,

E. and M., not shareholders in the A. company, applied, as nominees of shareholders of that company who were entitled to have shares issued to them, for shares in the B. company, and, having paid 1s. per share, were registered as holders of fully paid-up shares in the B. company. On the B. company being subsequently wound up, and the liquidator applying for a declaration that these shares were held subject to a liability of 19s. per share,

Held, that the contract and indorsed deed when registered was a sufficient contract in writing as required by section 25 of the Companies Act, 1867, even though E. and M. were not named in it or parties to it, and that the shares issued to them must be treated as fully paid up.

Carling's case, 24 W. R. 165, 1 Ch. D. 115, and *Hartley's case*, 23 W. R. 203, L. R. 10 Ch. App. 157, followed.—*Common Petroleum Engine Co., Re, Elsner and McArthur's case*, CH.D. ROMER, J., 361.

25. *Shares—New shares—Allotment—"Member"—Right of representative of deceased member—Companies Act*, 1862, *Table A*, *art.* 27.—In 1891 a special resolution of the defendant company was passed and duly confirmed increasing the capital of the company by the creation of new shares, and authorizing the directors to issue such shares. On the 21st of April, 1893, a special resolution of the company was passed that the new shares should be offered for allotment at par to the members of the company who, at the date of the confirmation of the resolution, should be the registered holders of the fully paid-up shares of the company. This resolution was duly confirmed on the 11th of May, 1893. The company was one to which Table A applied.

The plaintiff was the executrix of a member of the company who was living at the date of the special resolution increasing the capital, and was, therefore, by virtue of article 27 of Table A, entitled to the offer of a proportion of the new shares, but who died in 1892—*i.e.*, before the actual issue of the shares pursuant to the special resolution passed in April, 1893. On the 11th of May, 1893, circular letters were addressed to the shareholders calling upon them to state within ten days whether they wished to take the new shares to which they were entitled. One of these letters was addressed to "the executor" of the deceased member at an address which was not the registered address of the deceased member, and the letter never reached the plaintiff.

In May, 1894, the plaintiff became aware of the allotment of the new shares, and applied for the allotment to her of the shares to which the deceased member would have been entitled. The disposal of these shares had been deferred, and they were still in the hands of the company. The deceased member's name was still upon the register of shareholders.

Held, that the plaintiff was entitled to an allotment of the deceased member's proportion of the new shares.—*James* v. *Buena Ventura Nitrate Grounds Syndicate*, C.A., 372.

26. *Shares—Shares paid up in advance of calls—Payment of interest out of capital on shares so prepaid—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 14, 38, 101; *Table A*, *clause* 7.—By the articles of association of a company the directors were at liberty, as they thought fit, to receive payment from any shareholder of the whole or any part of the amount remaining unpaid on any shares held by him upon such terms in all respects as the directors might determine; and might also, if they thought fit, pay out of the capital of the company interest on sums paid up on shares in advance of calls. Some of the shareholders paid up in full the amounts remaining unpaid on their shares, such payments being payments in advance of calls, under an agreement with the company that they should receive interest at the rate of £6 per cent. per annum on the amount so paid up in advance.

Held, that such articles were perfectly legal and valid, and that the company were entitled to pay the interest on prepaid shares out of capital in the absence of profits.

Dale v. *Martin*, 9 L. R. Ir. 498, 11 *ibid.* 371, 31 W. R. Dig. 208, 32 *ibid.* Dig. 36, approved.—*Lock* v. *Queensland Investment Co.*, C.A., 257.

27. *Shares—Transfer of share—Directors' discretion to refuse—Rectification of register—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35.—Where the directors have a power to refuse to register transfers of shares, whether the power is general or is a power to refuse for stated reasons, it is for those who allege that the directors have not properly exercised the power to give evidence to that effect.

The directors of a company had power to refuse to register any transfer where they were of opinion that the proposed transferee was not a desirable person to admit to membership.

The directors considered the registration of a proposed transfer, and decided to refuse it, but gave no reasons.

Held (reversing the decision of Kekewich, J.), that the directors had not improperly exercised their power, and that the court could not interfere.—*Coalport China Co., Re; Middleton and Bell, Ex parte*, C.A., 38.

28. *Winding up—Auditor—Duties of—Misfeasance—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63) *s.* 10—*Companies Act*, 1879 (42 & 43 *Vict. c.* 76), *s.* 7, *sub-sections* 1, 5, 6.—It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do, and he is not concerned as to whether the business of the company is prudently or imprudently carried on, or as to whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders.

The duty of an auditor is to ascertain and state the true financial position of the company at the time of the audit, and, in examining the books of the company for that purpose, to take reasonable care to ascertain that they show the company's true position.

A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more, and an auditor who gives shareholders means of information, instead of information, does so at his peril. The words "the value of the assets as shown in the balance-sheet are dependent on realization," though unusual in an auditor's report, are unimportant, the auditor's duty being to convey in direct and express terms any information which he may think proper to be communicated.—*London and General Bank, Re*, C.A. 80.

29. *Winding up—Auditor—Misfeasance—"Officer" of company—Table A—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—Where the articles of association of a company, so far as they relate to the auditing of accounts, are substantially the same as those contained in Table A, and as the articles relating to audit in *In re London and General Bank*, 43 W. R. 481, [1895] 2 Ch. 166, the auditor is an "officer of the company" within the meaning

of section 10 of the Companies (Winding-up) Act, 1890.—*Kingston Cotton Mill Co., Re*, C.A., 210.

30. *Winding-up — Auditors — "Misfeasance" — Directors—Misstatement of value of assets—Payment of dividends out of capital—Reliance on manager's certificate—Auditors' duties—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—An officer of a company who has committed a breach of his duty to the company, the direct consequence of which has been a misapplication of its assets, for which he can be made responsible by an action at law or in equity, is guilty of a "misfeasance" within the meaning of section 10 of the Companies (Winding-up) Act, 1890; and in the winding-up of the company the liquidator may have recourse to the summary process provided by that section, and the proper remedy is not to bring an action.

Decision of Vaughan Williams, J. (*ante*, p. 363), affirmed.

The duty of an auditor of a company is to examine the books, ascertain that they are right, and to prepare a balance-sheet showing the true financial position of the company at the time to which the balance-sheet refers; but he is not an insurer, and in the discharge of his duty he is only bound to exercise a reasonable amount of care and skill, depending upon the circumstance of each particular case. If, however, there is nothing which ought to excite suspicion, less care may properly be considered reasonable than could be so considered if suspicion was or ought to have been aroused.

Re The London and General Bank (*ante*, p. 80), [1895] 2 Ch. 166, 673, followed.

Decision of Vaughan Williams, J., on this point (*ante*, p. 363) reversed.—*Kingston Cotton Mills Co. (No. 2), Re*, C.A.

31. *Winding up—Contributory—Underwriting contract—Register of members—Expiration of agent's authority to apply for shares—Ratification of application by subsequent conduct of principal.*—An underwriting letter containing an offer by the underwriter, in consideration of a premium, to take up such shares in a company as should not be taken up by the public in answer to an invitation for public subscription, and also the statement that "this engagement is binding on me for two months from this date," was addressed to the promoters of the company. The capital was offered to the public a few days after the date of the underwriting letter, but the underwriting letter was not accepted until a date at which the subscription list had been closed, the invitation to the public proving an almost total failure. The promoters applied for shares in the underwriter's name, and the shares were allotted to him and his name was placed on the register of members of the company, where it remained for more than three years, he acting all that time as a shareholder.

Held, that, whether or not the application for shares was properly made on behalf of the underwriter and accepted in due time, he had by his conduct ratified what had been done, and was liable to pay calls made in the winding up of the company.

Decision of Vaughan Williams, J., *ante*, p. 397, reversed.—*Hemp, Yarn, and Cordage Co., Hindley's case*, C.A., 630.

32. *Winding up—Debentures—Misfeasance—Property of company—Costs of petition to wind up—Companies (Winding up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—In the winding up of a company ordered to be wound up by the court, misfeasance proceedings were taken by the official receiver and liquidator which resulted in an order that contribution should be made by certain persons, officers of the company, to the assets of the company, and the liquidator thereby, and also by proceedings to enforce calls against shareholders, realized certain moneys.

The company had issued debentures charging the undertaking and property, whatsoevor and wheresoever, both present and future, of the company, including its uncalled capital for the time being. The assets of the company were insufficient to pay the debenture-holders in full. The winding-up order directed the petitioner's cost to be paid out of the assets of the company, and a claim was made that the costs of the petitioner were payable out of the fund recovered by the liquidator as aforesaid. It was not disputed that the fund in question was included in the debenture-holders' security.

Held, that the petitioner's costs were not payable out of the fund.—*Brabourne* v. *Anglo-Austrian Printing Co.*, CH.D. VAUGHAN WILLIAMS, J., 186.

33. *Winding up—Lease—Proof by lessor—Creditor—Insolvency of company.*—Since the decision in *Hardy* v. *Fothergill*, 37 W. R. 177, 13 App. Cas. 351, the earlier case as to proof by a lessor in the case of a company in liquidation have to be reconsidered, and it is the duty of the court to assist a lessor in proving in respect of the obligations of a company as lessee under its lease in all cases where the lessor is desirous of proving at once for his loss on the footing of the lease being determined or treated as determined.

A company which was lessee under an onerous lease went into voluntary liquidation, and the liquidator gave up possession to the lessors, but not so as to surrender the term; the lessors were ready to come to an arrangement by accepting a surrender or determining the lease on being allowed to prove for the loss thereby sustained.

Held, that liberty ought to be given to the liquidator to carry out such arrangement.—*Panther Lead Co., Re*, CH.D. ROMER, J., 573.

34. *Winding up—Mortgage of charges payable quarterly—Mortgage principal and interest in arrear—Proof by mortgagee as unsecured creditor for sum in arrear.*—A company mortgaged certain charges entitling the mortgagors to receive certain quarterly payments, and covenanted to pay to the mortgagees on the same quarter days, in discharge of principal and interest under the mortgage, sums equal to those payments; the understanding being that so long as the instalments were regularly paid to the mortgagees the mortgagors should continue to receive the payments under the charges. The payments due under the mortgage having fallen into arrear, and the mortgagors being in course of being wound up,

Held, that the mortgagee was entitled to keep the mortgage as a security for future payments payable thereunder, and to prove in the winding up, as for money had and received, for any payments received by the mortgagors in respect of the mortgaged property after the instalments due under the mortgage ceased to be paid.—*Lands Securities Co., Re* (*No.* 2), C.A. 611.

35. *Winding up—Official Receiver—Liquidator—Security for costs—Misfeasance summons—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—Where the official receiver and liquidator of a company being wound up compulsorily and only having assets sufficient to pay a small dividend to the debenture-holders takes out a misfeasance summons against officers of the company he is at the mercy of the court as regards costs at the

hearing of the summons, and the court has jurisdiction in such a case to order the liquidator personally to pay costs. The court in such a case, in considering whether the liquidator ought or ought not to be ordered to pay the costs personally, will have regard to the fact that an application for an order that he should give security for costs has been made and opposed by the liquidator.—*Powell & Sons, Re*, CH.D. ROMER, J., 618.

36. *Winding up—Practice—Right to inspection of depositions taken under section* 115 *of the Companies Act*, 1862—*Companies* (*Winding-up*) *Rules, April*, 1892, *rr.* 11, 32.—When a company is being wound up by the court, and an examination has been taken under section 115 of the Companies Act, 1862, every creditor and contributory whose claim or proof has been admitted is entitled under rule 32 of the Companies (Winding-up) Rules, April, 1892, as of right to inspect the file of proceedings and take copies of any documents therein.—*Standard Gold Mining Co., Re*, CH.D. VAUGHAN WILLIAMS, J., 63.

37. *Winding up—Public examination—Companies* (*Winding-up*) *Act*, 1890, *s.* 8, *sub-sections* 1, 2, 3, 7.—The words "after consideration of any such report" in sub-section (3) of section 8 of the Companies (Winding-up) Act, 1890, have reference to the "further report or further reports" mentioned in sub-section (2), and do not refer to the "preliminary report" mentioned in sub-section (1) of that section.

The court has no jurisdiction under sub-section (3) of section 8 to order any person to attend and be publicly examined unless the official receiver has, in addition to the preliminary report mentioned in sub-section (1), made a "further report or further reports" in the terms of sub-section (2) stating matters showing that in his opinion a fraud has been committed by the person sought to be examined.

Ex parte Barnard, In re Great Kruger Gold Mining Co., 40 W. R. 625, 641, [1892] 3 Ch. 307, explained. —*Barnes, Ex parte*, H.L., 433.

38. *Winding up—Scheme of arrangement—Construction of scheme—Discount, Meaning of.*—Expressions in a document addressed to commercial men should be construed in the sense in which ordinary men of business would understand them. Accordingly the words "discount at the rate of 4 per cent." in a scheme of arrangement and compromise with creditors were held to mean discount in the popular sense—viz., a rebate of interest on the amounts.—*Lands Securities Co., Re*, C.A., 514.

39. *Winding up—Set-off—Mutual dealings—Money on deposit—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 38—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.—A company which was being pressed by its creditors deposited certain moneys with a firm of solicitors to settle certain claims, and after the claims had been paid a balance remained in the hands of the solicitors. Shortly afterwards the company passed resolutions for voluntary winding up, which was continued under supervision. No account had been rendered to the company by the solicitors, though they kept an account in their books showing the various receipts and payments, and there was no evidence that the company had in any way consented to any portion of the money being applied to any purpose other than that for which it had been originally deposited with the solicitors. The solicitors claimed to set off a debt for costs against the liquidator's claim in the winding up for the balance.

Held, that there was no set-off.

Observations on the meaning of section 38 of the Bankruptcy Act, 1883.—*Mid-Kent Fruit Factory, Re*, CH.D. VAUGHAN WILLIAMS, J., 284.

40. *Winding up—Shares—Contract—Rectification of register.*—An agreement between the C. and P. Co. provided that the shareholders in the C. Co. should sell their shares to the P. Co. for fully-paid shares therein, and that the contract should be duly filed before the issue of the shares. The shares were issued before the contract was filed; notice of motion to rectify the register was served on the P. Co. Before the hearing the P. Co. was ordered to be wound up.

Held, that the register could only be rectified on terms that provision should be made for the liabilities of the P. Co. between the issue of the shares and the service of notice of motion.—*Preservation Syndicate, Re*, CH.D. VAUGHAN WILLIAMS, J.

41. *Winding up—Shares—Fully paid-up shares—Certificate—Estoppel—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—A person who was entitled to have fully paid-up shares in a limited company allotted to himself or his nominees procured fully paid-up shares to be allotted to another person as his nominee, in consideration of a money payment. The money was not paid to the company, but the company issued certificates to the allottee stating that the shares were fully paid up. It appeared that the allottee acted on the faith of the certificate, and believed that cash had been paid to the company for the shares. The liquidator in the winding up of the company sought to make the allottee liable, on the ground that section 25 of the Companies Act, 1867, had not been complied with.

Held, that, as against the allottee, the company and the liquidator were estopped from denying that the shares were fully paid up.—*Building Estates Brickfields Co., Parbury's case*, CH.D. VAUGHAN WILLIAMS, J., 107.

42. *Winding up—Shares—Placing shares—Brokerage*—Ultrà vires.—Where brokers are properly employed by the directors in the issue of the capital of of a company, and the payment of a commission per share is a fair and just payment for services rendered, such payment is not *ultrà vires* on the part of the company.

Lydney and Wigpool Iron Ore Co. v. *Bird*, 34 W. R. 749, 33 Ch. D. 85, and *In re Faure Electric Accumulator Co.*, 37 W. R. 116, 40 Ch. D. 141, distinguished. —*Metropolitan Coal Consumers' Co.* v. *Scrimgeour*, C.A., 35.

43. *Winding up—Voluntary winding up—Reconstruction—Option of shareholders to take shares in new company—Application by shareholder—Failure of liquidator to procure allotment—Liability in damages —Jurisdiction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 98, 133, 138, 151, 161—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 10, 13—*Companies* (*Winding-up*) *Rules*, 1890, *rr.* 89, 90.—A scheme for the reconstruction of a company, which was in voluntary liquidation under the supervision of the court, provided that the undertaking should be sold to a new company, and that the shareholders should have the option of taking shares in the new company in proportion to their holding in the old. In accordance with the terms of a circular issued by the liquidator, B., a shareholder in the old company, signed an application for shares in the new company and sent it, with a cheque for the required deposit, to the bankers of the company, who sent him a receipt therefore. The bank subsequently sent to the liquidator, at his request, a list of persons who had applied for shares, but did

not include therein the name of B. The liquidator afterwards sold the whole of the shares unapplied for, together with those which should have been allotted to B. He had no assets undistributed in his hands except the proceeds of sale of the shares unapplied for, and he had no shares which he could allot to B. Upon a summons by B. in the winding up.

Held, that the court had no jurisdiction to declare the liquidator liable in damages.—*Hill's Waterfall Estate and Gold Mining Co., Re*, CH.D. STIRLING, J.

See also BANKRUPTCY, 10; CONTRACT, 2, 7; DAMAGES, 1; GAS, 1; INSURANCE, 16; MORTGAGE, 9; PRACTICE, 18; PRINCIPAL AND AGENT, 1, 2; TRUSTEES, 7.

COMPENSATION.—See LANDLORD AND TENANT, 2; MASTER AND SERVANT, 1.

COMPROMISE:—

Consent by counsel — Mistake — Setting aside.—Where, acting upon general instructions for compromise, counsel consents to a compromise under a misapprehension—*e.g.*, intending to concede one thing, inadvertently concedes another, or where counsel on both sides are not *ad idem*, neither counsel nor client is bound by the compromise, and the court will set it aside.

Holt v. *Jesse*, 3 Ch. D. 177, approved.

Upon the question of the extent of the authority to compromise given to counsel by his client, the court will not require an affidavit from counsel, but will accept his statement if made from his place at the bar.—*Hickman* v. *Berens*, C.A.

CONSPIRACY.—See TRADE UNION.

CONTEMPT:—

Pending criminal charge — Newspaper comments tending to prejudice trial.—On an application for a writ of attachment for contempt of court by the respondents in respect of certain newspaper articles, it appeared that the applicant had been arrested on a charge of arson, and that the charge had been dismissed; that an article published in the paper while the applicant was under remand referred to the fact that he had been charged with arson, and imputed dishonesty to him. The applicant was afterwards committed for trial for larceny and embezzlement, and the trial was still pending at the date of the application. While he was awaiting trial there were published in the paper an article alluding to the charges pending against the applicant, and a report of the proceedings at a meeting of the standing joint committee of the county, at which the prosecution of the applicant was considered, and *ex parte* statements made as to that prosecution.

Held, that none of the publications appeared to be intended or calculated to prejudice the pending trial of the applicant, and that no attachment ought to issue.

Principles regulating applications to commit for contempt of court considered.—*Reg.* v. *Payne*, Q.B.D., 605.

CONTINGENT REMAINDER.—See POWER, 3.

CONTRACT:—

1. *Guarantee—Representations as to credit—Fraud—Mercantile Law Amendment (Scotland) Act*, 1856 (19 & 20 *Vict.* c. 60) *s.* 6—*Lord Tenterden's Act* (9 *Geo.* 4), *c.* 14.—The fact that representations as to the character and credit of another person, made to the intent that he might obtain credit, are made fraudulently, with the intention of obtaining a benefit for the person making such representations, does not take them out of the operation of section 6 of the Mercantile Law Amendment Act (Scotland), 1856, which is the same as section 6 of Lord Tenterden's Act, and requires such representations to be in writing.—*Clydesdale Bank* v. *Paton*, H.L.

2. *Manager—Salary—Arrears of salary—Foreign or English currency—Fall in rate of exchange.*—By an agreement entered into in England between the manager of a company carrying on business in Chile and the company it was provided that he should be paid an annual salary, at the rate of £1000 sterling, by monthly payments, "at such place or places and in such manner as he may direct." The manager, while the company was carrying on business, drew bills upon them from time to time for the monthly payments of his salary payable in Chile in Chilian dollars, in an amount of dollars that would at those dates, at the then rate of exchange, be equivalent to the amount of his sterling claim. These drafts were not paid by the company; and on the company subsequently going into liquidation the manager claimed to prove in the liquidation for the amounts of the unpaid instalments calculated in pounds sterling, the rate of exchange having fallen since the dates when the bills were drawn.

Held, that, the company not having paid the manager in the manner in which he "directed" by drawing the bills, his position was that of a person whose salary, at the rate of £1000 per annum, was unpaid; and that he was entitled to prove for his unpaid salary at the sterling rate.—*Taltal Chile Nitrate Co., Re*, C.A.

3. *Option to purchase within limited time—Exercise within time by unauthorized agent—Exercise after time by authorized person—Owner of unsound mind—Ratification.*—A. and B. agreed by articles of partnership that if either partner should die the other might purchase the deceased partner's share on certain terms upon giving to his legal representative notice within three months from his death. A. died during the partnership. B. had meanwhile become of unsound mind. Just before the time for the exercise of the option expired C., purporting, but without authority, to act for B., gave notice to purchase A.'s share. Shortly after the time expired B.'s committees, pursuant to an order in lunacy, gave a similar notice.

Held, that neither of the above notices was effectual, and that the doctrine of ratification had no application to such a case.

Bolton v. *Lambert*, 37 W. R. 434, 41 Ch. D. 295, distinguished.—*Dibbins* v. *Dibbins*, CH.D. CHITTY, J., 595.

4. *Ratification—Corporation—Contract by agent—No authority under seal—Withdrawal of offer—Specific performance.*—Although subsequent ratification may supply the want of authority in an agent at the time of his acceptance of an offer, yet it must be shown in such a case that there was a contract purporting to be made by and with the agent, which, if the agent had authority, would be a valid, binding contract.

The agent of a corporation, having no authority in that behalf from the corporation, entered into a contract to buy land. The vendor afterwards refused to sell. After such refusal the Corporation ratified the contract entered into by their agent; but neither this ratification nor the original contract was under the seal of the Corporation.

An action by the Corporation for specific performance was dismissed.

Kidderminster (*Mayor*) v. *Hardwick*, L. R. 9 Ex. 13, and *Oxford* (*Mayor*) v. *Crow*, 42 W. R. 200, [1893] 3 Ch. 535, followed.

Bolton Partners v. *Lambert*, 37 W. R. 434, 41 Ch. D. 295, distinguished.—*Athy Guardians* v. *Murphy*, V.C. (Ir.)

5. *Rescission—Unconscionable bargain—Unclaimed property—Champerty.*—The defendant, knowing of unclaimed real estate in the hands of the public trustee in New Zealand, and having ascertained that two ladies were the co-heiresses of the last known owner, induced them, on consideration of his divulging to them particulars of the property, to enter into a written agreement to give him half the property recovered, after payment thereout of costs. There was also a verbal arrangement that the defendant should assist in recovering the property. The co-heiresses were elderly women in humble circumstances and illiterate, and the defendant did not tell them that the property was of considerable value. The written agreement was prepared by the defendant, and the co-heiresses had no solicitor and no independent advice. The title of the co-heiresses was clear, and the property was obtained without litigation on an *ex parte* application to the public trustee. A portion of the property was divided on the terms of the agreement when the co-heiresses both died. In an action by their executor against the defendant to have the agreement set aside,

Held, (1) that the written agreement was unconscionable, and should be set aside; and that there had been no ratification of it by the co-heiresses as they did not know of their right to have it rescinded; (2) that the contract was also void for champerty by reason of the verbal arrangement as to sharing half the property with the defendant.—*Rees* v. *De Bernardy*, CH.D. ROMER, J.

6. *Sale—Trover—Wrongful sale by co-owner of shares in a ship—Implied contract of sale.*—The plaintiff was the owner of certain shares in a ship. The defendant, who was the managing owner of the ship, being desirous of selling the ship, in a letter addressed to the plaintiff asked her for a bill of sale of her shares. This she refused to give, but subsequently she offered to sell her shares for £100. The defendant, without further communication with her, sold the ship with the consent of all the other co-owners at a price which would have yielded to the plaintiff in respect of her shares a less sum than £100.

Held, that there was an implied contract on the part of the defendant to pay for the shares as upon a contract of sale, and that, though there was no presumption of law that the defendant agreed to pay any price asked, yet, it being found that the price asked was a reasonable one, a presumption arose from the facts of the case that the defendant agreed to pay that price.—*Nicol* v. *Hennessey*, Q.B.D., 584.

7. *Specific performance — Company — Shares — Assignment — Volunteer — Injunction.*—The doctrine that a volunteer cannot hold property, which has been conveyed by way of gift, as against the prior equity of a purchaser for value from the person by whom the conveyance was made, applies to a contract for the sale of shares of a company.—*Graham* v. *O'Connor*, CH.D. KEKEWICH, J.

See also ADMIRALTY, 6; COMPANY, 8, 9, 20, 21, 24, 40; CROWN, 1, 2; DAMAGES, 1, 2; ESTOPPEL, 1; FRAUDS, STATUTE OF; INSURANCE, 2; LOCAL GOVERNMENT, 13; MASTER AND SERVANT, 2, 6; NEGLIGENCE, 4; PRINCIPAL AND AGENT, 2; SPECIFIC PERFORMANCE, 1; TELEGRAPH; VENDOR AND PURCHASER, 9.

CONVEYANCING ACTS.—See BANKRUPTCY, 19; COMPANY, 11; MARRIED WOMAN, 4, 6; MORTGAGE, 8; POWER, 4; VENDOR AND PURCHASER, 3; WILL, 21*a*.

COPYHOLD:—

Heriot—Heriot service—Evidence.—A right to take a heriot as due by heriot service may exist as well in the case of copyhold as in that of freehold tenements of a manor.

Semble, on a question of the right of the lord to take a heriot as due by heriot service presentments of the homage appearing on the court rolls, are not evidence, inasmuch as they relate to a matter of private right in which the other tenants of the manor are not interested.—*Western* v. *Bailey*, Q.B.D.

See also MARRIED WOMAN, 1.

COPYRIGHT:—

1. *Dramatic copyright — Adaptation of dramatic piece — Material alterations — "Author" — Dramatic Copyright Act* (3 & 4 *Will.* 4, c. 15)—*Assignment of provincial rights — Right of assignor to maintain action.*—The adaptor of a play who introduces into his version material alterations is an "author of a dramatic piece" within the Dramatic Copyright Act (3 & 4 Will. 4, c. 15).

The author of such a dramatic piece, having assigned the provincial rights therein, cannot, without the concurrence of his assignee, maintain an action against an infringer of those rights.—*Tree* v. *Bowkett*, CH.D. KEKEWICH, J.

2. *Infringement—Injunction—Unpublished information—Right of property in—Contract—Procuring breach of—Damages—Stock Exchange.*—Under a contract made between the plaintiffs and the Committee of the London Stock Exchange, valuable information as to the prices of stocks and shares from time to time during the day was collected on the Stock Exchange and supplied to the plaintiffs, and printed on tapes and sheets of letterpress in their office. The defendant, having surreptitiously obtained such information, published it in the same form before its publication by the plaintiffs.

Held, that the plaintiffs had a right of property at common law in the information, and were entitled to an injunction to restrain the defendant from infringing that right by continuing to publish it.

In order to support an action for maliciously inducing persons to break their business contracts with the plaintiff, proof of specific damage need not be given; it is sufficient to prove facts from which it may properly be inferred that some damage must result to the plaintiff from the defendant's wrongful acts.—*Exchange Telegraph Co.* v. *Gregory*, C.A.

3. *Musical composition—Dramatic piece—Representation—Notice of reservation—Dramatic Copyright Act*, 1833 (*c.* 5), *ss.* 1, 2—*Copyright Act*, 1842 (*c.* 45), *ss.* 2, 20—*Copyright* (*Musical Compositions*) *Act*, 1882 (*c.* 40), *s.* 2—*Copyright* (*Musical Compositions*) *Act*, 1888 (*c.* 17).—A musical composition must have the characteristics of a dramatic piece in order to come within the Dramatic Copyright Act, 1833. A song that does not require for its representation either dramatic effect or scenery is not a dramatic piece, although it is intended to be sung in appropriate costume on the music-hall stage.

Where a musical composition is published in order to entitle the owner of the right of public representation or performance thereof to sue for penalties for unlicensed performance of such com-

position, the right of representation or performance must have been reserved by notice printed on every published copy under the Copyright Act, 1882, and this is equally required where the musical composition is also a dramatic piece within the Act of 1833. —*Fuller* v. *Blackpool Winter Gardens Co.*, Q.B.D.

4. *Photograph—Author—"Good and valuable consideration"—"For or on behalf of."*—The "author" of a photograph within the meaning of section 1 of the Fine Arts Copyright Act, 1862, is the person who generally controls the operation, and a person who performs the manual operations under his control and direction is not the author.

A portrait taken on the terms that the photographer may sell copies, though without payment by the subject, is made for a "good and valuable consideration" within the proviso in the section; but where it is the intention of the parties that the negative shall be kept by the photographer as his own property, it is not made "for or on behalf of" the subject, and therefore the proviso does not apply.

The words "any other purpose" in section 6 of the Act mean any person other than the author, and consequently include the person photographed. —*Melville* v. *Mirror of Life Co.*, CH.D. KEKEWICH, J.

5. *Photograph—Copy in illustrated paper—Copyright (Works of Art) Act*, 1862 (c. 68).—A drawing on a larger scale of an original photograph was reproduced in an illustrated newspaper by the defendants.

Held, that such reproduction was an infringement of the copyright in the original photograph, and that the defendants were liable to an injunction and penalties and damages under the Copyright Act, 1862.—*Bolton* v. *Aldin*. Q.B.D.

See also PATENT, 7.

CORPORATION:—

1. *Bye-law—Validity of—Betting—Bye-law prohibiting betting in a street or public place—Municipal Corporations Act*, 1882 (45 & 46 *Vict.* c. 50), *s.* 23.—A bye-law made by a borough council under section 23 of the Municipal Corporations Act, 1882, was in the following terms: "Any person who shall frequent and use any street or other public place within the borough of Wolverhampton, either on behalf of himself or of any other person, for the purposes of bookmaking and betting or wagering, or agreeing to bet or wager, with any person shall be liable to a penalty not exceeding £5."

Held, that the bye-law was not unreasonable; and that a person who frequented and used a street in said borough for the purpose of carrying on the business of betting was liable to be convicted under such bye-law, even though he did not in fact thereby create any obstruction or nuisance.—*Burney* v. *Berry*, Q.B.D., 512.

2. *Costs—Abandoned application—Officer*—Quo warranto—*Municipal Corporations Act*, 1882 (*c.* 50), *s.* 225.—A person giving notice of an application for an information in the nature of a *quo warranto* against the holder of a corporate office, is liable for the costs incurred by the defendant, even though the application be afterwards abandoned.—*Ballard* v. *Halliwell*, Q.B.D.

See also ADULTERATION, 3, 5; CONTRACT, 4; ELECTION LAW, 1; LOCAL GOVERNMENT, 5, 6.

COSTS.—See ADMINISTRATION, 1, 8; BANKRUPTCY, 12-15; CORPORATION, 2; COUNTY COURT, 2-5; DIVORCE, 17, 18, 26, 28; PATENT, 1, 5; PRACTICE, 3, 8, 10, 14; PROBATE, 20; RAILWAY, 4; SETTLED LAND, 2; SOLICITOR, 1, 3-13; WILL, 4.

COUNSEL.—See COMPROMISE; COUNTY COURT, 4; SOLICITOR, 6.

COUNTY COURT:—

1. *Appeal—Claim not exceeding £20, but counter-claim exceeding £20—County Courts Act*, 1858 (51 & 52 *Vict.* c. 43), *s.* 120.—Where in an action brought in a county court there is a counter-claim for a sum exceeding £20, there is a right to appeal in respect of the counter-claim, notwithstanding the claim itself was for a sum not exceeding £20.—*Smith* v. *Gill*, Q.B.D., 574.

2. *Costs—Action of tort—Recovery of less than £10—Action which could have been brought in county court—Title to hereditament—Easement—Dispute as to title County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *ss.* 56, 60, 116.—The plaintiff, being the owner in fee of land of a greater annual value than £50, claimed a right by way of easement to a flow of water through a pipe lying in the defendant's land, and brought an action in the High Court for an interference with that right. The defendant denied the plaintiff's title, but paid £2 into court, which the plaintiff took out in satisfaction of his cause of action.

Held, that, as the plaintiff could not have succeeded without proving his title to the easement, the action could not have been brought in the county court, and, therefore, the plaintiff was entitled to his costs of the action.—*Howarth* v. *Sutcliffe*, C.A., 33.

3. *Costs—Administration—Registrar's discretion—County Court Rules*, 1889, *ord.* 50 (*a*), *r.* 20.—In the taxation of an administrator's costs in an administration action as between solicitor and client the registrar can take into consideration the fact of the insolvency of the estate, as one of the "other circumstances" referred to in ord. 50 (*a*), r. 20, of the County Court Rules, 1889.—*Pain* v. *Bowden*, Q.B.D.

4. *Costs—Fees to counsel—Special allowance where no local bar.*—In a taxation of costs in a county court on the higher scale, the special item No. 86 which may be allowed by order of the judge to counsel where there is no local bar in, or within twenty miles of, the court town, can only be allowed once in the same case, although the counsel engaged may have been present in court on more than one occasion.—*Atkinson* v. *Carlisle (Mayor of)*, Q.B.D.

5. *Costs—Remitted action—Costs incurred before and after remittal—Taxation—Right of solicitor to recover—County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 118.—Where an action had been remitted for trial to the county court under section 65 of the County Courts Act, 1888, and tried there, and the solicitor for one of the parties delivered his bill of costs to his client, and no application was made within the proper time to tax the costs;

Held, that, in the absence of such an application to tax, section 118 of the Act did not apply so as to prevent the solicitor from recovering on the untaxed bill of costs.

Held, also, that section 118 did not in any way affect the costs incurred in the High Court before the action was remitted.

Boydell v. *Millar*, 39 W. R. 335, approved.—*Cubison* v. *Mayo*, C.A., 473.

6. *Interpleader—Auctioneer's commission—Independent claims by different parties in respect of sale of same property—County Court Rules*, 1889, *ord.* 27, *r.* 13.—The plaintiffs, a firm of auctioneers, sued the defendant in a county court for commission in respect of the sale of a house. Another firm of

auctioneers claimed from the defendant a different sum for commission in respect of the same sale of the same house.

Held, that the two claims were not opposing or competing, and could not be made the subject of an interpleader order.—*Greatorex* v. *Shackle*, Q.B.D., 47.

7. *Jurisdiction—High bailiff—Neglect to levy—Action for negligence—County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 49.—Section 49 of the County Courts Act, 1888, provides a remedy in the case of the neglect of the high bailiff to levy execution, but the section does not prevent the high bailiff being liable in such a case to an action for damages for failure to perform his statutory duty in the same manner as the sheriff of a county is liable.—*Watson* v. *White*, Q.B.D., 525.

8. *Jurisdiction — Proceeding under Charitable Trusts Act*, 1853—*Title—Rent-charge issuing out of lands—Annual value—Charitable Trusts Act*, 1853 (16 & 17 *Vict.* c. 139), *s.* 41—*County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 60.—An action by trustees of a charity to recover arrears of a rent-charge is not a "proceeding" within section 41 of the Charitable Trusts Act, 1853.

The plaintiffs sought to recover in the county court arrears of a rent-charge of £10 a year issuing out of lands of an annual value of more than £50.

Held, there was no dispute as to the title of the lands, but only as to the rent-charge, and that the jurisdiction of the county court was not ousted.—*Bassano* v. *Bradley*, Q.B.D., 576.

9. *Practice—Action against a county court bailiff—Statutory defence—County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 54—*Special defence, notice of—County Court Rules*, 1889, *ord.* 10, *rr.* 10, 18*a*.—The defence afforded to county court bailiffs by section 54 of the County Courts Act, 1888, being a statutory defence, notice must be given as provided by the County Court Rules, 1889, ord. 10, rr. 10, 18*a*, if a county court bailiff intends to rely on the section as a defence to an action against him.—*Denny* v. *Bennett*, Q.B.D., 333.

10. *Practice — Parties — Joinder of plaintiffs—Action under Employers' Liability Act—County Court Rules*, 1889, *ord.* 3, *r.* 1; *ord.* 44, *rr.* 18, 19.—The plaintiffs in an action brought in the county court under the Employers' Liability Act were the personal representatives of fifty deceased miners who were drowned in consequence of the flooding of a mine.

Held, on the authority of *Smurthwaite* v. *Hannay*, 43 W. R. 113, [1894] A. C. 494, that, notwithstanding ord. 3, r. 1, and ord. 44, rr. 18, 19, of the County Court Rules, 1889, the plaintiffs, having separate causes of action, could not properly be joined in one action.—*Carter* v. *Rigby*, C.A., 566.

11. *Remitting action to county court—Lodging writ and order with registrar—County Courts Act*, 1888 (51 & 52 *Vict.* c. 43), *s.* 66.—Where an order is made under section 66 of the County Courts Act, 1888, remitting an action to the county court, the action does not leave the High Court until the plaintiff has lodged the original writ and the order with the registrar of the county court.—*D'Errico* v. *Samuel*, C.A., 356

See also ADMIRALTY, 2; BANKRUPTCY, 5; PRACTICE, 42.

COVENANT.—See LANDLORD AND TENANT, 7, 8, 9, 13; RESTRAINT OF TRADE; SCHOOL; VENDOR AND PURCHASER, 2, 8.

CRIMINAL LAW:—

1. *Act of gross indecency with a male person—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict.* c. 69), *s.* 11.—Where two male persons are charged in separate counts of the same indictment with the commission of an act of gross indecency the one with the other, the acquittal of the one is not a bar to the conviction of the other.

It is an offence under section 11 of the Criminal Law Amendment Act, 1885, for one male person to procure the commission by another male person of an act of gross indecency with himself, the first of such male persons.—*Reg.* v. *Jones*, C.C.R., 110.

2. *Charge on property to defraud creditors—Bill of sale executed by defendant in pending action—Debtors Act*, 1869 (32 & 33 *Vict.* c. 62), *s.* 13.—The plaintiff in an action to recover unliquidated damages is not a creditor of the defendant within section 13, sub-section (2), of the Debtors Act, 1869, until he has signed judgment. Therefore the defendant in such an action who before judgment has granted a bill of sale over his property with intent to defeat any judgment which the plaintiff may obtain cannot be convicted under that sub-section of having made a charge on his property with intent to defraud the plaintiff.—*Reg.* v. *Hopkins*, C.C.R., 585.

3. *Common assault—Jurisdiction of justices to commit for trial—Proceedings not authorized by party aggrieved—Jurisdiction of grand jury to find true bill*—24 & 25 *Vict.* c. 100, *s.* 46.—An indictment for a common assault may be preferred by a person other than the person aggrieved or someone on his behalf. Where proceedings had been instituted before justices in respect of a common assault without the authority of the person assaulted, and the justices committed the defendant in such proceedings for trial under 24 & 25 Vict. c. 100, s. 46, and a true bill was found by the grand jury:

Held, that the grand jury had acted within its jurisdiction in finding a true bill, and that the defendant had been rightly put upon his trial pursuant to such finding.—*Reg.* v. *Gaunt*, C.C.R.

4. *Cruelty to animals—Domestic animal, what is—Tame Seagull—Cruelty to Animals Act*, 1849 (12 & 13 *Vict.* c. 92), *ss.* 2, 29—*Cruelty to Animals Act*, 1854 (17 & 18 *Vict.* c. 60), *s.* 3.—A seagull had been the property of one A. S. for three years, and was tame. It was kept in a field, with one wing pinioned so that it could not fly, but it could escape by means of a river running through the field. It would come to its owner when called and feed from her hand, and was used by her in her business of a photographer. The respondents were charged on an information with cruelly illtreating the seagull, and were proved to have been guilty of gross cruelty to the bird.

Held, that the seagull was not a "domestic animal" within the meaning of 12 & 13 Vict. c. 92, s. 29, and 17 & 18 Vict. c. 60, s. 3, and that the respondents therefore could not be convicted on the information.—*Yates* v. *Higgins*, Q.B.D., 336.

5. *Debtors Act*, 1869 (32 & 33 *Vict.* c. 62), *s.* 11—*Public examination of bankrupt—Admissions—Parol evidence—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 17.—At the public examination of a bankrupt under section 17 of the Bankruptcy Act, 1883, a shorthand writer took down the evidence given by him, and made a transcript of it; the transcript was not read over to or by or signed by the bankrupt, and the public examination was adjourned *sine die*. The bankrupt was afterwards tried upon an indictment charging him with misdemeanours under section 11 of the Debtors Act,

1869, and at the trial the shorthand writer gave parol evidence of admissions made by the bankrupt at the public examination tending to establish the misdemeanours with which he was charged.

Held, that the evidence was rightly admitted.—*Reg.* v. *Erdheim*, C.C.R., 607.

6. *Larceny—Delivery of chattel under common mistake — Subsequent fraudulent appropriation by recipient.*—The prosecutor, intending to discharge a debt of £2 due by him to the prisoner, handed the prisoner two bank-notes (Irish), both of which were then, alike by the prosecutor and the prisoner, thought to be £1 notes. One of the notes was in fact a £10 note. The prisoner afterwards discovered its true value, and fraudulently appropriated it to his own use.

Held, that the prisoner could not be convicted of larceny.

Reg. v. *Ashwell*, 34 W. R. 297, 16 Q. B. D. 190, considered.—*Reg.* v. *Hehir*, C.C.R. (Ir.).

7. *Larceny—Verdict—Absence of finding as to felonious intent—Conviction.*—At the trial of a prisoner on an indictment for larceny no evidence (except as to character) was called for the defence. In reply to a question from the presiding judge, the jury said they were not agreed on their verdict. He then asked them if they believed the evidence for the prosecution, and they replied that they did. The judge directed that this statement by the jury amounted to a verdict of guilty, and it was so recorded.

Held, that the effect of the judge's ruling was to supply a finding that the prisoner had a felonious intent; that he had exceeded his functions in so doing; and that the conviction was bad.—*Reg.* v. *Farnborough*, C.C.R., 48.

8. *Obtaining money by forged instrument—Forged telegram—Forgery Act*, 1861 (24 & 25 *Vict. c.* 98), *s.* 38.—The prisoner was indicted under section 38 of the Forgery Act, 1861, for obtaining money by means "of a certain forged instrument—to wit, a forged telegram." It appeared that the prisoner, who was a clerk in a post-office, sent to a bookmaker a telegram, by which he offered to bet a sum of money that a certain horse would win a certain race. The telegram purported to have been handed in for transmission before the race was run, and the bookmaker accepted the bet on that footing, and ultimately paid the money. The telegram was in fact sent by the prisoner after the race had been run, and after he had learnt that the horse in question had won.

Held (by Hawkins, Mathew, and Wills, JJ.; Lord Russell of Killowen, C.J., and Vaughan Williams, J., doubting), that the telegram was a forged instrument within the meaning of section 38 of the Forgery Act, 1861, and that the indictment was good.—*Reg.* v. *Riley*, C.C.R., 318.

9. *Rape and indecent assault—Evidence—Particulars of complaint made by prosecutrix—Admissibility.*—Upon the trial of a prisoner on a charge of rape or indecent assault or kindred offences against women the particulars of a complaint made by the prosecutrix as soon as possible after the acts complained of may be given in evidence as part of the case of the prosecution for the purpose of enabling the jury to judge whether the conduct of the prosecutrix was consistent with her sworn testimony that the acts complained of were done against her will.—*Reg.* v. *Lillyman*, C.C.R., 654.

10. *Wounding—Aiding and abetting—Indictment for felonious wounding—Conviction for misdemeanour only—Prevention of Offences Act*, 1851 (14 & 15 *Vict. c.* 19), *s.* 5—*Accessories and Abettors Act*, 1861 (24 & 25 *Vict. c.* 94), *s.* 8.—Where a prisoner is indicted for felonious wounding, and is convicted only of the misdemeanour of unlawful wounding, a person who is indicted with him for aiding and abetting the felony may be convicted of aiding and abetting the misdemeanour.—*Reg.* v. *Waudby*, C.C.R., 64.

See also EXTRADITION, 1.

CROWN:—

1. *Military service—Engagement made with military officer by the Crown—Petition of right.*—No engagement made by the Crown with any of its military or naval officers in respect of services either present, past, or future, can be enforced in any court of law.—*Mitchell* v. *Regina*, C.A.

2. *Prerogative—Servant of the Crown—Civil servant — Contract for personal service — Appointment held during pleasure.*—The prerogative of the Crown to dismiss its servants at pleasure applies to all public servants under the Crown, whether military or civil, unless there be some statutory provision for a higher tenure.

Where an authority representing the Crown appoints a person as a servant of the Crown in terms for a certain number of years, there must be taken to be imported into such appointment the right of the Crown to dismiss at pleasure, and no petition of right lies against the Crown in respect of such dismissal.

If any authority representing the Crown were to exclude such right by express stipulation, it would be a violation of public policy, and could not derogate from the power of the Crown.—*Dunn* v. *Regina*, C.A., 243.

DAMAGES:—

1. *Measure of — Contract — Company — Shares — Option to take—Breach of contract to allot—Sale of assets of company—Purchase-money—Value of shares at date of breach.*—Where a company, having agreed to give to certain persons an option or call upon certain of its shares at a specified price per share, extending to a particular date, subsequently and before the expiration of the stipulated period entered into a contract with another company for the sale and transfer of its assets to that company, thereby causing a breach of the contract creating the option, it was

Held (reversing Vaughan Williams, J.) that, in estimating the damages, if any, sustained by the option-holders by reason of such breach of contract, the price paid for the assets by the purchasing company ought alone to be taken into account, and not the assets comprised in the contract with that company.

Per Vaughan Williams, J.: The contract creating the option to call upon shares in the company was not illegal or *ultra vires* either of the company or of the directors.—*South African Trust Co., Re, Hirsch, Ex parte*, C.A.

2. *Measure of—Contract—Sale of goods to be delivered at future time — Repudiation by buyer — Acceptance of repudiation by bringing action—Subsequent re-sale by seller.*—By a contract, made on the 24th May 1895, the defendants purchased from the plaintiffs a cargo of maize, to be shipped from a port in the Argentine Republic about the 15th July. The market was then falling, and on the 28th May the buyers repudiated the contract, and on the 24th July the plaintiffs brought this action for damages for non-acceptance of the goods. The prices at that time were falling continuously, and there was no prospect of their recovery. If the plaintiffs had

re-sold about the 24th July, when they brought this action, the loss on the contract price of the cargo would have been £1,557, but they did not re-sell until the vessel and cargo arrived at her port of call on the 5th Sept., when the loss was £3,807.

Held, that the measure of damages was the sum of £1,557, being the difference between the contract price and the market price on the 24th July, when the plaintiffs accepted the defendants' repudiation by bringing this action, as, having regard to the falling prices, the plaintiffs ought to have re-sold at that time, and ought not to have waited until the arrival of the cargo on the 5th Sept.—*Roth* v. *Taysen*, Q.B.D.

3. *Measure of—Master and servant—Sum paid by master to servant for injury—Defect in plant—Warranty—Remoteness.*—The plaintiffs, who were stevedores, undertook to unload the defendant's ship. The defendant supplied the necessary chains and other plant. One of the chains was unsound and broke, thereby injuring a workman in the plaintiffs' employ. The workman sued the plaintiffs under the Employers' Liability Act, 1880, and the plaintiffs settled the action for an admittedly reasonable sum.

In an action by the plaintiffs to recover that sum from the defendant, it was admitted that the defendant had warranted the chain to be fit for the purpose for which it was to be used, and that there had been a breach of that warranty. It was also admitted that the plaintiffs might, by the exercise of reasonable care, have discovered the defect in the chain.

Held (affirming the judgment of Charles, J., 43 W. R. 528), that the plaintiffs were entitled to recover, as damages for the defendant's breach of warranty, the sum paid by them in settlement of their workman's claim.—*Mowbray* v. *Merryweather*, C.A., 49

4. *Measure of damages—Trespass—Injury to land—Deposit of spoil on land.*—The defendants, who were colliery owners, had committed a trespass on the plaintiffs' land by depositing spoil thereon from their colliery for a number of years. Further tipping having been restrained by injunction, and an inquiry as to damages having been directed,

Held, that the true measure of damages was the value of the land to the trespasser for the purposes for which he had used it.

The principle of the wayleave cases—*Jegon* v. *Vivian*, 19 W. R. 365, L. R. 6 Ch. 742; *Livingstone* v. *Rawyards Coal Co.*, 28 W. R. 357, 5 App. Cas. 25; and *Phillips* v. *Homfray*, L. R. 6 Ch. 770, 20 W. R. Dig. 121—applied.

Decision of Chitty, J. (*ante*, p. 459), affirmed.—*Whitwham* v. *Westminster Brymbo Coke and Coal Co.*, C.A., 698.

See also LANDLORD AND TENANT, 13; NEGLIGENCE, 3.

DEBTOR'S ACT.—See CRIMINAL LAW, 2, 5.

DESIGN.—See PATENT, 6, 7.

DETINUE:—

Trover—Finding of goods—Title of finder—Rings found in pool—Title of owner of pool as against finder.—Where an owner of land has a *de facto* possession of the land and an actual control over the same, a chattel found upon or beneath such land is presumed to be in the possession of the owner of the land, who can claim possession of the chattel from the finder.—*South Staffordshire Waterworks Co.* v. *Sharman*, Q.B.D., 653.

DIVORCE:—

1. *Adultery — Conduct conducing to adultery—Verdict of jury—Discretion—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.—On a petition by a husband for the dissolution of his marriage, adultery by the wife was admitted, but the jury found that the petitioner had been guilty of "wilful neglect or misconduct conducing to the adultery" within the meaning of section 31 of the Matrimonial Causes Act, 1857.

It appeared that the parties were domestic servants. The respondent had had an illegitimate child by the petitioner before the marriage. During their married life, between 1883 and 1894, the petitioner was abroad for long periods with his master; and the respondent meanwhile kept a lodging-house, the petitioner remitting to her regularly an adequate weekly allowance. The parties lived unhappily owing to the enforced separation. In 1894 a child was born, the result, as the respondent admitted, of the adultery imputed to her in the petition.

The court, notwithstanding the verdict of the jury, pronounced a decree nisi for the dissolution of the marriage, but directed that it should not be made absolute until the petitioner had secured to the respondent, by a proper deed, the annual sum of £20, payable in equal monthly instalments, commencing from the date of the decree nisi, during their joint lives, *dum sola et casta vixerit.*—*Parry* v. *Parry*, P.D. & AD.D.

2. *Alimony—Increase—Husband relieved of obligation to support children.*—If the husband is relieved of the obligation of supporting his children by reason of the custody of the children being given to the wife, his faculties are thereby increased, and the court can increase the permanent alimony already given the wife.—*Halligan* v. *Halligan*, C.A. (Ir.).

3. *Alimony, Permanent—Dissolution of marriage—Practice—Injunction—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32.—Where a wife having obtained a decree nisi for the dissolution of her marriage, an order had been made pursuant to section 32 of the Matrimonial Causes Act, 1857, that the husband should secure a sum for her maintenance, and that, for that purpose, it should be referred to one of the conveyancing counsel of the Chancery Division to draw a deed, the court granted an injunction restraining the husband, his servants and agents, from dealing with certain of his property until the execution of the deed.—*Newton* v. *Newton*, P.D. & AD.D.

4. *Cruelty—Husband charged by wife with committing an unnatural offence—Charge persisted in after verdict of jury acquitting husband—Restitution of conjugal rights—Judicial separation—Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68) *s.* 5.—*Per* Lindley and Lopes, L.JJ.—To constitute legal cruelty there must be danger to life, limb, or health bodily or mental, or a reasonable apprehension of it.

Per Rigby, L.J.—There may be exceptional cases in which, without bodily injury or threat of it, the injury to mental feelings may be legal cruelty.

Where a wife persisted in charging her husband with having committed an unnatural offence of which he had been acquitted by the verdict of a jury,

Held (Rigby, L.J., dissenting), that such conduct on the part of the wife did not amount to legal cruelty, and formed no ground for granting the husband a decree of judicial separation; but

Held also (by Lindley, Lopes, and Rigby, L.JJ.), that the wife's conduct disentitled her to a decree for restitution of conjugal rights, inasmuch as, since the Matrimonial Causes Act, 1884, the court, by necessary implication, had power to refuse a decree for restitution wherever the result will be to compel the court to treat one of the spouses as deserting the other without reasonable cause, contrary to the real truth of the case.—*Russell* v. *Russell*, C.A., 213.

5. *Desertion—Restitution of conjugal rights—Conduct of petitioner—Matrimonial Causes Act*, 1884 (*c.* 68), *s.* 5.—In a suit for restitution of conjugal rights, brought by a second wife, it appeared that differences had arisen between her and her husband, due to her inability to agree with her step-children, his daughters by the former marriage, and that she had in consequence left her home, and her husband had refused to receive her back.

Held, on consideration of the evidence, that the wife had done nothing to disentitle her to maintain a suit for desertion without reasonable cause, within the meaning of section 5 of the Matrimonial Causes Act, 1884, as interpreted by the Court of Appeal in *Russell* v. *Russell* (*ante*, p. 213, [1895] P. 315), and that she was therefore entitled to a decree for restitution of conjugal rights.—*Oldroyd* v. *Oldroyd*, P.D. & AD.D.

6. *Judicial separation—Alimony* pendente lite—*Application for injunction.*—Where in a suit for judicial separation the wife obtained an order for alimony *pendente lite*, the court refused to grant an injunction restraining the husband from parting with his property.—*Carter* v. *Carter*, P.D. & AD.D., 400.

7. *Judicial separation—Desertion—Limitation of time for proceedings—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 4—11 & 12 *Vict. c.* 43, *s.* 11.—For the purpose of proceedings under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, the desertion of a married woman by her husband is a continuing act; an application by the wife for an order under that section need not, therefore, be made within six months of the commencement of the desertion.—*Heard* v. *Heard*, P.D. & AD.D.

8. *Judicial separation—Justices—Jurisdiction—Aggravated assault.*—Where a separation order containing only a provision for the custody of children has been made by justices, there is no jurisdiction to make a subsequent order for maintenance.—*Woodhead* v. *Woodhead*, P.D. & AD.D.

9. *Judicial separation—Justices—Maintenance—Neglect to provide—Evidence of means—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 4—*Appeal—Costs of wife when unsuccessful respondent.*—Upon the hearing by a court of summary jurisdiction of a summons taken out by a married woman under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, charging her husband with wilful neglect to provide reasonable maintenance for her, the court, before making an order, must be satisfied that the husband either is in receipt of actual earnings, or has the capability of earning a livelihood; evidence of means cannot be entirely dispensed with.

Where a married woman is an unsuccessful respondent in an appeal to the Probate, Divorce, and Admiralty Division under the Summary Jurisdiction (Married Women) Act, 1895, the court, without laying down any binding rule of practice, will in ordinary cases follow the practice in matrimonial causes, and order her costs of the appeal to be paid by the husband.—*Earnshaw* v. *Earnshaw*, P.D. & AD.D.

10. *Judicial separation — Justices — Persistent cruelty—Summary Jurisdiction (Married Women) Act*, 1895 (*c.* 39), *s.* 4.—The words "whose husband shall have been guilty of persistent cruelty" in section 4 of the Summary Jurisdiction (Married Women) Act, 1895, are retrospective, and the cruelty relied on may be before the commencement of the Act.—*Lane* v. *Lane*, P.D. & AD.D.

11. *Judicial Separation — Justices — Summary Jurisdiction (Married Women) Act*, 1895—*Appeal—Findings of fact and of law—Notes in court below—Costs of notes of evidence and of grounds of decision.*—Upon appeals under the Summary Jurisdiction (Married Women) Act, 1895, the Divisional Court will not reverse a finding of fact, unless it be shown that the court of summary jurisdiction was clearly wrong in the conclusion at which it arrived.

In administering the Summary Jurisdiction (Married Women) Act, 1895, courts of summary jurisdiction should be careful not to interfere too much in matrimonial life.

Magistrates' clerks should take notes of the evidence and of the grounds upon which decisions are based, and the costs of such notes will be allowed in the costs of appeals under the Act.—*Harling* v. *Harling*, P.D. & AD.D.

12. *Maintenance — Alienability — Matrimonial Causes Act*, 1866 (29 & 30 *Vict.* c. 32), s. 1.—Maintenance granted to a divorced wife under section 1 of 29 & 30 Vict. c. 32, cannot be prospectively released or assigned.—*Watkins* v. *Watkins*, C.A., 677.

13. *Nullity—Duress.*—On the trial of a petition for a declaration of nullity of marriage, on the ground of duress, the following facts appeared. The petitioner, a girl of seventeen, went through the ceremony of marriage with the respondent in a church on the 5th of June, 1889. He was a friend of her brother's. She had met him only a few times, and he had never spoken to her of marriage, or professed affection for her. She stated that on the day in question her mother told her that they were going for a drive, and that they drove to the church, where they found the respondent; that she thought she was being betrothed to him, and would not have submitted even to that if she had not been so much under her mother's influence, that she did what she was told; that, on leaving the church, she threw away the ring; that she had never seen the respondent since; and that none of her family then knew what had happened except her mother, who died in 1890. A few days before, the respondent had obtained a marriage licence, falsely stating in his affidavit that the petitioner's father consented to the marriage. On the 5th of June he sailed for South Africa with the petitioner's brother, and on their arrival told him of the marriage. Her brother returned in 1889, but did not mention the matter to any member of his family except his mother, who told him to say nothing about it. In 1893 the petitioner went through the ceremony of marriage with another man. In the same year the respondent wrote to her father from South Africa, claiming her as his wife.

The court, upon consideration of the evidence, found that the petitioner had never consented to marry the respondent, but had gone through the ceremony as one of betrothal, and in doing so had been to such an extent under the influence of her mother and the respondent that she was not a free agent, and granted a decree *nisi* of nullity.—*Ford* v. *Stier*, P.D. & AD.D.

14. *Nullity—Fraud and duress.*—Petitioner was induced by her mother, acting in concert with respondent, to go through the marriage ceremony with respondent; the petitioner being persuaded by her mother that it was only a betrothal ceremony:

Held, entitled to a decree of nullity.—*Clarke* v. *Clarke*, P.D. & AD.D.

15. *Practice—Co-respondent—Necessity for making a person co-respondent—Inability to prove adultery—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *ss.* 28, 33.—Where the relief sought by the petitioner is on the ground of adultery alleged to have been committed with a man, who is alive, and whose name and identity are known, the petitioner must make that person a co-respondent; and the court ought not to excuse him from so doing merely because he finds that he cannot obtain evidence which will prove his case as against that co-respondent.—*Jones* v. *Jones*, P.D. & AD.D.

16. *Practice—Co-respondent—Substituted service—Necessity of affidavit by petitioner—Rules of* 1865, *rr.* 10, 11, 12, 13.—On an application to allow substituted service of a petition on a co-respondent, there should be an affidavit by the petitioner.—*Williams* v. *Williams*, P.D. & AD.D.

17. *Practice—Costs—Agreement for settlement of action—Costs of preparation and execution of separation deed.*—In an action for judicial separation the parties mutually agreed to a separation by deed and to the settlement of the action, the respondent paying the petitioner's costs of suit, and the terms of the agreement being made a rule of court.

Held, that the costs of settling the deed were not costs of suit, but might have been provided for in the agreement; as they were, however, not provided for, the court had no jurisdiction over them.—*Lancaster* v. *Lancaster*, C.A., 440.

18. *Practice—Costs—Solicitor—Pauper—Petition by husband suing* in formâ pauperis—*Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 51.—Section 51 of the Divorce Act, 1857, gives the court a discretion as to costs. The best exercise of such discretion, except under special circumstances, is to follow the rule laid down in *Carson* v. *Pickersgill & Sons*, 33 W. R. 589, 14 Q. B. D. 859, and to allow a husband suing *in formâ pauperis*, or his solicitor, only out-of-pocket expenses, including a reasonable sum for office expenses, against the co-respondent.

The adoption of such rule is intended to introduce a new uniform rule into all the divisions of the High Court.—*Richardson* v. *Richardson*, C.A., 102.

19. *Practice—Evidence—Decree in previous suit.*—On a petition by a wife for dissolution of her marriage on the ground of adultery coupled with desertion, the decree in a previous suit in which her husband had been co-respondent was produced. This decree stated that the jury found that the respondent had been guilty of adultery with the co-respondent, and that he had been condemned in costs, but contained no finding by the jury that the co-respondent had been guilty of adultery with the respondent:

Held, that the decree was not by itself sufficient evidence of adultery against the husband.—*Ruck* v. *Ruck*, P.D. & AD.D.

20. *Practice—Evidence—Identification—Use of photographs.*—In matrimonial cases, except under very special circumstances, the court will not act upon identification by a photograph only.—*Frith* v. *Frith*, P.D. & AD.D.

21. *Practice—Evidence—Judge's note of evidence—Admissibility—Divorce bill—Substituted service—Deceased witness.*—A certified copy of the judge's notes of the evidence of a witness called by the petitioner at the hearing of a petition for divorce *a mensâ et thoro* cannot, in case of the death of the witness, be received as proof of the matters deposed to by him upon the second reading of a bill for divorce presented by the petitioner.—*Griffin's Divorce Bill, Re*, H.L.

22. *Practice—Evidence—Motion to dispense with co-respondent—Confirmation.*—On a motion to dispense with co-respondents, the affidavit of the petitioner alone is not sufficient; such affidavit must be confirmed by further evidence.—*Barber* v. *Barber*, P.D. & AD.D.

23. *Practice—Sequestration—Right of sequestrators—Money held by third person, not party to the action—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 52.—The right of sequestrators to attach moneys, alleged to be held by third persons for the judgment debtor, but denied by them to be so held, cannot be determined upon a motion in a suit to which the third persons are not parties, unless they appear and submit to the jurisdiction of the court.

A co-respondent in a divorce suit not having paid the damages assessed against him by the jury, a writ of sequestration was issued against his property, in pursuance of which the sequestrators applied by a motion in the suit for an order calling upon the trustees of his marriage settlement to pay into court any moneys in their hands belonging to him. The trustees disputed their liability to the co-respondent, and the jurisdiction of the court to make the order:

Held, that, as the trustees were not parties to the suit, and disputed their liability to the co-respondent, and the jurisdiction of the court, the court had no power to make the order on motion in the suit.—*Craig* v. *Craig*, P.D. & AD.D.

24. *Queen's Proctor—Intervention—Unreasonable delay in presenting petition—Questions for jury—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 31.—In a suit by a husband for a dissolution of marriage, if the Queen's Proctor intervenes on the ground of unreasonable delay in presenting the petition,

Held, that the proper questions to be put to the jury are—(1) When did the petitioner first know or have reason to believe that his wife had committed adultery? (2) when did the petitioner first take action to obtain a divorce?.—*Brougham* v. *Brougham*, P.D. & AD.D.

25. *Variation of settlements—Acceleration of infant's interest by divorce of parents—Powers of petitioner.*—Upon a petition to vary two post-nuptial settlements after decree absolute for divorce, it appeared that the whole property was in land, and that, if the respondent's interests were extinguished, the petitioner would, by virtue of a clause in one of the settlements, have power to call upon the trustees to raise forthwith a sum which, at the present time, would exceed the sale value of the whole of the settled property, and which would, therefore, if exercised by the petitioner, absolutely blot out all interests of the infant child of the parties under the settlements. The registrar, notwithstanding this, recommended that the respondent's interests should be extinguished as if he were dead.

Held, that, inasmuch as the child's interest was accelerated by the extinguishment of the respondent's interests, the child was thereby obtaining a certain gain against an uncertain loss if the petitioner should now exercise the power conferred upon her by the settlement

Report of the registrar confirmed.—*Creagh* v. *Creagh*, P.D. & AD.D.

26. *Variation of marriage settlements — Consent order — Mistake — Amendment of original order — Subsequent circumstances—Further references—Order —Costs out of settled fund.*—The court, upon the application of the testamentary guardians of an infant child of the marriage of the petitioner and respondent, directed, after various references to the registrar, that an order, made by Butt, J., in 1886, upon the consent of the petitioner, respondent, and trustees of the marriage settlement, be amended by extinguishing the respondent's interest in a portion of the settled funds; and further directed that the costs of all parties be paid out of the said portion of the trust funds or the income thereof.—*Arkwright* v. *Arkwright*, P.D. & AD.D.

27. *Variation of settlements—Death of petitioner—Application to make executor party—Divorce Act*, 1859 (*c.* 61), *s.* 5—*Divorce Act*, 1878 (*c.* 19), *s.* 3.—The Divorce Court has no power, either under section 5 of the Act of 1859 or section 3 of the Act of 1878, to order the executor of a deceased husband petitioner to be made a party for the purposes of continuing proceedings for variation of settlement. —*Thomson* v. *Thomson*, C.A.

28. *Variation of settlements—No means, except income from settled property—Costs directed to be paid out of corpus of settled property*—22 & 23 *Vict.* *c.* 61, *s.* 5.—The petitioner, a widow with one child by her first husband, settled, upon her second marriage, certain property, producing an annual income of about £750, upon trust to pay the income to herself for her life; then to her husband, the respondent, for his life, and, in the events which happened, with remainder to her said only child, if he should attain twenty-one, with ultimate remainder to the petitioner. The petitioner obtained a decree absolute dissolving her marriage, and, in her petition to vary the settlement, she prayed that the respondent's life interest in the trust funds should be extinguished; and, further, that the trustees should be ordered to pay to her a sum of £1,000, or such other sum as the court should direct, to cover the costs and other incidental and additional expenses of the petitioner, arising out of the respondent's misconduct. The registrar reported in favour of the first, but submitted, in regard to the second, part of the prayer, that, as it would be to some extent prejudicial to the child's interests, no order ought to be made directing any payment out of the corpus of the fund until the infant was represented. Upon motion to vary the registrar's report, the court ordered an adjournment, so that the infant might be represented, and thereupon made an order extinguishing the respondent's interests, and directing the trustees to raise and pay to the petitioner a sum of £450 to cover costs, including the costs of this application.—*Douglas* v. *Douglas*, P.D. & AD.D.

See also MARRIED WOMAN, 10; PRACTICE, 2, 12.

DOG:—

1. *Animal—Negligence—Negligently keeping a ferocious dog*—Scienter—*Disposition to bite mankind.* —Where a claim is made for injuries caused by a dog to a human being, the evidence of *scienter* must show not only that the dog had a ferocious disposition, but that it had a ferocious disposition against mankind. Proof, therefore, that the dog had worried a goat was not sufficient evidence of *scienter* to make the defendant liable.—*Osborne* v. *Chocqueel*, Q.B.D., 575.

2. *Innkeeper—Liability of innkeeper for injuries caused by a dog*—28 & 29 *Vict.* *c.* 60.—An innkeeper is, by reason of section 2 of 28 & 29 Vict. c. 60, deemed to be the owner of a dog living in his hotel, and is liable for injuries to cattle caused by it, notwithstanding the dog was at the time of the injuries complained of under the control of a person staying at the hotel, to whose care it had been committed by the real owner.—*Gardner* v. *Hunt*, Q.B D., 527.

See also INLAND REVENUE, 7.

DONATIO MORTIS CAUSÂ:—

1. *Antecedent delivery—Change in character of possession.*—A person, not in contemplation of death, gave a deposit note to her mother to take care of for her. Some time afterwards, the note having remained all the time in the mother's possession, the donor, who was then in contemplation of death, and died a few days afterwards, gave the note absolutely to the mother in case she, the donor, should not recover.

Held, that this latter gift, by changing the character in which the mother already held possession of the note, was a sufficient delivery for the purpose of an effective *donatio mortis causâ*.—*Cain* v. *Moon*, Q.B.D.

2. *Deposit receipt—Unendorsed.*—A deposit receipt unendorsed is a good subject matter of *donatio mortis causâ*.

Duffield v. *Elwes* (1 Bli. N. S. 497) applied.—*Porter* v. *Wulsh*, C.A. (Ir.).

3. *Deposit receipt—Suicide contemplated—Public policy.*—The owner of a deposit receipt gave the document to her sister, the donor at the time of the gift contemplating suicide and intending the gift to take effect only in that event. The donor did commit suicide.

Held, that the gift under such circumstances did not constitute a valid *donatio mortis causâ*.—*Agnew* v. *Belfast Banking Co.*, C.A. (Ir.).

DOWER.—See INTESTATES ESTATES ACTS, 1.

EASEMENT:—

Prescription—User—Presumption in law of lost grant.—S. was the owner and occupier of three locks on a certain river, and certain navigation and other rights on the same river. The G. Corporation had for many years exercised the right to open the lock-gates in all times of flood, without opposition from S.'s predecessors in title. S. brought an action to restrain the defendants from exercising any such right. The G. Corporation, as owners of the adjoining lands at this part of the river, claimed an easement to open the gates, or, alternatively, the presumption of a lost grant.

Held, that a valid easement had been created in favour of the G. Corporation, and that such could be supported by the presumption of a lost grant.—*Simpson* v. *Godmanchester* (*Mayor of*), C.A., 149.

See also COUNTY COURT, 2; LIGHT; RAILWAY, 7; SOLICITOR, 11.

ECCLESIASTICAL LAW:—

1. *Benefice—Augmentation by bishop—Charge on lands—Arrears—Release of part of lands—Tenant of residue—Liability*—29 *Car.* 2, *c.* 8.—An augmentation having been granted under the Acts, 29 Car. 2, c. 8, and 1 & 2 Wm. 4, c. 45, and charged on certain lands, a portion of such lands was acquired by the predecessors of the defendant, who was tenant for life in possession, under a contract whereby they released the residue of the lands from the burden of the charge and indemnified the owners against it.

An action was brought to recover arrears of the augmentation from the defendant.

Held, that the defendant was liable for the whole amount of the charge, notwithstanding the fact that the annual profits of his lands fell short of the amount of the charge.—*Pertwee* v. *Townsend*, Q.B.D.

2. *Clergy Discipline Act*, 1892 (55 & 56 *Vict.* c. 32), ss. 2, 12—*Clergy Discipline Act*, 1892, *Procedure Rules*, r. 34—*Simony*—*False declaration under Clerical Subscription Act*, 1865 (28 & 29 *Vict.* c. 122)—*Meaning of "offence against morality not being a question of doctrine or ritual."*—The 2nd section of the Clergy Discipline Act, 1892, provides, *inter alia*, that if a clergyman is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted by any person approved by the bishop, and tried in the Consistory Court of the diocese in which he holds preferment; and by the 34th rule of the Procedure Rules made under the Act, a clergyman holding no preferment may be prosecuted under the Act in the Consistory Court of the diocese in which he resides.

The complaint in a criminal suit lodged in the registry of the Consistory Court of London at the instance of a person approved by the bishop, charged the defendant, a clergyman resident in the diocese, with having been guilty of offences against the laws ecclesiastical, being offences against morality and not being a question of doctrine or ritual, by having within the five years last past, and within the diocese, been guilty of simony, and knowingly made a false declaration against simony under the Clerical Subscription Act, 1865. The defendant brought in an answer denying that the offences alleged in the complaint were offences against the laws ecclesiastical, being offences against morality within the meaning of the 2nd section of the Clergy Discipline Act, 1892, and at the hearing of the issues of law raised on the pleadings, contended that the Consistory Court of London had no jurisdiction to entertain the suit.

Held, by the Ordinary, that the Consistory Court of London had jurisdiction in the suit under the Clergy Discipline Act, 1892.—*Lee* v. *Flack*, P.D. & AD.D.

3. *Faculty—Exclusive right to use of pathway across closed churchyard—Construction of faculty—Refusal to grant subsequent faculty derogating from previous grant—Ecclesiastical Leasing Acts*, 1842 *and* 1858 (5 & 6 *Vict.* c. 108; 21 & 22 *Vict.* c. 57)—*Practice—Refusal of Appellate Court to interfere with discretion of ordinary.*—In 1891 a faculty issued from the registry of the Consistory Court of London authorizing the rector and churchwardens of a parish in the City of London, in conjunction with a company owning premises abutting on the churchyard of the parish—a churchyard closed for burials under Order in Council—to make a pathway enclosed on the sides by railings, across the churchyard from the company's premises to a public thoroughfare on the opposite side of the churchyard, provided a specified rent was paid to the rector and his successors during a term of years. The faculty recited an agreement between the rector and churchwardens and the company whereby the former agreed to concur in granting to the company a right of way over the pathway afterwards authorized by the faculty for the term, and on payment of the rent there mentioned: all the works to be done at the company's costs, and "such right of footway to be for themselves their tenants and any others authorized by them in common with the rector and churchwardens and any others authorized by the rector and churchwardens." In 1892, after the company had done and paid for the works and whilst the term of years was still unexpired, the rector and churchwardens agreed with other owners of premises abutting on the churchyard adjacent to the company's premises to concur in granting to such owners a right of footway over the pathway made under the faculty of 1891, subject to the rights of the company, and also over a new footpath to be made over a piece of the churchyard to join the footpath so already made, and petitioned the Consistory Court of London for a faculty to make a new footpath and to remove a portion of the above-mentioned railings; the owners of the premises desiring the right of way over the two footpaths intervening in support of the petition:

Held, by the Consistory Court of London, that the faculty asked for must be refused, as the faculty of 1891 had granted to the company and their assigns the enjoyment for a term of years not yet expired of the pathway made under that faculty to the exclusion of the other occupiers of premises abutting on the churchyard, and the Ordinary ought not to sanction by faculty anything being done in derogation of the exclusive right so granted:

Held, further, by the same court, that the operation of the Ecclesiastical Leasing Acts of 1842 and 1858 is confined to glebe lands and property of that description, and does not extend to enable the incumbent of a parish, with the consent of the patron of the living and the Ecclesiastical Commissioners, to grant leases of or rights over all or any portion of the churchyard of the parish.

Held, on appeal by the Arches Court of Canterbury, that the construction put on that faculty by the court below was correct, and, the grant or refusal of the faculty prayed being in the discretion of the Ordinary, by whom that discretion had been properly exercised, the Appellate Court ought not to interfere, and the appeal must be dismissed.

Observations by the Chancellor of the Diocese of London as to the practice of the Consistory Court of London on the grant of faculties for the formation and use of private pathways across churchyards closed for burials, and as to the provisoes to be inserted in such faculties.—*St. Gabriel, Fenchurch-street* (*Rector*) v. *City of London Real Property Co.*, P.D. & AD.D.

4. *Monition—Jurisdiction—Criminal suit promoted by churchwardens against lay rector to compel repair of chancel.*—The articles in a criminal suit promoted by the churchwardens of a parish against the lay rector of a parish church, charged that the chancel of the church was in a very dilapidated condition, and that the respondent, though legally bound to repair it, had for four years refused and neglected to do so. On the respondent giving an affirmative issue to the articles and submitting to judgment, the Ordinary pronounced that the respondent had offended against the ecclesiastical law, and admonished him to do the repairs required.—*Morley* v. *Leacroft*, P.D. & AD.D.

EDUCATION.—See SCHOOL.

EJUSDEM GENERIS.—See LANDLORD AND TENANT, 9.

ELECTION LAW:—

1. *County council—No election on appointed day—Mandamus—Municipal Corporations Act*, 1882 (45 & 46 *Vict.* c. 50), *s.* 70.—Under section 70 (2) of the Municipal Corporations Act, 1882 (which is incorporated in the Local Government Act, 1888 (51 & 52 Vict. c. 41), by section 75 of that Act) an order for a peremptory *mandamus* to the returning officer to hold an election will issue in the first instance on the *ex parte* application of a duly qualified elector. —*West Sussex County Council, Re*, Q.B.D.

2. *Parliament — Election petition — Corrupt and illegal practices — Particulars of charges — Offences committed after the date of petition.*—In an election petition alleging certain specific offences and "other corrupt and illegal practices before, during, and after the election," the petitioner cannot, unless the petition be duly amended, include in his particulars or give evidence of offences alleged to have been committed subsequent to the date of the presentation of the petition.—*Cremer* v. *Lowles; Haggerston Election Petition, Re*, C.A., 629.

3. *Registration—Parliament—Franchise—Adjudication upon claims and objections—Closing the lists*—6 & 7 *Vict.* c. 18, *s.* 41.—A revising barrister gave notice that his court would be held on two successive days, and that the lists would be closed at the conclusion of the sitting on the second day. On the evening of the second day, having satisfied himself that there were no more claimants or persons objected to present who were desirous of being heard, he declared the lists closed. On the following day the revising barrister sat in court to read the lists and to initial names inserted or expunged. Whilst this was being done a person applied to be heard in support of his claim to be on the list

Held, that the lists having been declared closed, the applicant had no right to be heard in support of his claim.—*Reg.* v. *Soden*, C.A., 449.

4. *Registration—Parliament—Franchise—Notice of objection — Omission — Mistake — Amendment.*—The omission of merely formal matter in a notice of objection to a voter when such omission arises through a mistake, and is not of such a nature as to make it likely to mislead or cause hardship, may, and should, be amended by the revising barrister.

B. served notice of objection to A., whose name was on the list of voters for the parish of St. S. in the parliamentary borough of E. The notice set out the number of A. on the list and the grounds of objection, but omitted to state the parish in the list of which A.'s name appeared, contrary to the form given in the Registration Order, 1895. There were twenty-seven parishes in the borough of E. The revising barrister held that the omission rendered the notice bad, but having found as a fact that it arose through a mistake, and had misled no one and causes no hardship, he amended it and caused no hardship, he amended it and allowed the objection.

Held, that the revising barrister was right.

Bridges v. *Miller* (20 Q. B. D. 287) distinguished. —*Sandford* v. *Beal*, Q.B.D.

5. *Registration—Parliamentary franchise—Occupation elector—Claim for vote in borough—Description of qualification—Two dwelling-houses—Omission in claim of the word "successive"—Power to amend—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict.* c. 26), *ss.* 24, 28 (13)—*Registration Order*, 1895, *Schedule* 3, *Part I., paragraph* 17 (b).—A notice of claim to have claimant's name inserted in the list of occupation electors for a borough was in the following terms:—"(third column) Nature of qualification—Dwelling-house; (fourth column) Description of qualifying property—69, Richmond-road; 3, Hamilton-square." The claimant had in fact occupied during the qualifying period in immediate succession the two houses set out in the fourth column. The claim was objected to on the grounds, first, that it was not a claim for successive occupation, the word "successive" not being inserted in the third column; and, secondly, that the revising barrister had no power to amend the claim by inserting the word "successive." The barrister overruled the objections, and amended and allowed the claim.

Held, (1) (Vaughan Williams, J., *dubitante*) that the notice of claim, on the reasonable construction of its terms, must be taken to be a claim for successive occupation; (2) that having regard, however, to the Registration Order, 1895, Schedule 3, Part I., paragraph 17 (*i*) (*b*), the qualification was not sufficiently described in the claim, which ought to have contained the word "(successive)" in the third column; and (3) that the barrister had power under section 28, sub-section (13), of the Registration Act, 1878, to amend the claim by inserting therein the word "(successive)."

Quære, whether there is any power to amend a claim which, on the reasonable construction of its terms, is equivocal.

Hitchins v. *Brown*, 2 C. B. 25; *Foskett* v. *Kaufman*, 34 W. R. 90, 16 Q. B. D. 279; and *Plant* v. *Potts*, [1891] 1 Q. B. 261, 39 W. R. Dig. 142, discussed.—*Soutter* v. *Roderick*, Q.B.D., 205.

6. *Registration—Parliament—Service franchise—Part of a house — Cubicle — Separate occupation — Occupation as a dwelling—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict.* c. 26), *s.* 5 —*Representation of the People Act*, 1884 (48 *Vict.* c. 3), *s.* 3.—A police constable had the exclusive occupation of a cubicle in a police station. The cubicle was one of a number contained in one room. It was separated off from the rest of the room by a partition seven feet high not reaching to the ceiling, and was entered by a door opening into a passage which passed down the room. The cubicles had air, light, and warmth in common. The whole building was under the control of the chief constable, who could order any constable to change his cubicle at any time. The constable slept in the cubicle, but could not without leave take his meals there or smoke there, or go into it during the day time. He had the key of the door, but he was bound to let the inspector in at any time, and he could be ordered to give up the key.

Held, by the Court of Appeal (Rigby, L.J., dissenting), that the cubicle was not separately occupied by the constable as a dwelling within section 5 of the Parliamentary and Municipal Registration Act, 1878.

Barnett v. *Hickmott*, 43 W. R. 284, [1895] 1 Q. B. 691, approved.—*Clutterbuck* v. *Taylor*, C.A., 531.

7. *Registration — Parochial elector — Freeman—Duty of town clerk—Local Government Act*, 1894 (56 & 57 *Vict.* c. 73), *ss.* 2 (1), 44 (1)—6 & 7 *Vict.* c. 18, *ss.* 47, 48.—A freeman has no right, in default of other qualification, to have his name placed on the list of parochial electors.

Semble, there is no duty imposed on the town clerk in printing the lists of parliamentary electors to place the name of a freeman under some parish. —*Hart* v. *Beard*, Q.B.D., 154.

8. *Registration—Parochial elector—Local government — Woman — Qualification — Ownership—Local Government Act*, 1894 (56 & 57 *Vict.* c. 73), *s.* 2,

sub-section 1; *s.* 43.—A woman is not entitled to be on the parochial electors' register by reason of her ownership of property within the parish.

Decision of the Queen's Bench Division, *ante*, p. 78, [1896] 1 Q. B. 1, affirmed.—*Drax* v. *Ffooks*, C.A., 393.

EMPLOYERS LIABILITY ACTS.—See COUNTY COURT, 10; MASTER AND SERVANT, 1, 4.

ESCHEAT.—See INTESTATES ESTATES ACTS, 2.

ESTOPPEL:—

1. *Contract of indemnity—Evidence as to abandonment of claim.*—The plaintiff and defendant jointly guaranteed to a bank payment of a certain cash bond, the plaintiff agreeing with the defendant to indemnify him from all liability thereunder. Seven years afterwards the bank released the guarantors from liability on payment by each of £1,000.

In a suit by the plaintiff to declare the agreement of indemnity discharged, and to restrain the defendant from continuing his action thereon,

Held, that in the absence of a contract to discharge it, the defendant could not be estopped from enforcing it by any representation, express or implied, of his intention to abandon it. To raise an equity on behalf of the plaintiff there must have been misrepresentation of existing facts.

Jordan v. *Money*, 5 H. L. Cas. 185, approved.—*Chadwick* v. *Manning*, P.C.

2. *Judgment—Privies in estate—Fishery in non-tidal waters.*—A judgment *inter partes* is an estoppel against privies in estate only when the estate has been acquired by the person sought to be estopped subsequent to the date of the judgment.

A claim by an individual to a several fishery in non-tidal waters is not a question of public interest on which a judgment which does not work an estoppel is admissible against strangers. — *De Burgho's Estate, Re*, CH.D. (Ir.)

See also BANKRUPTCY, 5; BILL OF EXCHANGE, 2; COMPANY, 13, 19, 41; PATENT, 4.

EXECUTOR:—

1. *Devisee—Fixtures—Tapestry.*—Tapestry on the walls of a room in a family mansion, which was called the "Tapestry Room," had about a century ago been affixed to the walls of the room in a manner that skilled witnesses said would now be used if it was required to fix tapestry permanently. The mansion-house had been settled by the will of a former owner in strict settlement, but the will made no mention of the tapestry. The tapestry was claimed as a chattel by the residuary legatee of the will as against the devisee of the mansion-house.

Held, that as regards fixtures a claim by an executor against a devisee was on the same footing as a claim by an executor against an heir; that on the evidence in this case the tapestry was a fixture and passed under the devise of the mansion; and that the case fell within the principle of the decisions relating to claims to fixtures as between executor and heir, and was covered by the decision in *D'Eyncourt* v. *Gregory*, 15 W. R. 186, L. R. 3 Eq. 382.—*Norton* v. *Dashwood*, CH.D. CHITTY, J., 680.

2. *Executor and residuary legatee—Equitable charge of assets by executor or legatee—Creditor of testator—Notice—Priority—Right to follow assets.*—Where an executor, who is also residuary legatee, by a legal or equitable assignment and for valuable consideration transfers assets to a person who has no notice of the existence of unsatisfied debts of the testator, or of circumstances rendering such conduct on the part of such executor improper, and such transferee has given proper notice of his charge, such assignment will hold good against the unsatisfied creditors of the testator.—*Graham* v. *Drummond*, CH.D. ROMER, J., 596.

3. *Legacy — Appropriation.* — An executor may appropriate specific shares to a legatee, and even to himself if he is a legatee; and it is not necessary to the validity of such an appropriation that a proportionate amount of the specific shares should at the same time be appropriated to the other legatees. —*Richardson, Re, Morgan* v. *Richardson*, CH.D. NORTH, J., 279.

4. *Retainer—Principal—Surety.*—A testator mortgaged a reversionary interest as surety for his son, and died bequeathing a share of the residue of his estate to this son. After the testator's death the son became a bankrupt (in 1859) and never obtained his discharge. Neither the executors nor mortgagees proved in the bankruptcy. Certain payments were made by the executors and also by beneficiaries under the will to the mortgagees, who, however, ultimately sold the testator's reversionary interest in 1869, and out of the proceeds of sale retained the mortgage debt and handed over the balance to the executors. Upon the testator's residuary estate becoming divisible in 1894,

Held, that the testator's executors were entitled to retain as against the son's share of the residue, the amount of the mortgage debt retained by the mortgagees, and the payments made by the executors to the mortgagees, with interest at 4 per cent., but were not entitled to retain the amount contributed by other beneficiaries, nor to damages caused by the sale of the reversion instead of waiting for it to fall in.—*Watson, Re, Turner* v. *Watson*, CH.D. NORTH, J., 571.

5. *Retainer—Surety—Promissory note—Money due, but not paid—Receiver—Administration—Claim after chief clerk's certificate filed.*—A surety who is one of the executors of a testator is entitled to exercise his right of retainer in respect of the debt for which he is surety, if due though unpaid, out of the assets of the testator paid into court by the executors in an administration action; and such claim is not made too late even if first made after the chief clerk's certificate has become binding.—*Giles, Re, Jones* v. *Pennefather*, CH.D. KEKEWICH, J., 283.

6. *Will—Leaseholds specifically bequeathed—Assent—Vesting—Inland Revenue—Estate Duty—Finance Act*, 1894 (57 & 58 *Vict.* c. 30) *s.* 9 (1).—Leaseholds specifically bequeathed pass to the executor as such, and consequently estate duty upon them is primarily payable out of the general personal estate of testator, as they do not come within the exception in section 9 of the Finance Act, 1894.

Leaseholds specifically bequeathed, upon the assent of the executor, vest absolutely in the specific legatee, and no deed of assignment by the executor is necessary.—*Culverhouse, Re, Cook* v. *Culverhouse*, CH.D. KEKEWICH, J.

See also PROBATE, 18.

EXTRADITION:—

1. *Criminal law—Falsification of accounts—Warrant of committal—Extradition Treaty with France, article* 3, *clauses* 2, 18—*French Code Pénal, art.* 147 —"*Faux en écriture de commerce*"—*Larceny Act*, 1861 (24 & 25 *Vict.* c. 96), *s.* 83—*Falsification of Accounts Act*, 1875 (38 & 39 *Vict.* c. 24), *s.* 1—*Extradition Acts*, 1870 (33 & 34 *Vict.* c. 52) *and* 1873 (36 & 37 *Vict.* c. 60).—Where in proceedings for the

extradition of a foreign subject evidence sufficient to justify a committal is given of the commission by him of acts which constitute a crime, both according to English law and according to the law of the foreign State, and within the Extradition Treaty, extradition cannot be refused on the ground that the crime imputed falls under different headings or classes of crime in the English and foreign systems of criminal law, or in the English and foreign versions of the Extradition Treaty.

The extradition was demanded of a French subject on a charge of "faux," the ordinary English equivalent of which is "forgery." He was committed by the magistrate upon evidence showing that he had committed acts constituting the offence of "faux en écriture de commerce" under article 147 of the Code Pénal, and covered by head 2 (French version) of article 3 of the Extradition Treaty with France, and also constituting an offence (not amounting to forgery in English law) under section 83 of the Larceny Act, 1861, and section 1 of the Falsification of Accounts Act, 1875, and covered by head 18 (English version) of article 3 of the Extradition Treaty.

Held, that the committal order was rightly made.—*Arton, In re* (*No.* 2), Q.B.D., 351.

2. *Delivery up of British subject—Treaty with Belgium—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *ss.* 2, 6.—In 1876 a Treaty was signed between England and Belgium for the mutual surrender of fugitive criminals, and by an Order in Council the Extradition Act, 1870, was made to apply to this Treaty. In 1887, by a declaration between the two countries, it was provided that "in no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects."

Held, that while the contracting parties are not bound, they may under this Treaty surrender their own subjects; and that therefore the British Government had a discretion to surrender a fugitive criminal in this country, notwithstanding the fact that he was a British subject.—*Galwey, Re*, Q.B.D., 313.

3. *Requisition by foreign Government—"Offence of a political character"*—Bonâ fides *of foreign Government—Jurisdiction of court—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *s.* 3.—Upon an application by the accused for a writ of *habeas corpus*, the court has no jurisdiction to entertain or deal with the question whether the foreign Government in demanding the surrender was acting in good faith and in the interests of justice.—*Arton, Ex parte*, (*No.* 1), Q.B.D., 238.

FACTORS ACTS.—See SALE OF GOODS, 1, 2.

FACTORY:—

Cleaning of machinery—Child cleaning fixed part of machine in motion—Factory and Workshop Act, 1878 (41 *Vict. c.* 16), *s.* 9.—A child is not allowed, under section 9 of the Factory and Workshop Act, 1878, to clean any part of a machine in a factory—whether such part be fixed or in motion—while the machine itself is in motion by the aid of steam, water, or other mechanical power.—*Pearson* v. *Belgian Mills Co.*, Q.B.D., 334.

FINANCE ACT.—See INLAND REVENUE, 4-6.

FISHERY:—

1. *Fisheries Committee—Expenses of—Appointment of fishery officer—"Restrictions or conditions as to expenditure"—Fisheries Act*, 1888 (51 & 52 *Vict. c.* 54), *s.* 6 (1).—Section 6 (1) of the Fisheries Act, 1888, provides that the committee of a fishery district created under that Act, "subject to any restrictions or conditions as to expenditure" made by the council or councils by whom they are appointed, may appoint fishery officers.

Held, that the section refers to restrictions and conditions in existence at the time of the appointment, and that a council is not exempt from contributing to the expenses of such an appointment, under section 10 of the Act, for the reason that they disapproved of the expenditure subsequently to the appointment.—*Reg.* v. *Plymouth* (*Mayor of*), Q.B.D., 620.

2. *Salmon fishery — Boundary — Crown*, primâ facie *claim—Practice.*—Where in a pending cause it appears that the Crown has a *primâ facie* claim to salmon fishings in dispute, the court ought to direct intimation to be given to the Crown authorities, and stay proceedings pending the decision of the Crown as to whether it will interfere.—*Ogston* v. *Stewart*, P.C.

FOOD and DRUGS ACTS.—See ADULTERATION, 1, 4-8; JUSTICES, 3.

FRAUDS, STATUTES of:—

Interest in land—Landlord and tenant—Parol agreement for non-continuous letting and hiring of land—Entry on land for purposes of occupation after agreement—Exclusive possession during occupation—Statute of Frauds (29 *Car* 2, *c.* 3), *s.* 4.—Defendant verbally agreed with plaintiff to hire a field for three consecutive bank holidays, and to pay for the use of it the total sum of £45, which sum was to be paid by three equal payments on the days in question. Defendant occupied the field on the first of the three bank holidays only, and paid the instalment on account, but refused subsequently to pay the balance of the £45, and by way of defence to an action by the plaintiff, pleaded that under section 4 of the Statute of Frauds the agreement was void.

Held, that section 4 of the Statute of Frauds was no defence, because upon the evidence it appeared that the parol agreement was a single letting (although the period for the agreed letting was not continuous) at a single rent; and there had been an entry by the defendant on the land after the agreement for the purposes of occupation, and a payment of rent on account of entry.—*Smallwood* v. *Sheppards*, Q.B.D. 44.,

See also PRACTICE, 41; SPECIFIC PERFORMANCE, 1.

FRIENDLY SOCIETY:—

Dissolution—Infant members—Instrument of dissolution signed by fathers and guardians—Consent of governing committee—Action by trustees—Friendly Societies Act, 1855 (18 & 19 *Vict. c.* 63), *ss.* 9, 13, 15, 21, 25, 27—*Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *ss.* 6, 9, 13, 15, 21, 25.—A friendly society consisting entirely of members between the ages of six and eighteen, and formed under the Friendly Societies Act, 1855, as a juvenile branch of a parent lodge, the government thereof being placed in the hands of a committee appointed by the parent lodge, was held precluded from dissolving itself under section 13 of the Act of 1855, or section 25 of the Act of 1875, without the consent of that committee.—*Rudd* v. *James*, C.A.

GAMES:—

Prescription—Claim for inhabitants of adjoining parishes.—The inhabitants of more than one parish cannot claim by custom a right of recreation on

land situate in one of the parishes.—*Edwards* v. *Jenkins*, CH.D. KEKEWICH, J., 407.

GAMING:—

1. *Betting—Illegal Betting—Unlawful user of a place for the purpose of betting—"Place"—Betting Houses Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.—The respondent, who was a bookmaker, was on several consecutive days standing on or near the same spot between two stays which supported a hoarding erected on a piece of vacant ground, and was there making bets on horse-races with persons who came to him for the purpose. The vacant ground was not circumscribed otherwise than by the hoarding which partially surrounded it.

Held, that the ground between the stays of the hoarding was a "place" within the meaning of section 3 of the Betting Houses Act, 1853, and that the respondent was guilty of the offence under that section of using a place for the purpose of betting with persons resorting thereto.

Doggett v. *Catterns*, 13 W. R. 390, and *Whitehurst* v. *Fincher*, 17 Cox C. C. 70, distinguished.—*Liddell* v. *Lofthouse*, Q.B.D., 349.

2. *Partnership—Action for account—Bookmaker's business—Place used for betting—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 3.—In an action by a turf commission agent or bookmaker against his partner, who was the active partner and transacted the business at race meetings, for an account of the profits of the business,

Held, that, inasmuch as the conduct of a bookmaker's business did not necessarily involve any violation of the provisions of the Betting Act, 1853, and it appeared that the plaintiff contemplated that the business would be carried on in conformity with the rules of Tattersall's enclosure at meetings, and not in such a manner as to come within the prohibition of the statute, the plaintiff was entitled to relief at the hands of the court, and the order must go for an account, notwithstanding that the defendant might have acted illegally at meetings.

Construction of the word "place" in the Betting Act, 1853, considered.—*Thwaites* v. *Coulthwaite*, CH.D. CHITTY, J., 295.

3. *Stock Exchange—Transactions in stocks and shares—Deposit of securities as cover—Right to recover securities—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.—On certain written terms, which amounted to speculation in differences, S. opened an account and deposited with the appellants, who were outside brokers, certain securities as cover for any balance which might be found due to them. The result was a loss to S. above the value of the securities. In an action by S. to recover his securities the jury found on what was considered sufficient evidence that the transactions between the parties were gaming transactions.

Held, that the deposit was not made "to bide the event" of a wager, but as security against a debt which might arise from a gambling transaction, and therefore not within the 18th section of the Gaming Act, 1845 (8 & 9 Vict. c. 109), and consequently the securities might be recovered.—*Universal Stock Exchange* v. *Strachan*, H.L., 497.

4. *Stocks and shares — Payment of differences — Money deposited as cover—Repudiation of gaming contract—Betting Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.—The plaintiff deposited with the defendant a sum of money as cover in respect of certain gaming transactions in stocks and shares entered into with the defendant. Before the plaintiff gave notice that he repudiated the gaming contracts, the deposit had been absorbed by the winnings of the defendant.

Held, that, having regard to the provisions of section 18 of the Betting Act, 1845, the money could not be recovered.—*Strachan* v. *Universal Stock Exchange Co.*, C.A., 90

GAS:—

1. *Supply—Arrears of rates—Company—Receiver and manager — Whether tenants of company — Gas Works Act*, 1847 (*c.* 15), *s.* 16—*Gas Works Act*, 1871 (*c.* 41), *s.* 11. — A gas company supplied the mill of a milling company with gas. A receiver and manager of the milling company was appointed by debenture-holders, and he entered into possession of the mill and continued the business. At that time there was a sum due to the gas company for arrears of gas rates during the milling company's occupation.

Held, that the receiver and manager was merely custodian of the milling company's property, and not an incoming tenant of, or a purchaser from, the milling company; and that the gas company was entitled to refuse to continue to supply gas unless the arrears were paid.

Smith, Re, Mason, Ex parte [1893], 1 Q. B. approved.—*Paterson* v. *Gas, Light, and Coke Co.*, C.A.

2. *Supply of gas—Breach of statutory duty—Remedy—Right of action—Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *ss.* 11, 12, 36.—Where a gas company to whom the provisions of the Gasworks Clauses Act, 1871, apply cause damage to a consumer by reason of their failure to supply to him gas sufficient in quantity and quality to satisfy the requirements of the Act, an action will not lie by the consumer against the company in respect of such damage. The only remedy for breach of the statutory obligation of the company is by proceeding for penalties under section 36 of the Act.—*Clegg, Parkinson, & Co.* v. *Earby Gas Co.*, Q.B.D., 606.

See also NEGLIGENCE, 1.

GAVELKIND.—See VENDOR AND PURCHASER, 5.

GIFT.—See SOLICITOR, 14.

GOODWILL. — See INLAND REVENUE, 25; PARTNERSHIP, 3, 4.

GRAIN:—

Metage on Grain (Port of London) Act, 1872 (35 & 36 *Vict. cap. c.*)—*Construction—Grain brought in "for sale."*—The Metage on Grain (Port of London) Act, 1872, imposes a duty upon "all grain brought into the port of London for sale."

Held (affirming the judgment of the Court of Appeal, *ante*, p. 55) that the duty was only payable upon grain imported for sale as grain, and that grain, which was imported in order to be manufactured before sale into a substance which could not be described as "grain," was not liable to duty.—*Cotton* v. *Vogan*, H.L.

GUARANTEE—See BANKRUPTCY, 23; CONTRACT, 1; PRACTICE, 17.

HABEAS CORPUS.—See EXTRADITION. 3.

HEIRLOOMS:—

Will — Actual possession — Chattels bequeathed in trust for person for time being entitled to "actual possession" of real estate.—Where real estate was limited to a person for life and to his son in tail, and chattels were bequeathed as heirlooms in trust to go along with and to be enjoyed by the person for

the time being entitled to "actual possession" of the real estate.

Held, that the tenant in tail, who, having previously barred the entail, died during the lifetime of the tenant for life, had no such right in the heirlooms annexed to the hereditaments as to enable him to transfer them.—*Angerstein* v. *Angerstein*, CH.D., KEKEWICH, J., 152.

HERIOT.—See COPYHOLD.

HIGHWAY.—See LOCAL GOVERNMENT, 7, 9-12; RAILWAY, 3.

HIRE and PURCHASE.—See SALE OF GOODS, 1, 2, 3.

HUSBAND and WIFE.—See DIVORCE; MARRIED WOMAN, 9; PRACTICE, 12.

INCOME TAX.—See INLAND REVENUE, 9-14

INDUSTRIAL SOCIETY:—

Deceased Member's property—Intestacy—Distribution—Discretionary power—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict.* c. 39), *s.* 27.—The power given to the committee of an industrial society by section 27 of the Industrial and Provident Societies Act, 1893, of distributing the property of a member who has died intestate to the next of kin without letters of administration is a discretionary power, and an action will not lie to compel the committee to exercise their discretion.—*Escritt* v. *Todmorden Co-operative Society*, Q.B.D., 544.

See also BILL OF SALE, 3.

INFANT:—

1. *Maintenance — Income — Contingent interest — Conveyancing Act*, 1881 (44 & 45 *Vict.* c. 41) *s.* 43.—Where property is settled on trust for such members of a class as shall attain twenty-one, the accumulated income will be divisible into as many shares as there are members in existence, one of such shares being payable to each adult, and one of such shares being applicable under the Conveyancing Act, 1881, s. 43, for the maintenance of each infant.

The fact that the class is capable of increase will make no difference.—*Jeffery, Re, Arnold* v. *Burt*, CH.D., NORTH, J., 61.

2. *Religious education—Rights of father—Abdication by course of conduct.*—Where a father had acquiesced in his two daughters being educated as Protestants until they had attained the ages of fifteen and eleven respectively, the court refused the father's application to have them educated as Roman Catholics, being of opinion that such a resumption of the father's authority would be contrary to the interests of the children.—*Newton, Re*, C.A., 470.

See also BANKRUPTCY, 6; DIVORCE, 25; FACTORY; FRIENDLY SOCIETY; TRUSTEE, 11; VENDOR AND PURCHASER, 5.

INJUNCTION.—See COPYRIGHT, 2, 5; DIVORCE, 3, 6; LANDLORD AND TENANT, 11; MASTER AND SERVANT, 2, 3; PARTNERSHIP, 4; PATENT, 5; PRACTICE, 25, 25A, 26, 51; TELEGRAPH; TRADE NAME, 1, 2; TRADE UNION.

INLAND REVENUE:—

1. *Account duty—Annuity to widow of deceased partner out of proceeds of business—Customs and Inland Revenue Act*, 1881 (44 *Vict.* c. 12), *s.* 38, *sub-section* 2 (c.)—*Customs and Inland Revenue Act*, 1889 (52 *Vict.* c. 7), *s.* 11. Under a covenant in a contract of co-partnery the widow of one of the two partners became entitled, on the death of her husband, to be paid an annuity by the surviving partner out of the profits (if any) of the business—which, however, the surviving partner was not bound to carry on.

Held, that the annuity was "property" which "passed" to the widow under a voluntary settlement within the meaning of section 38, sub-section 2 (c.) of the Customs and Inland Revenue Act, 1881, and section 11 of the Act of 1889, and was therefore chargeable with account duty.—*Attorney-General* v. *Wendt*, Q.B.D.

2. *Account duty—Marriage settlement of widow—Children by former marriage—Voluntary disposition—Customs and Inland Revenue Act*, 1881 (44 *Vict.* c. 12), *s.* 38, *sub-section* (a) (c)—*Customs and Inland Revenue Act*, 1889 (52 *Vict.* c 7), *s.* 11.—The consideration of marriage extends only to the husband and wife and the children of that marriage; all other persons are volunteers in some sense.

In a marriage settlement made by a widow on her second marriage, shares belonging to her were given to her adult sons by her former marriage, and other shares belonging to her were assigned to trustees upon trust as to some, for the benefit of other children of the widow by her former marriage, and as to the residue upon trust in the events that happened, but subject to certain life interests, to all her children by her former marriage. The settlor died in 1890, within five months of the execution of the settlement.

Held (reversing the decision of the Queen's Bench Division, 43 W. R. 253), that the children by the former marriage were not within the marriage consideration, but were volunteers; that, therefore, the Crown was entitled to account duty under the Customs and Inland Revenue Acts, 1881 and 1889, as upon a voluntary disposition in respect of the shares taken by the children of the former marriage.

Gale v. *Gale*, 25 W. R. 772, 6 Ch. D. 144, distinguished.—*Attorney-General* v. *Jacobs-Smith*, C.A.

3. *Account duty—Voluntary transfer—Customs and Inland Revenue Acts*, 1881 (44 & 45 *Vict.* c. 12), *s.* 38, *sub-section* 1, 2 (b); 1889 (52 & 53 *Vict.* c. 7), *s.* 11.—The Customs and Inland Revenue Act, 1881, s. 38, sub-section 2 (*b*), enacts that account stamp duty shall be paid upon any property "voluntarily" transferred by the deceased into the joint names of himself and another person, so that the beneficial interest in such property accrues by survivorship to such other person.

Held, the word "voluntarily" is used in this sub-section in its ordinary meaning of "without compulsion" or "without obligation," and does not mean "without consideration."—*Attorney-General* v. *Ellis*, Q.B.D., 13.

4. *Estate duty—Settlement estate duty—Settled legacies—Duties payable out of residuary estate—Finance Act*, 1894 (57 & 58 *Vict.* c. 30), *ss.* 1, 2, 4, 5 (1) (a), 6, 8, 9.—Testator, who died after the Finance Act, 1894, came into operation, gave a pecuniary legacy to persons by way of succession, and bequeathed his residuary personal estate in shares, some of which were given absolutely and others to persons in succession.

Held, that under the Finance Act, 1894, settlement estate duty as well as estate duty in respect of both classes of the settled legacies should be borne by, and was payable by the executors out of, the general residuary estate.—*Webber, Re, Gribble* v. *Webber*, CH.D. NORTH, J., 489.

5. *Estate Duty—Settlement—Power of appointment*

—Appointment of specific portion to one—Residue of settled fund appointed to others—Apportionment of duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 6, *sub-section* (4); *s.* 8, *sub-section* (4); *s.* 14, *sub-section* (1).—By a settlement of 1841 a fund was directed to be laid out in the purchase of lands to be held on trust for A. for life, with remainder as B. should by will appoint. B. died in 1886 in A.'s lifetime, having by will directed the reconversion into money of the trust premises, and appointed a specific amount part thereof to C. absolutely, and the residue to others. The life tenant A. died after the Finance Act, 1894, came into operation. The fund had never been invested in the purchase of land.

Held, (1) that the fund must be treated as land; (2) that it was "property which passed" on the death of A., and was therefore liable to estate duty under section 1 of the Finance Act; (3) that the amount appointed to C. was a "sum charged on the property" within the meaning of section 14, sub-section (1); and (4) that the estate duty on the whole appointed fund should be borne rateably by C. and the appointees of the rest of the fund.—*Orford (Countess), Re, Cartwright* v. *Del Balzo*, CH.D, NORTH, J., 383.

6. *Estate duty—Voluntary covenant to pay money on death of covenantor — Liability of estate of covenantor—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 6, 7, 8, 9.—A testator who died after the Finance Act, 1894, came into operation had covenanted to pay, within six months of his decease, a sum of money to the trustees of his son's marriage settlement.

Held, that under the Finance Act, 1894, estate duty was payable upon the sum covenanted to be paid, and that such duty should be borne, not by the covenantees, but by the testator's residuary estate; for the covenant, although a debt for all other purposes, was not a debt which, under section 7 of the Finance Act, could be deducted in ascertaining the estate duty; and the covenantees being creditors were not persons taking under the will within the meaning of section 9.—*Gray* v. *Gray*, CH.D. NORTH, J., 406

7. *Excise—Dog tax—Shepherds' dogs—Certificate of exemption — Justices — Jurisdiction— Offence of trifling nature*—30 & 31 *Vict. c.* 5, *s.* 8—*Customs and Inland Revenue Act*, 1878 (41 *Vict. c.* 15), *s.* 22 — *Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 16.—Justices have no jurisdiction to review the decision of the Commissioners of Inland Revenue refusing to grant a certificate of exemption from the dog tax under section 22 of the Customs and Inland Revenue Act, 1878. They cannot refuse to convict the owner of a dog who has neither a licence nor a certificate of exemption on the ground that he is in their opinion entitled to such a certificate, and that his offence is therefore of a trifling nature within the meaning of section 16 of the Summary Jurisdiction Act, 1879.—*Phillips* v. *Evans*, Q.B.D., 429.

8. *Excise—Licence to deal in plate—Soliciting orders—Secretary of watch club—Inland Revenue Act*, 1867 (30 & 31 *Vict. c.* 90), *ss.* 1, 3, 17.—The respondent was a telegraph clerk and the secretary of a watch club formed in a provincial town by a London watchmaker who held an excise licence for dealing in plate. The respondent collected subscriptions from the members of the club, and at intervals conducted a ballot, the winner in which was entitled to select a watch or other article supplied by the watchmaker. The respondent thereupon informed the watchmaker as to the article chosen, and the article was forwarded by the watchmaker to the respondent, who handed it to the member in question. The respondent was paid a commission by the watchmaker. The respondent had no excise licence to deal in plate.

Held, that the respondent was a person soliciting, taking, or receiving orders within the meaning of section 17 of the Inland Revenue Act, 1867, and was not within the exemption as to *bonâ fide* travellers in that section, and was therefore liable to a penalty.—*Killick* v. *Graham*; *Lintern* v. *Burchell*, Q.B.D., 669.

9. *Income tax—County council—Interest arising on loans—Deductions*—16 & 17 *Vict. c.* 34, *Schedule D.* —The London County Council, under the powers and provisions of various Acts of Parliament, borrowed large sums of money for their own purposes and for the purpose of lending sums of money to various local bodies. Upon these borrowed sums they paid interest, income tax being deducted by the Bank of England and paid over to the Inland Revenue, and upon the sums they lent they received interest. In 1894 they were served with a notice of assessment under Schedule D of the Income Tax Act (16 & 17 Vict. c. 34) in respect of a sum of £352,021, being interest received by them in the year ending March, 1893, in full without deduction of income tax, upon loans advanced by them.

Held, that the London County Council were properly so assessed. The interest they received was part of their funds and part of the *corpus* of the property which they enjoyed, and they ought to pay income tax on it.

The London County Council could not be treated as a trading concern so as to bring the money they borrowed, on the one side, and the money they lent, on the other side, into an account.—*London County Council* v. *Grove*. Q.B.D., 599.

10. *Income tax—Deductions—Money laid out or expended for the purposes of trade—Money paid to an employee in compensation for his dismissal—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule.*—By the terms of an agreement for the purchase by the appellant company of the business of another insurance company, the appellant company agreed to take into their service the manager of the other company at a salary of £4,000 a year, or, in the event of their electing not to retain him, to pay him a lump sum in commutation of his salary, the manager undertaking not to enter the service of any other insurance company. Shortly after the transference took place, the appellant company elected not to retain the manager, and paid him a lump sum.

Held, that the sum so paid could not be properly deducted from the gross profits of the business of the appellant company for the purpose of ascertaining the amount on which income tax was payable, seeing that it was not money "wholly and exclusively laid out or expended for the purposes of" the business.—*Watson* v. *Royal Insurance Co.*, C.A., 89.

11. *Income tax—Deductions—Money wholly laid out for purposes of trade—Colliery company—Contributions to Coalowners' Association—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, rules applying to the first and second cases, rule* 1.—The owners of a colliery were members of a coalowners' association, and paid to the funds of that association certain sums of money in return for which the association indemnified them against losses in case of strikes. In returning the amount of their profits for the purposes of the Income Tax Act, the

colliery owners claimed to deduct the yearly average of the excess of their contributions over the amounts received as indemnities.

Held, that the deductions claimed could not be allowed, as the subscriptions paid to the association were not "money wholly and exclusively laid out or expended for the purposes of" the trade carried on by the colliery owners, within the meaning of the first of the rules applying to both the first and second cases in Schedule D, section 1, of 5 & 6 Vict. c. 35.—*Rhymney Iron Co.* v. *Fowler*, Q.B.D, 651.

12. *Income tax—Foreign trade—Agents in United Kingdom—Agent "having the receipt of profits or gains"—Assessment of agent in name of principal resident abroad—Income Tax Act*, 1842 (5 & 6 *Vict.* c. 35), *ss.* 41 *and* 44—*Income Tax Act*, 1853 (16 & 17 *Vict.* c. 34), *s.* 2, *Schedule D.*—A foreign wine merchant carrying on business at Rheims employed agents in this country to canvass for orders to be forwarded to him for execution if he thought fit. Upon acceptance of the order the principal invoiced the goods in his name to the customer and delivered them on board at Rheims at the expense and risk of the customer. The amounts due were usually forwarded direct by the customer to the principal, but in some cases received by the agents.

Held (Lord Morris dissenting), that the foreign principal did not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, 1842 and 1853.

Semble, that in section 41 of the Income Tax Act, 1842, the words "having the receipt of any profits or gains" should be read so as to apply to the words "factor" and "agent" as well as the word "receiver."

Decision of the Court of Appeal, 43, W. R. 184, [1895] 1 Q. B. 71, reversed.—*Grainger* v. *Gough*, H.L., 561.

13. *Income tax—Interest on foreign investments of English company—Profits invested abroad—Schedule D of 5 & 6 Vict. c. 35, s.* 100.—An insurance company, having its head offices at Norwich, carried on business abroad by means of branches in New York, New Zealand, and elsewhere. In order to do so, it became necessary to have capital invested abroad, and from time to add to these foreign investments as the business of the company increased. For this purpose the interest accruing from these investments was set aside and invested abroad, and, although shown in the credit account of the annual balance-sheet of the company issued from the head office in England as profits, was never specifically remitted to or received in the United Kingdom.

Held, that these investments abroad were necessary for the profitable carrying on abroad of the company's business, and that the interest arising from such investments was taxable as profits.—*Norwich Union Fire Insurance Co.* v. *Magee*, Q.B.D., 384.

14. *Income tax—Profits and gains of English company owning railway abroad—Control in England—Profits received in England—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D, cases* 1, 5; 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—An English company, with a registered office in London, was incorporated for the purpose of making and working a railway in Brazil. The directors resided in England, and controlled at the London office the whole conduct and management of the company, but the profits were earned in Brazil.

Held, that the company did not carry on its business exclusively out of the United Kingdom, and was therefore assessable to the income tax under case 1, Schedule D—viz., on the full amount of their net profits and gains.

Decision of the Court of Appeal, 43 W. R. 339, [1895] 1 Q. B. 580, affirmed.—*San Paulo Railway Co.* v. *Carter*, H.L,. 336.

15. *Inhabited house duty—Exemption—"Charity school"—48 Geo. 3, c. 55, Schedule B, case* 4—14 & 15 *Vict. c.* 36, *s.* 2.—By 48 Geo. 3, c. 55, Schedule B (repealed by 4 & 5 Will. 4, c. 19, but re-enacted by 14 & 15 Vict. c. 36), "any hospital, charity school, or house provided for the reception or relief of poor persons" is exempted from inhabited house duty.

An institution is a charity school within the schedule if its primary object is the education of those who cannot afford to educate themselves.

A college was founded with the object of enabling women to continue their education after leaving school with all the advantages of a collegiate life. The college was maintained partly by endowment and partly by students' fees, but the fees alone would not have been sufficient to carry on the college in the manner directed by the deed of trust.

Held, that the college was not a charity school, and the exemption from inhabited house duty contained in 48 Geo. 3, c. 55, Schedule B, did not apply to it.—*Southwell* v. *Royal College, Holloway*, Q.B.D., 315.

16. *Inhabited house duty—Public school—Head master's house—School buildings—Chapel, library, &c.—Mode of assessment—43 Geo. 3, c. 55, Schedule B*—14 & 15 *Vict. c.* 36.—In the Clifton College case an assessment was made of £1,978 upon the college in respect of inhabited house duty. The buildings assessed comprised the school itself, the head master's house, the chapel, library, sanatorium, gymnasium, racquet courts, fives courts, swimming baths, carpenter's shops, museum, garden, and playground, all of which were within one boundary. The head master held his house under a lease subject to his continuing to hold that post; he resided there himself, together with sixty-seven boarders; he paid no rent. With the exception of the sanatorium, no one slept in any of the other buildings.

Held, that the head master was the occupier of his dwelling-house, and was taxable in respect of such occupation with inhabited house duty. He did not, however, in any sense occupy the various other buildings; there was nothing to show that they belonged to or were occupied with his dwelling-house, and they could not be themselves treated as dwelling-houses.

In the Charterhouse case an assessment of £3,000 for inhabited house duty was made upon the governing body of the school. The buildings assessed were the head master's house (the head master was bound by the school statutes to reside in the house, he paid no rent, and took in sixty boys as boarders), two assistant masters' houses (these masters paid rent and took in boys as boarders), the chapel, hall, library, classrooms, laundry, science rooms, museum and theatre, carpenter's shop, drawing school, sanatoriums, swimming baths, racquet courts, lodges, and other buildings.

Held, that the head master and assistant masters ought to be treated as the occupiers of their houses respectively. They occupied the houses for their own profit, and not merely as representatives of the school or the governors, and they were therefore assessable to the inhabited house duty. The governing body were not assessable for the other premises, as, with the exception of the sanatoriums,

they were not inhabited dwelling-houses taken by themselves.—*Clifton College* v. *Thompson; Charterhouse School* v. *Gayler*, Q.B.D., 410.

17. *Inhabited house duty — Tenements — Lessee dividing premises into a dwelling-house and a shop respectively—Lessee retaining the shop and sub-letting the dwelling-house—Assessment made on the whole of the premises—House Tax Act*, 1803, *s.* 10—48 *Geo.* 3, *c.* 55, *Schedule B, rr.* 3, 6, 14—*Land Tax Act*, 1851—*Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 13 (1) *and* (2).—A trading company became the lessees of a house, which they had divided, before taking possession, into two distinct and separate tenements. The lower tenement they retained themselves, but used it solely as a shop for the purposes of their trade, the upper tenement they let for residential occupation to a tenant, who was not a servant of the company.

The whole of the premises having been assessed to inhabited house duty:—

Held, that the assessment was right, as the exemption conferred by section 13 of the Inland Revenue Act, 1878, in respect of business premises, was intended to extend only to the case of a person who let the whole of a house in separate tenements, and did not apply where the landlord or lessee retained the occupation of part of the premises for the purposes of his own business or trade.—*Hoddinott* v. *Home and Colonial Stores*, Q.B.D., 285.

18. *Legacy duty—Annuity—Accumulations—Term of years to secure—Annuitant tenant for life subject to term—Legacy Duty Act*, 1845 (8 & 9 *Vict. c.* 76), *s.* 4.—A testator devised estates to trustees for a term of 500 years upon certain trusts, and subject thereto to certain persons successively for life. The trusts of the term were (*inter alia*) to pay to the person who for the time being should, subject to the term, be entitled under the will to the possession or receipt of the rents and profits of the devised estates a certain annuity. Subject to that trust, the trustees were directed, during the period of twenty-one years from the testator's death, to accumulate the rents and profits arising from the hereditaments comprised in the term, and apply the same, with the accumulations, upon trust to purchase land and settle the same as nearly as possible in the same manner as the estates devised by the will, and after the determination of the period of twenty-one years upon trust to pay the rents and profits to the person or persons for the time being entitled to the hereditaments comprised in the term and the reversion expectant on the term.

The testator died on the 2nd of November, 1875, and upon the death of C. D., on the 12th of April, 1893, J. D. became entitled to receive from the trustees an annuity of £3,000, and became tenant for life subject to the term.

Held, affirming the decision of Stirling, J., 43 W. R. 630 (Rigby, L.J., dissenting), that, having regard to the substance rather than the conveyancing form of the gift, the annuity to which J. D. became entitled was not one charged upon his own estate, and that consequently legacy duty was payable upon it by virtue of 8 & 9 Vict. c. 74, s. 4, and not succession duty.

Shirley v. *Earl Ferrers*, 1 Ph. 167, distinguished.—*De Hoghton, Re, De Hoghton* v. *De Hoghton* (*No.* 1), C.A., 550.

19. *Probate duty—Certificate of shares held in foreign companies—Realizable asset of estate—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 27—*Probate Court Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 92.—An English testator was possessed of share certificates of a foreign company, being documents necessary to establish the legal title to the shares; the holder of the certificates having an equitable title which would enable him to obtain registration of the shares in his own name in the foreign country. Delivery of the certificates was sufficient to transfer this equitable title, and the certificates were marketable on the London Stock Exchange.

Held, that probate duty was payable in respect of the certificates.—*Stern* v. *Reg.*, Q.B.D., 302.

20. *Probate duty—Partnership—Option to purchase partnership premises within period after testator's death—Will—Extension of period—Option exercised in extended period—Conversion—Customs and Inland Revenue Act*, 1881, *s.* 27.—The proceeds of sale of real estate, sold after a testator's death, in order to be liable to probate duty must have been sold pursuant to a contract subsisting at the death.

A testator, in partnership with his sons, agreed in the partnership deed that the sons should have the option to purchase the partnership premises, consisting of freeholds and leaseholds, within a certain period after his death. By his will he extended the period. The sons exercised the option after the original period fixed by the articles had expired, but within the extended period.

Held, probate duty not payable on the proceeds of sale of the freeholds.—*Goodall* v. *Goodall*, CH.D. NORTH, J., 70.

21. *Probate duty—Undistributed residuary estate of English testator—Foreign mortgages forming part of such undistributed residuary estate—Liability to probate duty of the estate of English residuary legatee.*—An English testatrix was entitled, under the will of her husband—a domiciled Englishman whose will was proved in England by English executors—to one-fourth share of his residuary estate. That estate included, among other property, money invested in mortgages of real estate in New Zealand. At the date of the testatrix's death no part of the residuary estate had been distributed, nor had any of the mortgages been converted.

Held (Lord Esher, M.R., dissenting), that the testatrix's share in her deceased husband's residuary estate was an English chose in action, and that probate duty was payable in England by her executors on one-fourth of the New Zealand mortgages.

Decision of the Divisional Court, 43 W. R. 700, reversed.—*Attorney-General* v. *Sudeley* (*Lord*), C.A., 340.

22. *Stamp duty—Bond being security for annuity or sum of money at stated periods—Sum payable weekly for indefinite period*—Ad valorem *duty on annuity or "sum periodically payable"—Duty on What sum to be calculated — Stamp Act*, 1891 (54 & 55 *Vict. c.* 39)—*Schedule.*—In the 1st Schedule to the Stamp Act, 1891, any bond, covenant, or instrument being the only or principal or primary security for any annuity, or for any sum of money at stated periods (not being interest or rent), if such sum be for the term of life or any other indefinite period, is made liable to a duty of 2s. 6d. for every £5 "of the annuity or sum periodically payable."

C. and H. entered into an agreement under seal whereby H. was to become the manager of an hotel owned by C., was to receive all the profits and pay to C. a certain sum weekly. The agreement could be terminated by either party on giving three months' notice, and was expressed to be neither a demise nor a deed of partnership.

Held, that the "annuity or sum periodically

payable" on which the *ad valorem* duty ought to be charged was the sum payable weekly only, and not the same sum multiplied by fifty-two and regarded as an annual payment.—*Clifford* v. *Inland Revenue Commissioners*, Q.B.D.

23. *Stamp duty — Commissioners of Customs — Transfer order to by merchant—Whether or not a bill of exchange—Sole purpose of remitting money—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 32, *and Schedule "Bill of Exchange," exemption* (10).—The goods of A., a merchant, being subject to the payment of customs duty, A. gave to the revenue officer a document addressed to the cashier of the Bank of England, drawn and signed by B. & Co., his bankers, which was in the following terms: "Transfer from our account to the account of the Commissioners of Customs £225 16s. 7d." (the amount payable in respect of the duty payable in respect of A.'s goods). On the receipt of such document the revenue officer cleared the goods.

Held, that such document was a bill of exchange payable on demand within the meaning of the Stamp Act, 1891, s. 32, and that it did not fall within the exemption (10) as being drawn for the sole purpose of remitting money to be placed to an account of public revenue. — *London Clearing Bankers* v. *Inland Revenue Commissioners*, C.A., 516.

24. *Stamp duty — Conveyance on sale — Colonial patent—Licence to use in colony—Property locally situate out of United Kingdom—Stamp Act*, 1891 (*c.* 39) *s.* 59, *sub-section* (1).—A share in a patent granted in New South Wales and a sole licence to use the patented invention in a specified district of that colony, are "property" within section 59, sub-section 1 of the Stamp Act, 1891, and do not come within the exception in that sub-section in favour of "lands, tenements, or property, locally situate out of the United Kingdom." An agreement made in England for the sale of the share in the patent and of the licence, is, therefore, liable to *ad valorem* stamp duty under that sub-section as though it were an actual conveyance on sale.—*Smelting Co. of Australia* v. *Inland Revenue Commissioners*, Q.B.D.

25. *Stamp duty—Conveyance—Agreement for sale of goodwill and trade-marks—Business carried on abroad and in England—Trade-mark registered in England—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59.—An agreement under seal was entered into for the sale of a business carried on in the United States, including the goodwill of the said business and the trade-marks and names used in connection therewith, to purchasers in the United Kingdom. The vendors were manufacturers of soap in America, a large proportion of which they sold wholesale to a syndicate in England. The vendors were also owners of a trade-mark registered in and extensively advertised throughout the United Kingdom, whereby a demand for the soap had been created therein.

Held, that the goodwill and trade-mark were "property" within the meaning of section 59 of the Stamp Act, 1891, and not "property locally situate out of the United Kingdom" within the exception contained in that section, and that therefore so much of the consideration as represented the price paid for the said goodwill and trade-mark was chargeable with conveyance duty under section 59 of the Stamp Act, 1891.—*Brooke* v. *Inland Revenue Commissioners*, Q.B.D., 670.

26. *Stamp duty—Equitable mortgage—Foreclosure — Conveyance by order of court—"Conveyance on sale"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 57.—A conveyance executed by order of the court by a mortgagor, the equitable mortgagee having obtained a foreclosure decree, is a "conveyance on sale" within the meaning of section 54 of the Stamp Act, 1891, and as such is chargeable with an *ad valorem* duty, *vide* "Conveyance or Transfer on Sale" in the schedule to the Act; and by section 57 the debt is the consideration in respect whereof the conveyance is chargeable.—*Huntington* v. *Inland Revenue Commissioners*, Q.B.D., 300.

27. *Stamp duty—Marketable security—Promissory note—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 82 (1) (b); 122.—An American railway company, as security for a temporary loan, handed through, their English agents, to the lender a certain instrument in writing which stated that for value received they promised to pay twelve months after date to the order of themselves, the amount therein named; and it also stated that it was one of a series, and was secured by a deposit of gold bonds which were under an existing trust deed to be held in trust for the benefit of the holders of the instruments. The instruments which had been indorsed before issue, were dealt in upon the London Stock Exchange though not officially quoted there.

Held, that the instrument was not a mere promissory note; that it contained a contract that the holder should be entitled to the benefit of the security mentioned in it; that it was consequently a security for the money lent upon it; and that it required to be stamped as a "marketable security" within the meaning of section 82, sub-section (1) (*b*), and section 122 of the Stamp Act, 1891.

Decision of the Divisional Court ([1895] 1 Q. B. 240) reversed.—*Brown, Shipley, & Co.* v. *Inland Revenue Commissioners*, C.A.

28. *Stamp duty—Practice—Evidence—Unstamped promissory note—Document used for purpose of refreshing memory—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 38 (1).—In an action for money lent an unstamped promissory note may be put in the hands of the defendant for the purpose of challenging his memory as to whether he had signed the note and had received the money, although such note could not be used as evidence, and, notwithstanding that by section 38 of the Stamp Act, 1891, it is provided that a promissory note not duly stamped shall not be "available for any purpose whatever."—*Birchall* v. *Bullough*, Q.B.D., 300.

29. *Succession duty—Freehold premises devised subject to leases—Increased value at determination of leases—Liability of successor—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 15, 20, 21, 42.—Joseph M., who died in 1873, devised two freehold premises to George M. These houses were at the date of testator's death let on leases at rents not purporting to be rack-rents. In 1877 succession duty was paid in respect of both houses, based on the rents then reserved by the said leases. In 188 both houses were sold to the defendants, who were the tenants of one of the houses. In 1889 the leases expired, and the defendants became entitled in possession to the full value of the houses, which value was greater than the rents reserved by the said leases. The crown claimed that under sections 20 and 21 of 16 & 17 Vict. c. 51 duty became payable in 1889 by the defendants in respect of the increased value accruing to them upon the determination of the leases as an annuity during the residue of the lives of the defendants equal to the increase of annual value.

Held, that the defendants were not "successors" at all; they had bought property to which George M. had already succeeded, and were not liable to pay duty as successors. They were only liable by virtue of section 42 for what George M. would have

been liable for—namely, duty on the increase of value by the falling in of the leases calculated as an annuity during the residue of George M.'s life equal to the increase of annual value.—*Attorney-General* v. *Mander*, Q.B.D., 413.

See also EXECUTOR, 6.

INNKEEPER:—

Lien—Commercial traveller—Goods the property of a third person.—A commercial traveller, whilst staying at an inn for the purpose of carrying on his business, had sent to him by his employers certain goods for sale, which goods the innkeeper, at the time they were received, knew did not belong to the traveller, but to his employers. On the traveller failing to pay for his board and lodging, the innkeeper detained certain of the said goods, claiming a lien on them.

Held, that the innkeeper had a good lien upon the goods in respect of the debt incurred by the traveller.—*Robins* v. *Gray*, C.A., 1.

See also DOG, 2.

INSURANCE:—

1. *Accident—"incapacitated from employment by reason of accident"—Nervous shock through fright.*—By a policy of insurance the defendants undertook to pay to the plaintiff, who was a signalman in their employment, the sum of £1 a week "in case of his being incapacitated from employment by reason of accident sustained in discharge of his duty in the company's service," the insurance to be "absolute for all accidents however caused to the insured in the fair and ordinary discharge of his duty." While the plaintiff was on duty in his signal-box he saw an express train approaching with sparks and dust flying from it, one of the carriages having broken down. The plaintiff waved a flag to stop the train, and was so excited and terrified that an accident would happen to the train that he received a nervous shock to his system and became incapacitated from employment.

Held, that this was an "accident sustained" by the plaintiff in the discharge of his duty within the meaning of the policy, and that the plaintiff was entitled to recover.—*Pugh* v. *London, Brighton, and South Coast Railway Co.*, C.A., 627.

2. *Accident — Policy — Continuing policy — New contract every year.*—A policy of insurance against accident for the term of one year was renewable from time to time by consent.

Held, that each renewal must be considered as a new contract, and not as a renewal of the original contract; and consequently, that where the assured assigned all his property to a trustee for the benefit of his creditors and died two years afterwards from an accident while the renewed policy was existing, the insurance money belonged not to the trustee of the creditors, but to the executors of the assured.—*Stokell* v. *Heywood*, CH.D. KEKEWICH, J.

3. *Assignment of rights to insurer—Settlement of claim—Judicature Act (Queensland)* (40 *Vict. c.* 86).—B. insured the safe delivery of certain wool in the V. Insurance Co. The wool was lost owing to the negligence of K., and the insurance company honestly paid the claim made upon them for such loss by B., and took from him a formal assignment of his causes of action against K., B. stipulating that the assignment should not authorize the use of his name in legal proceedings.

Held, that the insurance company were entitled to the remedies available to B. against K., and although the subrogation by act of law would not give the insurance company a right to sue in their own name, the Judicature Act (corresponding with the English Judicature Act of 1873) and the above assignment together would.—*King* v. *Victoria Insurance Co.*, P.C., 592.

4. *Life—Policies for benefit of wife and children—Domicile of assured—Foreign assurance company—*Lex loci contractûs—Lex loci solutionis.—Policies of assurance on his life were effected by a domiciled Englishman with an American assurance company through their English branch office. The moneys assured were expressed to be payable to the wife of the assured, for her sole use if living, "in conformity with the statute," and, if not living, to the children of the assured, or their guardian for their use, or if there should be no such children surviving, then to the executors, administrators, or assigns of the assured.

Held, that the policies, in accordance with the intention of the parties, must be construed, so far as related to the distribution of the assurance moneys, in accordance with the *lex loci solutionis*, the law of the place of domicile of the assured.

Held, also, that all the children of the assured took vested interests as tenants in common.—*Crosland* v. *Wrigley*, C.A.

5. *Marine— Constructive total loss — Chartered freight—Bill of lading freight—Advanced freight—Delivery of cargo at port of destination—Rights of underwriters.*—A ship, which was chartered for a particular voyage, was insured by the owners. The cargo was shipped under bills of lading, which provided that the cargo was to be delivered at the port of destination to the order of the shippers or their assigns, they paying freight as per charter-party. Part of the charter-party freight was prepaid before the commencement of the voyage. During the voyage the ship became a constructive total loss, and notice of abandonment was given to, and accepted by, the underwriters. The ship and cargo were subsequently brought to the port of destination and the cargo was delivered, and the shipowners received the amount of the freight, less the prepaid freight, from the consignees of the cargo.

Held, that the underwriters were only entitled to the freight earned by the delivery of the cargo after the ship became their property; that the freight so earned was the difference between the total freight and the prepaid freight; and that therefore they were not entitled to recover the balance.—*Red Sea, The*, C.A., 306.

6. *Marine— Freight—Inception of risk—"From the time of the engagement of the goods"—"At and from"—Vessel lost before arrival at port of loading.*—Shipowners were insured on freight "at and from" any port or ports of loading on the west coast of South America to ports described in the policies. The policies were in the usual Lloyds form, but each contained, in addition to certain other provisions, the following clause: "This policy to cover the freight from the time of the engagement of the goods or after a shipping order has been issued by the agent or his broker." A steamer belonging to the insured whilst proceeding from the River Plate to Valparaiso in order to load cargo there and at other ports on the west coast of South America was lost by perils insured against. At the time of her loss cargo had been engaged for her and was ready for shipment by her at Valparaiso and at other ports on the west coast, the freight upon which was afterwards declared on the policies:

Held, that the insured could not recover under the policies, inasmuch as the words "from the time

of the engagement of the goods" must be read subject to the "at and from" clause which defined the time and place of commencement of the risk, and that, therefore, under the circumstances the policy had never attached.

Decision of Barnes, J., [1896] P. 154, affirmed.—*Copernicus, The*, C.A.

7. *Marine—Goods—Partial or total loss—How partial loss calculated—Costs of conditioning—Average.*—A cargo of rice on board a lighter was insured by a policy wherein the rice was valued at £450. While the policy was in force the lighter was sunk by perils insured against, and the rice damaged. The damaged rice was afterwards kiln-dried at a cost of £68, and sold as damaged rice for £111, being almost one-third of its sound value.

Held, that the rice was not a total loss, but a partial loss only; and that the mode of ascertaining the partial loss was to obtain the difference between the sound value and the price which the damaged rice actually fetched, without deducting the cost of the kiln-drying; the proportion of this loss to the sound value is the proportion of the value in the policy to which the assured is entitled.—*Francis* v. *Boulton*, Q.B.D., 222.

8. *Marine—Live cattle—All risks, including mortality, from any cause whatsoever—Detention in port of refuge — Extra fodder—Suing and labouring clause.*—A marine policy of insurance on live cattle against all risks, including mortality, from any cause whatsoever, renders the insurer liable under the suing and labouring clause for the extra cost of fodder supplied to the cattle while the vessel was detained in a port of refuge for necessary repairs due to perils of the sea, for there is danger of total loss unless the expense is incurred.—*Pomeranian, The*, P.D. & AD.D.

9. *Marine—Policy of re-insurance—Construction of policy.*—A policy of re-insurance, whereby the plaintiffs re-insured with the defendant, contained a clause that the re-insurance was to be "subject to the same conditions as the original policy, and to pay as may be paid thereon, but against the risk of total or constructive loss only."

Held, that upon the construction of this clause the defendant was only bound to pay to the plaintiffs when the plaintiffs were themselves liable to pay in respect of the loss re-insured, and that if the plaintiffs made a *bonâ fide* payment for a total loss when there was no total loss, they could not recover from the defendant.—*Chippendale* v. *Holt*, Q.B.D., 128.

10. *Marine — Policy on ship — Life salvage—Liability of underwriter—Merchant Shipping Act*, 1894 (57 & 58 *Vict.* c. 60), *s.* 544.—Life salvage is not a loss for which under Lloyds policy on ship in the usual form an underwriter is liable.—*Nourse* v. *Liverpool Sailing Shipowners' Protection Association*, C.A., 500.

11. *Marine—Salvage—Perils of sea—Unseaworthiness—Time policy.*—Where a vessel left port with an insufficient supply of bunker coal for her whole voyage, and was lying helpless at sea till towed by a passing tug,

Held, that the salvage expenses could not be recovered from her underwriters as an average loss under a time policy.—*Ballantyne* v. *Mackinnon*, Q.B.D.

12. *Marine—Ship—Salvage—Total loss.*—A ship whose cargo was insured for £3,300 took fire at sea and was abandoned. She was afterwards picked up by another vessel whose crew extinguished the flames and towed her into Rio, where they claimed salvage. The claim was settled in England the underwriters of the cargo contributing £1,250 "on account without prejudice." Instructions were sent to Brazil to release the ship, but the Brazilian court had sold the ship and retained the proceeds:

Held, that the underwriters must pay a total loss and could not deduct the £1,250 paid in settlement of the salvage claim.—*Buchanan* v. *London and Provincial Marine Insurance Co.*, Q.B.D.

13. *Marine—Syndicate of underwriters—Policy signed by manager of syndicate—Joint or several liability of members—Partnership.*—The manager of a syndicate of underwriters, which had been formed under an agreement, entered into a policy of re-insurance on ships valued at £79,300. The subscription form was signed by the manager as manager for the syndicate, and the proportion which each member underwrote was written opposite his name. The agreement authorized the manager to sign policies on behalf of the syndicate, and under it no liability was to attach to any member beyond his own proportion set opposite to his name, and the profits or losses were to be divided amongst or to be borne by the members in proportion to the amounts subscribed by each.

Held, that the liability on the policy was not a joint, but a several liability, and that the agreement did not constitute the members partners in the business.—*Tyser* v. *Shipowners Syndicate*, Q.B.D., 207.

14. *Marine—Time policy—Hull and machinery—"Warranted uninsured" — "Honour" policy—"Disbursements"—Breach of warranty.*—The plaintiff effected a time policy of insurance with the defendants on the hull and machinery of a steamship of the value of £10,000, and by the policy warranted that £5,000 was uninsured. The total amount insured on the hull and machinery was £5,000, but the plaintiff effected "honour" policies (*i.e.*, policies void under 19 Geo. 2, c. 27) on "disbursements" to the extent of £2,600. The disbursements were made in respect of coal, stores, provisions, and port expenses.

Held (affirming the decision of Kennedy, J.), that the disbursements were not covered by the words hull and machinery, and that there had been no breach of the warranty.

Quære, whether the latter policy, being null and void at law, could, under any circumstances, constitute an infringement of the warranty in the earlier policy.—*Roddick* v. *Indemnity Marine Insurance Co.*, C.A., 27.

15. *Marine—Valued policy—Insurance against fire—Depreciation by stranding—Repairs not done when a subsequent total loss occurred by fire—Right of assured to recover under fire policy.*—The steamship B. was insured with certain underwriters against the perils of the sea, and with the defendant company against loss by fire and explosion only. The vessel, through stress of weather, was driven ashore and became a constructive total loss. While stranded she was totally destroyed by fire.

Held, that the insured were entitled to recover from the defendant company upon the ground that the loss by stranding would only become a total loss if due notice of abandonment of the ship were given; if no such notice were given the loss would be a particular average only, and that a partial loss, however serious, would not impair the right of the assured to recover for a subsequent total loss upon the basis of the valuation by which, in case of loss by fire, the parties agreed the indemnity was to

be calculated.—*Woodside* v. *Globe Marine Insurance Co.*, Q.B.D., 187.

16. *Mortgage — Debenture—Company — Insolvency of insurance company—Scheme of arrangement—Discharge of liability.*—The appellants insured the debentures in a limited company, the directors of which undertook to repay the insurers all sums within a prescribed amount which the latter should have paid under the insurance policy.

Default was made in payment of the debentures, and the appellants passed a resolution for voluntary winding up; a scheme of arrangement between the appellants and the directors of the limited company was sanctioned by the court, under which "in lieu of its liabilities under such policies" the rate of interest payable by the appellant corporation was, as from the date of the winding-up resolution, reduced, and the time for payment of the principal was extended.

The appellants made a payment of interest calculated on the original rate up to the date of winding up, and at the reduced rate for the period subsequent thereto, and claimed to be re-imbursed by the directors of the limited company.

Held, that the directors of the limited company were not liable, as the payment was made wholly under the scheme of arrangement and not under the policy. — *Mortgage Insurance Corporation* v. *Pound*, H.L.

See also PRACTICE, 48; TRUSTEE, 14; WILL, 26.

INTEREST:—

1. *Rate of—Tenant for life—Remainderman—Capital income — Apportionment.* — The court, in applying the rule laid down in *Re Earl of Chesterfield's Trusts* (32 W. R. 361, 24 Ch. D. 643) and analogous cases, ought now to take interest at 3 per cent. instead of 4 per cent. as the basis of calculation.—*Goodenough, Re, Marland* v. *Williams*, CH.D. KEKEWICH, J., 44.

2. *Sum payable at a certain time—Time fixed by reference to death*—3 & 4 *Will.* 4, *c.* 42, *s.* 28.—A sum payable by virtue of a written instrument within a fixed time after the death of the party chargeable is payable at a certain time within the meaning of 3 & 4 Will. 4, c. 42, s. 28, and in case of default of payment within such time the court will allow interest on the sum from the expiration of such time until payment.

Knapp v. *Burnaby*, 9 W. R. 765, followed.—*Horner, Re, Fooks* v. *Horner*, CH.D. CHITTY, J., 556.

See also WILL, 3, 22.

INTESTATES' ESTATES ACTS:—

1. *Dower—Priority—Intestates' Estates Act*, 1890 (53 & 54 *Vict.* c. 29), *ss.* 2, 4.—The widow's dower out of the real estate of an intestate is subject to abatement in respect of the proportionate part to be borne by the real estate of the charge of £500 created by the Intestates' Estates Act, 1890.—*Charriere, Re, Duret* v. *Charriere*, CH.D. NORTH, J., 539.

2. *Escheat—Equitable interest—Proceeds of the sale of real estate directed to be sold under will—Beneficial interest ineffectually disposed of—Intestates' Estates Act*, 1884 (47 & 48 *Vict.* c. 71) *ss.* 4, 7.—Under sections 4 and 7 of the Intestates' Estates Act, 1884, the law of escheat applies to proceeds of the sale of real estate directed to be sold under the will.—*Wood, Re, Attorney-General* v. *Anderson*, CH.D. ROMER, J., 685.

See also PROBATE, 5.

JAMAICA, LAW of:—

Trade-mark—Registration—"Club Soda"—Misrepresentation by plaintiff of his goods.—In an action by the appellant who had registered his English trade-mark of "Club Soda" in Jamaica, under Law 17 of 1888, it appeared that the respondents persisted in selling their goods under the same name in a way calculated to deceive.

Held, that the appellant was not disentitled to relief merely because he had printed on his label the words "manufactured in Ireland by H.M. Royal Letters Patent." Those words, explained by the evidence to relate to patented machinery, did not necessarily represent or induce belief contrary to the fact that the ingredients of their article were patented.—*Cochrane* v. *Macnish*, P.C.

JAPAN, LAW of:—

Consular courts — Jurisdiction — Counterclaim against Japanese plaintiff. — By treaty between Great Britain and Japan, the English Consular Courts in Japan and the Territorial Courts of Japan have exclusive jurisdiction over claims against British and Japanese subjects respectively.

The defendants, an English company, being sued by the Emperor of Japan in a British Consular Court for damages resulting from a maritime collision, counterclaimed in respect of the same collision as due to the negligence of the plaintiff's servants.

Held, that there was no jurisdiction to entertain the counterclaim in the Consular Court, the cognizance of such claim belonging to the Territorial Court.—*Imperial Japanese Government* v. *Peninsular and Oriental Steam Navigation Co.*, P.C.

JOINTURE.—See POWER, 5.

JUSTICES:—

1. Certiorari—*Summons for an offence punishable by fine or imprisonment—Dismiss by justices*—Nemo bis vexari pro eadem causa.—A writ of *certiorari* cannot be issued to quash an order for acquittal made by justices on the hearing of a summons for an offence punishable by fine and imprisonment.—*Reg.* v. *Antrim Justices*, Q.B.D. (Ir.).

2. *Diseases of Animals Act—Right to prosecute—Local authority—Diseases of Animals Act*, 1894 (57 & 58 *Vict.* c. 57), *ss.* 2, 51, 52, 54, 57.—The local authority are not the only persons who have power to enforce the Diseases of Animals Act, 1894, and the orders made in pursuance of the Act. Any person may prosecute for an offence under the Act or orders.

Reg. v. *Cubitt*, 37 W. R. 492, 22 Q. B. D. 622, distinguished.—*Reg.* v. *Stewart, Burnham, Ex parte*, Q.B.D., 368.

3. *Jurisdiction—Adulteration—Milk sold with a false warranty—Prosecution of offenders—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict.* c. 61), *ss.* 6, 10, 13, 20, 27—*Amendment Act*, 1879 (42 & 43 *Vict.* c. 30), *s.* 3.—K., a Rutlandshire farmer, contracted to sell milk to a dairy company whose premises were situate at Finchley-road, London, but not within the district of the C. metropolitan police court. K. consigned a churn of milk with a written warranty attached to the churn, at Oakham, to the dairy company in the Finchley-road. The dairy company resold the churn of milk to a London hospital whose premises were situate within the district of the C. police court. An inspector of that district procured (under section 3 of the Food and Drugs Act, 1879) at the premises of the hospital, a sample of the milk, and obtained an analysis of it by the analyst of that district, who certified that it

was adulterated with water. Proceedings were instituted by the inspector in the C. police court against K. for an offence under section 27 of the Sale of Food and Drugs Act, 1875, by reason of his having given a false warranty as to the milk.

Held, that the magistrate of the C. police court had no jurisdiction, as the offence alleged against K. had not been committed within the district of that court.

Fortune v. *Hanson, ante*, p. 431, [1896] 1 Q. B. 205, commented on.—*Reg.* v. *Smith (Horace)*, Q.B.D., 492.

4. *Jurisdiction — Child charged with larceny—Charge dismissed—Industrial Schools Act*, 1866 (29 & 30 *Vict. c.* 118), *ss.* 14, 15.—Where a child has been charged before the justices, and they dismissed the charge, but evidence had been given which, in their opinion, justified them sending the child to an industrial school, they have power to make such an order forthwith, and it is not necessary that the child should be brought before the court again on a fresh summons or warrant.—*Reg.* v. *Jennings, Symons, Ex parte*, Q.B.D., 128.

5. *Jurisdiction — Licensing Law — Objection to renewal of licence—Refusal of justices to renew—Appeal to quarter sessions—Jurisdiction to order non-appearing objector to pay costs—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-sections* 2, 5—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 13, *sub-section* 11.— The licensee of a licensed house received notice of objection to the renewal of his licence, and the objector appeared at the annual licensing meeting and opposed the renewal. The licensing justices refused to renew the licence, and the licensee appealed to the court of quarter sessions, having served due notice of the appeal upon the objector. The objector took no part in the appeal, and did not appear before the court, which allowed the appeal and ordered the objector to pay the costs.

Held, that the court of quarter sessions had jurisdiction to order the objector to pay the costs, as he was a "party" to the appeal within section 31 of the Summary Jurisdiction Act, 1879, although he had not appeared before the court.—*Reg.* v. *Kent Justices*, Q.B.D., 603.

6. *Local government — Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76)—*Continuing offence—Limitation of time—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*Amendment—Baines' Act*, (12 & 13 *Vict. c.* 45), *s.* 7.—On a conviction for wilfully and knowingly acting contrary to an order to close certain premises as unfit for human habitation the magistrate inflicted a fine of a shilling a day for the whole period during which the offence had continued (193) days.

Held, that the conviction was bad as contrary to the six months' limitation of section 11 of the Summary Jurisdiction Act, 1848.

Held further, that the conviction could not be amended under section 7 of Baines' Act, since the mistake was not one made in drawing up the conviction, but a mistake of law.—*Reg.* v. *Slade*, Q.B.D.

See also ADULTERATION, 1, 5, 8; BASTARDY, 1, 2; BREACH; CRIMINAL LAW, 3; DIVORCE, 8-11; INLAND REVENUE, 7; LICENSING LAW, 1-3; METROPOLIS, 12; MINES; PRACTICE, 2.

LANDLORD and TENANT:—

1. *Building agreement—Covenant—Piece of land for roadway—Maintenance—Acquirement of such land—Whether covenant implied.*—Every obligation which on a fair construction of the language of a deed is imposed on one of the parties thereto amounts to an express covenant by him to perform that obligation. But the language must clearly show an intention that there should be an agreement between the covenantor and the covenantee to do or not to do the particular thing referred to. —*Cadogan Estate, Re*, C.A.

2. *Compensation — Allotments — Cottage garden—Holding used by seedsman for trade purposes—Allotments and Cottage Gardens Compensation for Crops Act*, 1887 (50 & 51 *Vict. c.* 26), *ss.* 4, 5.—A plot of land occupied by a seedsman and used by him for the business of a seedsman is not an allotment or holding within the meaning of section 4 of 50 & 51 Vict. c. 26, and the occupier is not entitled to compensation under section 5. The Act only applies to poor persons who cultivate their gardens for food or pleasure.—*Cooper* v. *Pearse*, Q.B.D., 494.

3. *Distress — Suspension of right of.*—Where a tenant gave his landlord a bill of exchange for rent due:—

Held, that there was evidence to go to the jury of an agreement by the landlord to suspend his right of distress during the currency of the bill.—*Palmer* v. *Bramley*, C.A.

4. *Ejectment — Forfeiture — Distress — Waiver of forfeiture—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 210.—In an action of ejectment under section 210 of the Common Law Procedure Act, 1852, on a right of re-entry for non-payment of rent, the levying a distress after the right of forfeiture has accrued is not a waiver of the forfeiture if after the distress and before the issue of the writ in the action there remains one half-year's rent due.

Brewer v. *Eaton*, 3 Doug. 230, followed.

Cotesworth v. *Spokes*, 10 C. B. N. S. 103, distinguished.—*Thomas* v. *Lulham*, C.A.

5. *Furnished lodgings—Agreement to let—Implied promise—Fitness for occupation—Sanitary condition.* —In an agreement to let furnished lodgings and to supply ordinary household attendance there is no implied promise that the lodgings shall be in a sanitary condition throughout the period for which they are let.—*Sarson* v. *Roberts*, C.A.

6. *Lease—Agreement for lease of colliery—Action for specific performance—Tenant in possession—Order to give up possession—Entry under order—Distress.*— In an action by C. for specific performance of an agreement for a lease of a colliery the defendant company, who were in possession and actually working the colliery, were ordered to pay certain arrears of rent, and in default to give up possession to C. Default being afterwards made, the defendant company accordingly gave up possession to C. The question was raised whether C. was entitled to distrain on goods upon the colliery which were admitted to be the property of the debenture-holders of the defendant company, and in the possession of the debenture-holders' receiver.

Held, that C., by taking the above-mentioned order and insisting on his right of taking possession under it, had elected to treat the defendant company as purchasers, and had obtained an equitable remedy inconsistent with the continuance of the relation of landlord and tenant; that C. was now in possession as vendor, and not as landlord; and consequently that the principle of *Walsh* v. *Lonsdale*, 31 W. R. 109, 21 Ch. D. 9, did not apply to the case, and C. was not entitled to distrain on the goods.—*Murgatroyd* v. *Old Silkstone Coal Co.*, CH.D. CHITTY, J., 198.

7. *Lease—Covenant not to assign without consent—*

—*Consent not to be unreasonably withheld—Reasonable grounds for withholding consent.*—A lease granted by the plaintiff's predecessor in title contained a covenant by the lessee not to assign without the written permission or licence of the lessor, such permission or licence not to be unreasonably withheld in the case of any respectable and responsible assignee. The plaintiff, being desirous of taking possession for himself, entered into negotiations with the lessee for a surrender of the lease. The lessee offered to sell the lease for £400. The plaintiff did not immediately close with this offer, and in the meantime the lessee agreed to sell the lease to the defendant for £400. The plaintiff, while admitting that the defendant was a respectable and responsible person, refused to give his licence for an assignment of the lease to him, on the ground that he himself was willing to give the sum of £400 for the lease.

Held, that this was not a reasonable ground for withholding consent to the assignment.—*Bates* v. *Donaldson*, C.A., 659.

8. *Lease—Covenant for title—Covenant for quiet enjoyment—Implied covenants—Word "demise."*—In a lease for a term of years there is, in the absence of the word "demise," no implied covenant for title. Where there is an implied covenant for quiet enjoyment, such covenant only operates during the continuance of the lessor's estate.

Decision of Lord Russell of Killowen, C.J., 43 W. R. 524, affirmed.—*Baynes* v. *Lloyd*, C.A., 328.

9. *Lease—Covenant—Restrictive covenant—Not to carry on certain businesses "or any other offensive or noisy trade or profession whatsoever"*—Ejusdem generis—*Private hospital.*—A lease of a plot of ground let for the building thereon of residential houses in a high-class quarter of the City of Dublin contained a covenant on the part of the lessee, his executors, administrators, and assigns not to carry on or permit to be carried on on the demised premises or any part thereof the business of a tavern, soap-boiler, baker, butcher, druggist, apothecary, tanner, silversmith, blacksmith, "or any other offensive or noisy trade, business, or profession whatsoever." The defendant, a sub-lessee of part of the demised premises, used them as a boarding-house for patients needing medical or surgical advice and treatment, but persons suffering from any infectious disease were not received therein.

Held, by the Court of Appeal (Fitzgibbon, L.J., dissenting), that having regard to the locality and the circumstances under which the original lease was granted, the business carried on by the defendant was a breach of the covenant in the original lease, which should be restrained by an interlocutory injunction.

Tod-Heatley v. *Benham*, 40 Ch. D. 80, and *Withington Board* v. *Manchester Corporation*, [1893] 2 Ch. 19, discussed.—*Pembroke (Earl)* v. *Warren*, C.A. (Ir.).

10. *Lease—Re-entry—Without process of law—Right to relief from forfeiture—Preamble to section* 2, 4 *Geo.* 2, *c.* 28—*Common Law Procedure Act*, 1852, *ss.* 211, 212—*Bankruptcy Act*, 1883, *ss.* 44, 168.—In a proper case a lessee is entitled to relief from even forfeiture where the re-entry of the lessor has been a peaceable one and made without process of law.

The effect of the preamble to section 2 of 4 Geo. 2, c. 28, and of section 112 of the Common Law Procedure Act of 1852, is not such as to limit the jurisdiction of the court to grant such relief only in those cases where ejectment proceedings have been taken.

The right to relief from forfeiture is not a right purely personal to the lessee, but vests on his bankruptcy in his trustee in bankruptcy, and may be assigned by such trustee.—*Howard* v. *Fanshawe*, CH.D. STIRLING, J.

11. *Lease—Residential flats—Common scheme—Implied contract—Injunction.*—A general scheme for the management of a set of residential flats conducive to the benefit and convenience of the tenants, and contained in the tenancy agreements, implies a contract on the part of the lessor not to alter the private residential character of the building, and a breach of such implied contract may be restrained by injunction.

Spicer v. *Martin*, 37 W. R. 689, 14 App. Cas. 12, applied.—*Hudson* v. *Cripps*, CH.D. NORTH, J., 200.

12. *Lease—Stipulation for payment of additional rent of £3 per ton by way of penalty for every ton of hay or straw sold off the premises—Material difference between manurial value of hay and straw—Penalty—Liquidated damages—Stipulations of varying importance.*—A lease of a farm contained a stipulation that the lessee should pay additional rent at the rate of £3 per ton by way of penalty for every ton of hay or straw which should be sold off the premises during the last twelve months of the tenancy. It was proved that there was a material difference between the manurial value of hay and the manurial value of straw.

Held, that the sum of £3 per ton was a penalty, and could not be recovered as liquidated damages.

Wright v. *Tracey*, 7 Ir. R. C. L. 134, not followed.—*Willson* v. *Love*, C.A., 450.

13. *Underlease—Covenant to keep in repair—Measure of damages.*—In an action for damages on a breach of covenant to keep demised property in repair, the proper measure of damages is the difference in value between the reversion with the covenant performed and the value of that reversion with the covenant unperformed.

In the case of an underlease, if the underlease discloses the fact that it is an underlease, the liability over of the underlessor to his superior landlord is a material circumstance to be taken into account in ascertaining the amount of damages to be paid by the underlessee to the underlessor for breach of covenant to keep in repair.—*Ebbetts* v. *Conquest.*, C.A., 56.

See also BANKRUPTCY, 18; COMPANY, 33; FRAUDS, STATUTE OF; PRACTICE, 16, 23.

LANDS CLAUSES ACTS:—

1. *Railway company—Notice to treat—Part of a building—"House"—"Manufactory"—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 18), *s.* 92.—Where a railway company gives notice to treat for part of a building, another part of which building is used, together with the adjacent land and premises, for the purposes of a manufactory, the company is requiring the sale of a part of the manufactory within the 92nd section of the Lands Clauses Act, and cannot resist a counter-notice calling upon the company to take the whole manufactory.—*Brook* v. *Manchester, Sheffield, &c., Railway Co.*, CH.D. CHITTY, J.

2. *Railway company—Superfluous lands—Pre-emption—Compulsory sale by railway company—Lands Clauses Act*, 1845 (8 & 9 *Vict.* c. 18), *ss.* 127, 128.—It is not to be inferred from the compulsory sale by one railway company to another of lands which, if not sold, might have been required for the purposes of the selling company, that the lands are superfluous lands in the hands of that company.

Under the powers of a special Act passed in 1863 the defendants acquired certain lands from the plaintiff's predecessors in title. Under the powers conferred by a special Act passed in 1883 the Lancashire and Yorkshire Railway Co. acquired compulsorily, among other lands, part of the lands acquired by the defendants from the plaintiff's predecessors in title. The Act contained a proviso that the enactment should not affect or prejudice any estate, right, title, interest, or advantage of the plaintiff, his heirs or assigns. The evidence showed that the lands, if they had not been sold to the Lancashire and Yorkshire Railway Co., might have been required for the purposes of the defendants' undertaking.

Held (reversing the decision of Kekewich, J.), that the lands sold to the Lancashire and Yorkshire Railway Co. could not be treated as superfluous lands of the defendants.

Hobbs v. *Midland Railway Co.*, 30 W. R. 516, 20 Ch. D. 418, approved.

Lord Carington v. *Wycombe Railway Co.*, 16 W. R. 494, L. R. 3 Ch. App. 377, distinguished.—*Dunhill* v. *North-Eastern Railway Co.*, C.A., 231.

3. *Reinvestment of purchase money — Rebuilding rectory—Lands Clauses Act*, 1845, *s.* 69.—In 1890 a rector rebuilt the rectory at a time when considerable repairs would otherwise have been necessary. In 1893 some of the glebe was acquired by the Manchester Ship Canal Co., and the purchase money paid into court. Part of the expenses of rebuilding the rectory was still unpaid; on a petition by the rector,

Held, that the sum remaining due could not be paid out of the fund in court.—*Newton Heath (Rector), Ex parte*, CH.D. NORTH, J., 645.

See also RAILWAY, 1, 3, 4; SCHOOL.

LEASE.—See ADMINISTRATION, 8; LANDLORD AND TENANT, 6-13; NEGLIGENCE, 2; PRACTICE, 16; SOLICITOR, 10; VENDOR AND PURCHASER, 6-8; WILL, 23.

LIBEL.—See PRACTICE, 19, 47.

LICENSING LAW:—

1. *Justices—Renewal—Adjournment*—Mandamus.—A notice of an application for renewal of a licence, given for the first day of the general annual licensing meeting, holds good for all adjournments.—*Reg.* v. *Armstrong*, Q.B.D.

2. *Justices—Renewal—Objection—Meeting of justices in private room—Adjournment*—Mandamus—*Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 1, 3, 9—*Licensing Act*, 1872 (*c.* 94), *s.* 12—*Licensing Act*, 1874 (*c.* 49), *s.* 26.—An application for renewal of a licence was made, and the justices adjourned the consideration of the renewal. Pending the adjournment notice of objection to the renewal was for the first time served on the applicant. The applicant attended at the adjourned hearing and was heard by her solicitor, and the justices refused the renewal.

On an application for a *mandamus*,

Held, that the objection had been lodged in time, and that as the justices had heard and determined the matter no *mandamus* would be granted.—*Reg.* v. *Anglesea Justices*, Q.B.D.

3. *Licence—Renewal—Beerhouse*—Mandamus.—In the case of a beerhouse coming within the provisions of section 19 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), on an application for a renewal of the licence the magistrates, in the absence of any objection within section 8, have no choice but to grant a renewal without qualification, save where there have been such alterations in the premises since the last renewal as, in the opinion of the justices, destroy the identity of the premises, when they may treat the beerhouse as a new beerhouse, and grant or refuse a new licence for it at their discretion.—*Reg.* v. *Bradford Justices*, Q.B.D.

4. *Sale of liquor elsewhere than on licensed premises—Licensing Act*, 1872 (35 & 36 *Vict.* c. 94), *s.* 3.—The appellant held an off licence for the sale of beer by retail. His practice was to employ a carter, who went round to the customers' houses every week with a cart from which he delivered jars of beer and received orders for the following week. The carter in this way received an order from a customer at the customer's own house for a jar of beer, which was the following week delivered from the cart at the house and there paid for. The jar was one of several gallon jars, none of which were distinguished by any label or other mark from other similar jars in the cart.

Held, that the sale of beer to the customer took place at the latter's house and not on the licensed premises, and the appellant was therefore properly convicted under section 3 of the Licensing Act, 1872, of selling intoxicating liquor at a place where he was not authorized by his licence to sell the same.—*Pletts* v. *Campbell*, Q.B.D.

5. *Sale of drink to drunken person—Sale by barman contrary to orders—Conviction of publican—Licensing Act*, 1872 (35 & 36 *Vict.* c. 94), *s.* 13.—A publican gave general instructions to his barmen not to sell drink to drunken persons. A barman, in the absence of the publican, sold drink to a drunken person.

Held, that the act of the barman being within the scope of his employment, the publican was liable to be convicted under section 13 of the Licensing Act, 1872, for selling intoxicating liquor to a drunken person.—*Police Commissioners* v. *Cartman*, Q.B.D., 637.

6. *Sale at place not authorized by licence—Sale—Appropriation of goods sold—Licensing Act*, 1872 (35 & 36 *Vict.* c. 94), *s.* 3.—A brewer at Burnley, having an off-licence for the sale of beer by retail, sent round a traveller to obtain orders at Accrington. The traveller handed to the customer at whose house he called a printed and stamped post-card, addressed to the brewery; the traveller wrote on the post-card the quantity of ale required, and the customer signed the post-card, which was then posted by the traveller. The post-card contained a request to the brewer to supply the quantity of ale named weekly until further notice, and concluded as follows: "I assent to the appropriation by you to this order at your brewery of goods of the above description and in a deliverable state." The brewer's carter selected at the brewery, in accordance with such an order, six bottles of ale, one of which he labelled with the customer's name and address, and placed them in a coop or box together with six other bottles, for another customer, one of which was also labelled. The goods (with others) were then placed on a lorry, and ultimately delivered at the customer's house, where they were paid for on delivery.

Held, that there had been a complete sale and appropriation of the goods at the brewery at Burnley, and that the brewer could not be convicted under section 3 of the Licensing Act, 1872, of selling intoxicating liquor at a place where he was not authorized by his licence to sell the same.

Pletts v. *Campbell*, [1895] 2 Q. B. 229, distinguished.—*Pletts* v. *Beattie*, Q.B.D.

See also JUSTICES, 5; THEATRE.

LIGHT:—

Ancient lights—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4—*Interruption.*—An action cannot be brought in respect of a prescriptive right to light unless the access and use of the light has, at the time of action brought, been actually enjoyed for the full period of twenty years without interruption; the fact that, by reason of enjoyment of access of light for more than nineteen, but under twenty years, effectual interruption has become impossible before the completion of the full period, does not make any difference.—*Battersea* (*Lord*) v. *City of London Sewers Commissioners*, CH.D. NORTH, J., 124.

See also PRACTICE, 25.

LIMITATIONS, STATUTE of:—

1. *Composition—Failure by debtor to pay composition—Action for original debt.*—In 1888 the defendant arranged with his creditors (including the plaintiff) for a composition of his debts incurred before 1887, payable by instalments. The first instalment was not paid. On the 28th of October, 1893, the plaintiff brought an action for the amount of the original debt.

Held, that the plaintiff was entitled to judgment; that there was implied in the arrangement made in 1888 a promise on the part of the debtor that in case he failed to pay the composition at the agreed time, he should pay the entire debt; and consequently, that the Statute of Limitations had not barred the debt.—*McDonnell* v. *Broderick*, C.A. (Ir.).

2. *Money charged on land—Devise of lands charged to tenant for life of charge under a settlement—Presumption of payment of interest by devisee in fee—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.—A testator, having covenanted to pay within twelve months of his death to the trustees of his son's marriage settlement a sum of money, and having charged certain real estate with payment of the same and interest, devised the estate, subject to the charge, to his son in fee. The son was tenant for life under the settlement, and entered into possession of the estate on the death of his father, and received the rents and profits for more than twelve years. The money had never been raised, nor had any interest ever been paid in fact.

Held, that there had been no payment of interest so as to prevent the Statute of Limitations running in favour of the personal estate.

Decision of Kekewich, J. (43 W. R. 491), affirmed.—*England, Re, Steward* v. *England*, C.A., 119.

3. *Rent-charge—Non-payment—Extinguishment—Distress—Statute of Limitations* (3 & 4 *Will.* 4, *c.* 27), *ss.* 1, 2, 34.—A rent-charge is a "rent" within the Statute of Limitations (3 & 4 Will. 4, c. 27), and the owner thereof is barred from the remedy of distress after the right to recover the rent-charge has become extinguished by non-payment during the period limited by the statute.

And the statute is not prevented from running by the fact that the land subject to the rent-charge is in the possession of a statutory corporation.

James v. *Salter*, 3 Bing. N. C. 544, applied.—*Jones* v. *Withers*, C.A.

See also, ADMIRALTY, 1; BANKRUPTCY, 28; COMPANY, 23; PARTNERSHIP, 1; SOLICITOR, 12; TRUSTEE, 3, 8.

LOCAL GOVERNMENT:—

1. *Arbitration—Differences between district councils—Appointment of arbitrator by Local Government Board—"Other mode of adjustment"—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 59 (4), *and* (6) *and* 62 (2).—In the case of differences between district councils a provision in the order or scheme, under section 57 of the Local Government Act, 1888, that such differences may be adjusted by the county council is not another mode of adjustment within section 62 (2) of that Act. The mode of adjustment contemplated in section 59 (4) is adjustment by the order or scheme itself.—*Sowerby District Council and Mytholmroyd District Council's Arbitration, Re*, Q.B.D.

2. *Arbitration—Paving expenses—Apportionment—Award of arbitrator—Remedy of local authority—Proceedings to enforce award—Jurisdiction of High Court—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150—*Arbitration Act*, 1889 (52 & 53 Vict. c. 49), *s.* 12.—An award of an arbitrator under section 150 of the Public Health Act, 1875, fixing the proportion of paving expenses payable by an owner of premises to the local authority is not enforceable under section 12 of the Arbitration Act, 1889.—*Willesden Local Board* v. *Wright*, C.A., 676.

3. *Bye-law—Invalidity—Coal—Sale from vehicle—Requisition to weigh—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21). *s.* 28.—By a bye-law made by a local authority under section 28 of the Weights and Measures Act, 1889, which enables local authorities to make bye-laws regulating the sale of coal in small quantities, "Every person in charge of any vehicle carrying coal for sale . . . in quantities not exceeding two hundredweight . . . shall re-weigh the coal upon being requested to do so by any purchaser, or by anyone on behalf of the purchaser, or by an inspector of weights and measures, or by any constable."

Held, by Lord Russell of Killowen, C.J. (Wright, J., doubting), that the section authorized the making of a bye-law requiring the coal to be weighed by the person in charge of the vehicle, but held by the court that the bye-law was unreasonable, and therefore bad.—*Alty* v. *Farrell*, Q.B.D.

4. *Bye-law—Validity—New buildings—Powers of corporation to disapprove of plans—Leeds Improvement Act*, 1893 (56 & 57 *Vict. c. ccx.*), *s.* 57—*Notice to stop building disregarded—Penalty.*—The Corporation of Leeds under the powers given them by certain local improvement Acts made bye-laws relating to new buildings in the city.

Bye-law 61 provided that any person who shall erect a new building without having the plans previously approved of by the corporation shall be liable to a penalty.

C., a building owner, sent in plans, which the corporation, within twenty-one days, gave written notice to C. of their refusal to pass, on the ground, as stated in their notice, that the provisions of section 57, sub-sections (1) and (3), of the Leeds Improvement Act, 1893, would not be complied with by the proposed plan.

C. thereupon commenced to erect the buildings in accordance with the plans, and was summoned by the corporation and convicted under bye-law 61.

Held, that although bye-law 61 purported to give an absolute power to the corporation to sue for a penalty whenever a building was commenced without their previous approval having been obtained, yet, as the corporation had not used that power capriciously, but had stated the grounds for their disapproval, the conviction was right and must be affirmed.—*Cook* v. *Hainsworth*, Q.B.D., 541.

5. *County council—Bye-law—Validity—Construction—Lights on vehicles—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Local Government*

Act, 1888 (52 & 52 *Vict. c.* 41), *ss.* 75, 85.—A bye-law for the good rule and government of a locality made by the local authority ought to be construed so as to give reasonable effect to the object aimed at.

A county council made a bye-law that "a person driving any vehicle shall, from the end of the first hour after sunset to two o'clock a.m., except during such part of that period as shall be between the rising and setting of the moon, carry attached to such vehicle a lighted lamp placed so as to exhibit a light in the direction he is proceeding in order to signal the approach or position of the vehicle; and in case of a vehicle carrying timber, such person shall also carry attached at the end thereof a lighted lamp so as to exhibit a light to persons overtaking the vehicle."

Held, that this bye-law was not bad, either (1) by reason of its throwing on an alleged offender the *onus* of proving that the alleged offence occurred at a period between the rising and setting of the moon, for that could be proved by means of an almanac; or (2) by reason of the omission in the bye-law of the words "in any street or public place," for those words were to be implied; or (3) by reason of the words "attached to the end thereof" being capable of being construed as applicable either to the vehicle itself or to the timber carried thereon, for those words reasonably construed must be taken as applicable only to the vehicle itself.—*Walker* v. *Stretton*, Q.B.D., 525.

6. *County council—Bye-law for good rule and government—Use of profane or obscene language—Reasonableness—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 16.—A bye-law for the good rule and government of a county made by a county council under section 23 of the Municipal Corporations Act and section 16 of the Local Government Act, 1888, prohibited any person from singing profane or obscene songs or using profane or obscene language "in any street or public place, or on land adjacent therto."

Held, that the bye-law was unreasonable and invalid, not only because it extended the prohibition to land adjacent to a street or public place, but because it did not restrict the offence to cases where the song was sung or the language used to the annoyance of any person or of the public.

A bye-law for good rule and government made under section 23 of the Muncipal Corporations Act, 1882, does not require confirmation by the Local Government Board.—*Strickland* v. *Hayes*, Q.B.D., 398.

7. *County council—Main roads—Urban district—Maintenance — Contribution — Paved footways — General Turnpike Act* (3 *Geo.* 4, *c.* 126), *ss.* 111, 112 —*Highways and Locomotives Act*, 1878 (41 & 42 *Vict. c.* 77), *ss.* 13, 15—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.—Where an urban authority claim, under section 11 of the Local Government Act, 1888, to retain the powers and duties of maintaining any main road within their district, the liability of the county council to contribute to the costs of maintaining such road extends to the costs of maintaining the paved footways which run along the side of such road, even though the road was formerly a turnpike road which became a main road on being disturnpiked.

In re Local Board of Warminster and the County Council of Wilts, 38 W. R. 670, 25 Q. B. D. 450, approved.—*Burslem* (*Mayor of*) *and Staffordshire County Council Arbitration, Re*, C.A., 356

8. *Drain—Sewer—Single drain draining several houses—Liability to repair—Public Health Act*, 1875 (*c.* 55), *ss.* 4, 13, 41—*Public Health Act*, 1890 (*c.* 59), *s.* 19.—A drain pipe passing through private property had, from a date prior to 1890, received the drainage of several houses belonging to different owners before it joined the public sewer. The pipe having become a nuisance, the local authority (who had adopted the Public Health Act, 1890) gave the owners of the houses notice to repair it, and on their failure to do so executed the necessary works themselves, and claimed to recover the expenses from the owners:

Held, that the pipe in question was a "single private drain" within section 19 of the Public Health Act, 1890, and that the local authority was entitled to recover.

Self v. *Hove Commissioners*, 43 W. R. 300, [1895] 1 Q. B. 685, followed.

Hill v. *Hair*, 43 W. R. 651, [1895] 1 Q. B. 906, disapproved. — *Bradford* v. *Eastbourne* (*Mayor*), Q.B.D.

9. *Highway—District inclosure commissioners with jurisdiction over highways—District council—Transfer of authority—Repair of roads—Mode of raising expenses—Exemption from outside highway rates—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 25 *and* 29.—The expression "highway authority" in the Local Government Act, 1894 (56 & 57 Vict. c. 73), is general, and has not the limited meaning given to the same expression in the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77). And highway expenses raised by an acre rate are not defrayed out of any property or funds other than rates within section 29 of the Local Government Act, 1894.

Commissioners of M. had under certain local and private Acts powers of inclosure and drainage, and jurisdiction over the roads in M., a district made up of parts of certain parishes, some of which were in rural and others in urban sanitary districts. Under these Acts the expenses of repairing the roads in M. were raised by an acre rate levied equally on the lands in M., and the lands in M. were exempted from all other highway expenses. The opinion of the court being asked, it was

Held, that the commissioners were a highway authority within the Local Government Act, 1894; that their authority as to the roads in the rural district was by section 25 of that Act transferred to the rural district council, their authority as to the roads in the urban district to the urban district council; that the highway expenses of M., after the transfer, were not to be raised by an acre tax, but treated as general expenses under section 29 of the Act, and that the lands in M. were no longer exempted from general highway rates.—*Marshland Smeeth Commissioners* v. *Marshland District Council*, Q.B.D.

10. *Highway — Encroachment on—Obstruction — Right to abate nuisance—No previous conviction—Urban district council—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26 (1).—An urban district council may remove any obstruction to or encroachment on any highway vested in them by section 149 of the Public Health Act, 1875, without previously taking any proceedings, either by indictment or summarily, against the person who is alleged to have caused the obstruction or encroachment, but they do so at their own risk, and the *onus* is on them of showing that an obstruction or encroachment did in fact exist.—*Reynolds* v. *Presteign District Council*, Q.B.D., 479.

11. *Highway — Roadside waste — Obstruction —*

Expenses of removal—Local Government Act, 1894, *s.* 26 (1).—Under section 26 (1) of the Local Government Act, 1894, a local authority is entitled to remove an obstruction to a roadside waste, and can recover the expenses of so doing from the obstructor.—*Louth District Council* v. *West*, Q.B.D.

12. *Highway — Main road—Footways—Repair—Highways Act*, 1878 (*c.* 77), *s.* 13—*Local Government Act*, 1888 (*c.* 41), *s.* 11.—Under section 11, sub-section (2) of the Local Government Act, 1888, a county council must pay to the urban authority an annual sum towards the costs of the repair in an urban district of the paved footpaths upon or at the sides of disturnpiked roads, which have become main roads under the Highways Act, 1878, s. 13.

In re Warminster, 25 Q. B. D. 450, and *In re Burslem*, [1896] 1 Q. B. 24, approved.—*Derby County Council* v. *Matlock Bath District Council*, H.L.

13. *Illegal contract—Contract with local authority—No penalty clause—Right of action—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 174 (2).—The Public Health Act, 1875, s. 174 (2), enacts that with respect to contracts made by an urban authority under that Act the contract shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed.

Held, that this provision is not directory, but is peremptory. An action will therefore not lie against a local authority for money due under a contract which does not contain a penalty clause.—*British Insulated Wire Co.* v. *Prescot Council*, Q.B.D., 224.

14. *Nuisance — Abatement — Action by local authority — Consent of Attorney-General — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 107.—Proceedings by a local authority under section 107 of the Public Health Act, 1875, to enforce the abatement of a nuisance from which the local authority suffers no damage, can only be taken with the consent of the Attorney-General.

Wallasey Local Board v. *Gracey*, 35 W. R. 694, 36 Ch. D. 593, approved.—*Tottenham Urban District Council* v. *Williamson*, C.A., 676.

15. *Nuisance — Abatement — Notice served on premises—Right of occupier to recover expenses from owner—Public Health (London) Act*, 1891.—Under the Public Health (London) Act, 1891, a sanitary authority served on certain premises an intimation or warning addressed to the owners, that, if certain necessary works were not completed within a specified time, they would commence proceedings against them "by the service of a statutory notice." Thereupon, the occupier, without forwarding the document to the owners, or informing them of it, caused the work to be executed, and then sought to recover the amount expended thereon from the owners. It was decided by Lawrance, J., on the authority of *Gebhardt* v. *Saunders*, 67 L. T. Rep. 684, [1892] 2 Q. B. 452, that the owners were liable. On appeal:

Held, that the occupiers, not being compellable to execute the work, had acted as mere volunteers in doing so, and had no claim to be reimbursed by the owners.—*Thompson* v. *Hawes*, C.A.

16. *Sewer—New buildings and streets—Expenses of sewerage—Refusal of local authority to approve plans—Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *s.* 34—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 158, 277.—The owner of land in a rural district in which section 157 of the Public Health Act, 1875, was in force desired to erect upon his land considerable blocks of houses comprising several streets. The bye-laws of the District Council made under section 157, required that the building owner should deposit plans showing, *inter alia*, "the intended line of drainage of the buildings," and should also deposit "a description in writing of the intended mode of drainage"; the bye-laws did not relate to the provisions for the sewerage of new streets. The owner deposited plans of the proposed new streets and houses, showing in the case of each house a separate drain ending in the soil of a proposed new street, with no cesspool or other receptacle for drainage, and evidently contemplating the existence of a sewer down the proposed street into which the separate drains should empty. The District Council refused to approve the plans, upon the ground only that the owner declined to agree with them for the construction at his expense of the necessary main sewers and sewage outfall works.

Held, that the District Council were not entitled to refuse to approve the plans upon that ground.—*Reg.* v. *Tynemouth District Council*, Q.B.D., 646.

17. "*Slaughter-house*" — "*So continued to be used*"—*Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 126, *and Local Government Act*, 1858 (21 & 22 *Vict. c.* 98).—"Slaughter-house" as used in the Towns Improvement Clauses Act, 1847, and the Local Government Act, 1858, includes not merely the premises where the actual slaughtering of cattle takes place, but also the premises used for processes connected with or incident to the slaughtering; and premises in use for these processes, even though no actual slaughtering of cattle takes place within them, are used as slaughter-houses within section 126 of the Towns Improvement Clauses Act, 1847.

A. was owner of certain premises in Sheffield, which for many years previous to the adoption of the Local Government Act, 1858, by the borough had been used for the slaughter of cattle. In January, 1893, he ceased to slaughter cattle there, but used the premises for "pining" cattle preparatory to slaughter. In March, 1895, he again began to slaughter cattle there. On summons for using as a slaughter-house an unlicensed place, the magistrate held that, as no cattle had been slaughtdred on the premises between January, 1893, and March, 1895, the premises had not been "so used" or "continued to be used as such," within section 126 of the Towns Improvement Clauses Act, 1847, and convicted A. On appeal:

Held, that the conviction was wrong.—*Hides* v. *Littlejohn*, Q.B.D.

18. *Street—Paving expenses—Schools—Charge on school premises — "Owners" — Trustees — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257—*Schools Sites Act* (4 & 5 *Vict. c.* 38), *s.* 6.—The trustees of premises conveyed to them for the purposes of a school under section 6 of the School Sites Act, 1841, are "owners" within section 4 of the Public Health Act, 1875, and the local authority is entitled to a charge on the premises for a proportionate amount of the expenses of paving the street fronting the premises.—*Hornsey District Council* v. *Smith*, CH.D. KEKEWICH, J., 559.

19. "*Street*"—*Vestry—Soil below surface—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Tunbridge Wells Improvement Act*, 1890 (53 & 54 *Vict. c. ccxxxv.*), *ss.* 4, 93.—Where the Public Health Act, 1875, or any local Act, vests a street in a urban authority, it only vests in them such property in the soil of the street as is necessary for the control, protection, and maintenance of the street as a highway for public use, and confers upon them no

authority to make excavations in the soil below the surface for the purpose of public conveniences.

Dictum of Bramwell, L.J., in *Coverdale* v. *Charlton*, 4 Q. B. D. 104, explained.

An agreement was entered into between the lord of a manor and the freehold tenants, which was confirmed by a private Act of Parliament, by which it was provided that a certain promenade, formerly part of the waste of the manor, should remain open and free for the public use.

Held, that the soil under the surface of the promenade remained the property of the lord.—*Tunbridge Wells (Mayor)* v. *Baird*, H.L.

20. *Water-closet — Defective water-closets — Notice requiring owner to amend—Validity of — Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 39, *sub-section* 3; *s.* 41, *sub-section* 2.—By the Public Health (London) Act, 1891, s. 39, sub-section 1, the county council are required to make bye-laws with respect to water-closets; and by sub-section 3 any directions given by the sanitary authority under that Act, so far as they are not in accordance with such bye-laws, shall be void. By section 41, sub-section 2, if on examination any water-closet "appears to be in bad order and condition, or to require cleansing, alteration, or amendment," the sanitary authority shall serve a notice on the owner requiring him to put it in proper order or condition. And by sub-section (3) "any person who thinks himself aggrieved by any notice . . . in relation to any water-closet . . . may appeal to the county council, whose decision shall be final."

The county council made bye-laws under section 39 with respect to future water-closets, prescribing the mode of their construction, but made none with respect to structural alterations of existing water-closets.

The respondent was to owner of a water-closet which had been constructed before the making of the bye-laws. The appellants as the sanitary authority, purporting to act under section 41, sub-section 2, served a notice on the respondent requiring him to make certain structural alterations in the water-closet.

Held, (1) that upon a summons for non-compliance with the notice the magistrate had jurisdiction to inquire into the validity of the notice, notwithstanding the provisions as to an appeal to the county council. (2) That the notice was void under section 39, sub-section 3, there being no bye-laws for it to be in accordance with.

Held also, by Kennedy, J., that the "alteration or amendment" which the sanitary authority are empowered to require under section 41, sub-section 2, does not comprise structural alteration.—*Fulham Vestry* v. *Solomon*, Q.B.D.

See also ELECTION LAW, 7, 8; JUSTICES, 6; NEGLIGENCE, 3; POOR LAW, 4.

LOCKE KING'S ACT.—See MORTGAGE, 3.

LONDON BUILDING ACT, 1894.—See METROPOLIS MANAGEMENT, 1, 4, 9.

LOTTERY:—

Newspaper competition—Naming the winners of horse races—Lottery Acts, 1802 (42 *Geo.* 3, *c.* 119), *s.* 2, *and* 1823 (4 *Geo.* 4, *c.* 60), *s.* 43.—The proprietor of a weekly paper offered £100 to anyone who should correctly fill in a coupon, provided for the purpose in an issue of the paper, with the names of the first four horses in a race about to take place.

Held, that this was not a lottery within the meaning of the Lottery Acts.—*Stoddart* v. *Sagar*, Q.B.D., 287

LUNACY:—

1. *Action by committee—Subsequent bankruptcy of lunatic—Trustee in bankruptcy added as defendant—Application by trustee to stay proceedings granted—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 132—*Lunacy Act*, 1890 (53 *Vict. c.* 5), *ss.* 117, 120—*R. S. C.*, 1883, *ord.* 16, *r.* 17.—A., the committee of B., a lunatic, commenced an action against C. B. was subsequently adjudicated a bankrupt, whereupon, at the instance of C., the writ was amended by adding B.'s trustee in bankruptcy as a defendant to the action. On an application by the trustee that the action might be stayed as against him on the ground that it was vexatious,

Held, that the right of action vested in the trustee on the bankruptcy of the lunatic; that the trustee could not be added as defendant to the action against his will; and that he was entitled to have the action stayed as against him.—*Farnham* v. *Mitchell*, CH.D. STIRLING, J., 135

2. *Committee of lunatic's business—Personal liability—Receiver and manager—Committee in position of bailiff or trustee.*—A committee appointed by the court to carry on the business of a lunatic cannot be made personally liable on contracts entered into in course of trading, unless it can be shown that the goods were supplied on his credit. He is, therefore, in a different position as regards personal liability to that of a manager and receiver appointed by the court, being in fact merely a bailiff or trustee of the business. In the event of the assets of the business not being for a time available to pay the creditors the committee cannot be compelled to pay them out of his own pocket, repaying himself at a later time from the funds of the business when the assets come to hand.—*Isaacs* v. *Chinery*, Q.B.D.

3. *Lunatic bankrupt—Jurisdiction—Title of trustee—Creditors—Voluntary settlement—Void gift—Bankruptcy Act*, 1883 (*c.* 52), *s.* 47—*Bankruptcy Act*, 1890 (*c.* 71), *s.* 1—*Lunacy Act*, 1890 (*c.* 5), *ss.* 117, 120.—A lunatic can be adjudicated bankrupt under the direction of his committee with the consent of the Court in Lunacy.

Upon a person being found lunatic the jurisdiction of the Court in Lunacy immediately attaches to his property, including the discretionary powers vested in the court by sections 117 and 120 of the Lunacy Act, 1890, of applying his property for his benefit, and cannot be ousted by a subsequent adjudication in bankruptcy; and consequently the trustee in bankruptcy can only take the lunatic's property subject to the jurisdiction in lunacy.

A voluntary settlement which is "void against the trustee" in bankruptcy of the settlor under section 47 of the Bankruptcy Act, 1883, is void for all purposes and does not entitle the trustee to stand in the place of the beneficiary so as to defeat a prior title to the settled property—*e.g.*, the jurisdiction of the Court in Lunacy where the settlor has been found lunatic between the date of the settlement and the adjudication in bankruptcy.

Sanguinetti v. *Stuckey's Banking Co.*, 43 W. R., approved.—*Farnham, Re* (*No.* 1), LUNACY.

4. *Lunatic bankrupt—Property vested in or under the control of trustee in bankruptcy—Jurisdiction of court sitting in lunacy to order transfer.*—Where property of a lunatic so found who has also been adjudicated a bankrupt is vested in or under the control of the trustee in the bankruptcy, the court sitting in lunacy has no jurisdiction, upon an applica-

tion made in lunacy, to order such trustee to transfer that property to the credit of the lunacy.—*Farnham, Re* (*No.* 2), LUNACY, 465.

5. *Lunatic domiciled in Victoria—Transfer of stock standing in the name of the lunatic—Discretion of the court—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 134.—A., a person domiciled in Victoria, had been there found a lunatic, and B., the Master in Lunacy of the Supreme Court of Victoria, had been appointed, under the Lunacy Act of Victoria, 1890, to manage A.'s estate. B. applied to the English court to have a transfer to him of the capital and dividends of stock standing in the lunatic's name in England.

Held, that, under section 134 of the Lunacy Act, 1890, the court had a discretion as to making the order, but that, under the circumstances, it was right that both capital and income should be transferred to B.—*Brown, Re*, LUNACY, 17.

6. *Lunatic tenant for life—Conveyance by committee under Settled Land Acts—Covenants for title—Lunacy Act*, 1890 (53 *Vict. c.* 5), *s.* 124—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 62.—Upon a sale by the committee of a lunatic tenant for life selling under the powers of the Settled Land Act, 1882, the court has power, under section 124 of the Lunacy Act, 1890, to authorize the insertion of such covenants for title as are usual and proper in a conveyance upon a sale.

In re Fox, 35 W. R. 81, 33 Ch. D. 37, explained.—*Ray, Re*, LUNACY, 353.

7. *Lunatic tenant for life—Order in the lunacy for payment of annuities to remainderman for twenty years—Payments erroneously continued beyond that period—Mortgage by and bankruptcy of remainderman—Claim by representative of tenant for life to retain amount of excessive payments—Statute-barred debt—Set-off—Priority.*—A tenant for life became lunatic, and by orders in the lunacy made in 1867 and 1868 annuities were directed to be paid to a remainderman (upon proper security for repayment) out of the income of the settled estates for twenty years. The payments were through some unexplained cause continued beyond this period, and in the meantime the remainderman mortgaged his interest in the estates, and subsequently became bankrupt. On the death of the tenant for life, his personal representative claimed to retain out of the share of personal estate, to which the remainderman then became entitled, the amount of the excessive payments beyond the period of twenty years, in priority to the remainderman and all persons claiming under him, together with interest thereon.

Held, that the personal representative was entitled so to retain these amounts together with interest, and that the fact of the estate of the remainderman being in mortgage made no difference.—*Langham, Re, Otway* v. *Langham*, CH.D. STIRLING, J.

8. *Person lawfully detained—Settled land—Tenant for life—Power of leasing—Exercise of power by receiver duly constituted—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 62—*Lunacy Act*, 1890 (53 *Vict. c.* 5), *s.* 116, *sub-sections* 1 (c), 2; *s.* 120 (h).—The court has power, under sections 116 and 120 of the Lunacy Act, 1890, to authorize the committee of the estate of a lunatic, lawfully detained but not so found by inquisition, to exercise the powers of leasing given to the lunatic as tenant for life of settled land.

In re Baggs (a note to the case of *In Re X.*), 42 W. R. 657, [1894] 2 Ch. 415, distinguished.—*Salt, Re*, LUNACY, 146.

9. *Person of unsound mind—Detention under law of Belgium — Jurisdiction to appoint receiver — "Lawfully detained"—Lunacy Act*, 1890 (53 *Vict. c.* 5), *s.* 116 (1) (c).—In the Lunacy Act, 1890, the expression "lawfully detained" means lawfully detained under that Act.

A lady of unsound mind, though not found a lunatic by inquisition, residing in Belgium, was detained as a lunatic according to the law of Belgium. Her father having applied to be appointed to receive the income of stocks standing in her name in this country,

Held, that there was no jurisdiction to make such an order.—*Watkins, Re*, LUNACY, 609.

10. *Practice—Action in name of lunatic—Leave to bring—Jurisdiction of master in lunacy—Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-section* 1.—Under section 27, sub-section 1, of the Lunacy Act, 1891, a master in lunacy has jurisdiction to authorize the committee of a lunatic to bring an action in the name of the lunatic, in respect of an alleged breach of trust by the trustees of a will under which the lunatic is a beneficiary, without any confirmation of his order by the judge in lunacy.—*Hinchliffe, Re*, LUNACY.

MAINTENANCE.—See INFANT, 1; TRUSTEE, 10.

MANDAMUS.—See ELECTION LAW, 1; LICENSING LAW, 1-3; PRACTICE, 33.

MARGARINE.—See ADULTERATION, 2-5.

MARKET.—See PEDLAR.

MARRIAGE:—

Solemnization by clergyman of the Established Church on board a British warship without licence or banns—Subsequent adultery—Dissolution of marriage.—A marriage between British subjects, solemnized on board an English man-of-war at a foreign station by a clergyman of the Established Church without licence or banns, is valid.

The petitioner, an officer in her Majesty's army, was married in 1884 to the respondent, also a British subject, on board one of her Majesty's ships, then lying at Limasol, in Cyprus, where the petitioner was stationed. The ceremony was performed by the chaplain of the vessel, a clergyman of the Established Church. There had been no publication of banns, and no licence had been obtained.

Held, that there had been a valid marriage according to the common law of this country, and that, upon proof of the respondent's adultery, the petitioner was entitled to a decree *nisi* for dissolution of the marriage.—*Culling* v. *Culling*, P.D. & AD.D.

MARRIED WOMAN:—

1. *Deed of settlement by—Acknowledgment—Copyholds—No surrender made—Declaration of trust—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *s.* 77.—A., a married woman, with the concurrence of her husband, by a deed duly acknowledged made a declaration of trust in respect of certain copyhold hereditaments. No surrender was ever made by A.

On the death of A., her customary heir, B., was duly admitted tenant on the court rolls in her stead.

Held, that the declaration of trust was a disposition within the meaning of section 77 of the Fines and Recoveries Act, and, consequently, that B. was bound by the trusts thereof.—*Carter* v. *Carter*, CH.D. STIRLING, J., 73.

2. *Reversionary life interest in proceeds of sale of real estate — "Interest in land" — Trust funds invested on mortgage of realty—Fines and Recoveries Abolition Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 77.—A married woman's beneficial interest in a sum of money properly invested by her trustees on a mortgage of land conveyed to them, is an "estate" within the meaning of that word as defined in section 1 of the Fines and Recoveries Abolition Act. Consequently the married woman is competent to dispose of her interest in such money by virtue of section 77 of the same Act.

So held by the Court of Appeal (Kay, L.J., dissenting).

In re Newton's Trusts, 23 Ch. D. 181, 32 W. R. Dig. 64, overruled.—*Miller* v. *Collins*, C.A., 466.

3. *Separate estate — Restraint on anticipation—Arrears of income accrued before judgment—Execution.*—Where a married woman was entitled to the income of property for her separate use without power of anticipation,

Held, that arrears of income which had accrued due before the date of a judgment against the married woman, although such arrears had not, at the date of the judgment, actually reached her hands, were liable to be taken in execution.

Decision of the Court of Appeal in *Loftus* v. *Heriot*, [1895] 2 Q. B. 212, 43 W. R. Dig. 112, reversed.

Hood Barrs v. *Cathcart* (*No.* 2), 42 W. R. 631, [1894] 2 Q. B. 567, and *Pillers* v. *Edwards*, 71 L. T. 788, 43 W. R. Dig. 111, overruled on this point.—*Hood Barrs* v. *Heriot* (*No.* 1), H.L., 481.

4. *Separate estate—Restraint on anticipation—Discretion of court to remove restraint—Debt to moneylender—Costs of defending criminal proceedings—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.—The court in exercising its discretion under section 39 of the Conveyancing Act, 1881, to bind the interest of a married woman in any property notwithstanding that she is restrained from anticipation, has to consider all the circumstances and to balance the undoubted benefit of the restraint against the alleged benefit of its removal.

Married women who have got into debt through extravagance or have gone to moneylenders will not, as a rule, be relieved from the restraint on anticipation.

It is for the benefit of a married woman to defend herself against legal proceedings involving an imputation on her character.—*Pollard's Settlement, Re*, CH.D. CHITTY, J., 474.

5. *Separate estate—Restraint upon anticipation—Judgment—Execution—Arrears of income accruing due after judgment—Receiver.*—Where judgment has been obtained against a married woman who is entitled under a settlement to income for her separate use with a restraint upon anticipation, there is no power to appoint a receiver of her income which has accrued due after the date of the judgment.

The decision of the Court of Appeal to the above effect in *Hood Barrs* v. *Cathcart* (*Nos.* 1 *and* 2), 42 W. R. 628, [1894] 2 Q. B. 559, is not affected by the decision of the House of Lords in *Hood Barrs* v. *Heriot* (*No.* 1), *ante*, p. 481, [1896] A. C. 174.—*Whiteley* v. *Edwards*, C.A., 530.

6. *Separate use—Restraint on anticipation—Order binding her interest in fund appointed to her son with her consent — Conveyancing Act*, 1881, *s.* 49.—Restraint on anticipation of personalty settled by a married woman on herself for life, with remainder to her husband for life, was removed so as to allow a sum of £500, which she and her husband had appointed to their son, the only child of the marriage, subject to her life interest, to be raised by the trustees of the settlement, and expended in buying cattle and implements of husbandry for the purpose of starting the son as a farmer, and relieving the husband and wife of the expense of maintaining him.—*Sawyer's Trusts, Re*, M.R. (Ir.).

7. *Separate estate—Restraint on anticipation—Probate*—Caveat—*Action brought against* caveator—"*Instituting*" *an action or proceeding—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.—A married woman who enters a *caveat* in the Probate Registry, and afterwards so insists on her objection to the proving of a will that an action has to be brought against her to have it proved in solemn form, does not "institute" an action or proceeding within the meaning of section 2 of the of the Married Women's Property Act, 1893; and therefore an order cannot be made for payment out of property of the married woman subject to a restraint on anticipation of costs of the action which she may have been ordered to pay.—*Moran* v. *Place*, C.A., 593.

8. *Separate use—Restraint on anticipation—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* (1); *s.* 61, *sub-sections* (2), (6); *s.* 58, *sub-section* (1) *viii.—Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 8—"*Settlement*"—"*Tenant for life.*"—A married woman entitled in possession under a will to the equitable fee of a share of realty for her separate use without power of anticipation is not a tenant for life, and has not the powers of a tenant for life under the Settled Land Act, 1882, of the share, there being no "settlement" of such share within the definition in section 2, sub-section (1), of the Act.

Section 8 of the Settled Land Act, 1884, enacting that, for the purposes of the Act of 1882, the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife, refers to a tenant by the curtesy in possession only.—*Bates* v. *Kesterton*, CH.D. CHITTY, J., 150.

9. *Separate use—Trustee—Husband taking possession before Married Women's Property Act*, 1882, *of property settled to separate use of married woman—Notice of trust—Constructive notice—Acquiescence—Trustee Act*, 1888 (51 & 52 *Vict. c.* 99), *s.* 8.—A husband taking possession before the Married Women's Property Act, 1882, of property coming to his wife under circumstances that should put him on his inquiry as to whether it is settled to her separate use, becomes a trustee of such property for her; and if the husband has retained such property for his own use, neither he nor his executors can rely on section 8 of the Trustee Act, 1888, as a defence.—*Wassell, Re, Wassell* v. *Leggatt*, CH.D. ROMER, J., 298.

10. *Settlement—Post-nuptial settlement—Covenant to settle after-acquired property—Real estate at law or in equity—Mistake—Relief in court of equity—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 77—"*Future interests*"—*Malins' Act* (20 & 21 *Vict. c.* 57), *s.* 1—*Power of Divorce Court to vary settlements—Divorce and Matrimonial Causes Acts* (20 & 21 *Vict. c.* 85, *s.* 45, *and* 22 & 23 *Vict. c.* 61, *s.* 5).—In 1877 a married woman by a deed, separately acknowledged by her, covenanted to settle any real and personal property which might thereafter be devised or bequeathed or descend or devolve to or upon her.

Held, that such covenant was void as to both

classes of property, for section 77 of the Fines and Recoveries Act did not apply to that which at the date of the deed of covenant was a mere possibility or expectation at some future time of an estate or interest in land; and Malins' Act (20 & 21 Vict. c. 57) did not apply to a mere expectancy in personal estate; the words in that Act, "every future interest" meaning an interest to which the married woman at the date of the disposing deed has some existing title at law or in equity.

Where, on the 24th of April, 1894, a decree was made by the Divorce Court for the variation of a marriage settlement by reason of the divorce of the wife for adultery, and such decree proceeded upon a common mistake of both the husband and wife as to what property of the wife was comprised in the settlement;

Held, that a court of equity could grant relief to the divorced wife in respect of such mistake, but would only do so upon her undertaking to consent that any application to the Divorce Court under section 45 of the Divorce Act, 1857, for a further settlement upon the husband and child of the marriage, should be dealt with in all respects as if it had been made before the 24th of April, 1894, and was being considered by the court on that day.—*Allcard* v. *Walker, Lucas, Re*, CH.D. STIRLING, J., 661.

See also ADMINISTRATION, 3, 4; ELECTION LAW, 8; PROBATE, 4, 21; SETTLED LAND, 3; VENDOR AND PURCHASER, 12.

MARSHALLING.—See WILL, 12.

MASTER and SERVANT:—

1. *Apprentice—Compensation for injuries—"Estimated earnings"—Mode of calculating in case of apprentice—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 3.—An apprentice, when suing his employer under the Employers' Liability Act, 1880, for personal injuries, cannot recover, under section 3 of the Act, more than for three years of the wages he is receiving as an apprentice, and in such case the value of the tuition he receives ought not to be included as part of his "earnings" within the meaning of that section for the purpose of increasing the compensation to which he would otherwise be entitled.—*Noel* v. *Redruth Foundry Co.*, Q.B.D., 407.

2. *Confidential employment — Implied contract — Copying list of master's customers—Breach of confidence and trust—Injunction.*—The defendant, who was employed by the plaintiff as manager in his business, made a list of the names of the plaintiff's customers from his order-book without the plaintiff's knowledge or authority, with the intention of using it in a rival business after he left the plaintiff's employment, and he did in fact so use it. The plaintiff having claimed damages and an injunction to restrain the defendant from using the list,

Held, that there was an implied term in the contract of service that the servant should act honestly and faithfully towards his master, and that the defendant had committed a breach of that contract, and that damages and an injunction ought to be granted.

Lamb v. *Evans*, 41 W. R. 405, [1893] 1 Ch. 218, followed.—*Robb* v. *Green*, C.A., 25.

3. *Confidential relation—Use of information and materials acquired during service—Taking copies from employer's books—Damages—Injunction.*—The good faith which exists between an employer and those in his employ renders it illegal, even in the absence of any stipulation to the contrary, for the persons so employed to make use, after the termination of the employment of any materials or any information acquired by them while they were in that confidential relationship; and the court will grant an injunction to restrain such use, in addition to awarding damages.—*Louis* v. *Smellie*, C.A.

4. *Negligence—"Person in charge or control of locomotive engine or train upon a railway"—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-section* 5.—The Employers' Liability Act, 1880, by section 1, sub-section 5, enacts that where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer "who has the charge or control of any . . . locomotive engine or train upon a railway," there shall be the same right of compensation against the employer as if the workman had not been in his service.

A "person who has the charge or control of a train" does not necessarily cease to have charge of it, within the meaning of the Act, because some of the carriages are uncoupled from one another and from the engine in order that they may be separately dealt with. And those words do not necessarily point only to one person who is in charge of the whole train, but may include persons who have duties to perform in respect of parts of the train.

An engine-driver, employed with his fireman in the discharge of loaded wagons on a railway, took a locomotive engine and several wagons to a point on an incline, and there proceeded with the engine and one of the wagons to the place of discharge, intending to return for the other wagons in due course. The fireman uncoupled the remaining wagons and scotched them to prevent them running down the incline. One of the wagons broke away, ran down the incline, and killed a workman in the service of the same employers. There was evidence that the method of scotching adopted was unsafe, and was known to and approved by the engine-driver. The representative of the deceased having brought an action for compensation against the employers:

Held, reversing the decision of the Queen's Bench Division and the Court of Appeal, that there was evidence for the jury that the death was caused by reason of the negligence of a person who had the charge or control of a train within the meaning of the Act, since either the engine-driver had the charge or control, or the fireman had, and there was evidence of negligence in both.—*McCord* v. *Cammell*, H.L.

5. *Shop—Employment of young person in—Employment partly in shop and partly outside—Employment "in or about shop"—Shop Hours' Act*, 1892, (55 & 56 *Vict. c.* 62), *s.* 3.—When a young person is employed in a shop, and when his employment is partly inside the shop and partly outside the shop, the time occupied in the outdoor employment is time occupied "in or about the shop" within the meaning of section 3 of the Shop Hours' Act, 1892; and the time so occupied in the outdoor employment when added to the time of employment in the shop itself cannot, in any one week, exceed the limit of seventy-four hours laid down in that section.—*Collman* v. *Roberts*, Q.B.D., 445.

6. *Ship—Seaman—Wages—Contract of Service—Increased Danger — Uncompleted Voyage.* — The J. Government bought a warship in E. which they placed in charge of a master to navigate to J. O. contracted with the master to serve as one of the crew for the voyage for a fixed sum. During the

voyage the J. Government declared war against C., and O. then refused to continue to serve, and left the ship.

Held, that the master was responsible for the act of his principals in declaring war, and that as the risks of O. were increased, O. was justified in abandoning the voyage, and was entitled to the stipulated sum notwithstanding that the voyage was not completed,—*O'Neil* v. *Armstrong*, C.A.

See also DAMAGES, 3; RAILWAY, 6.

MAYOR'S COURT.—See PRACTICE, 29.

MERCHANDIZE MARKS ACTS.—See ADULTERATION, 3.

MERGER:—

Charge—Tenant for life of estate subject to charge—Bequest of charge to tenant for life—Intention.—Where an owner in fee of real estate becomes owner of a charge, the latter is *primâ facie* merged unless there is either an expressed intention to the contrary by the fee simple owner, or an implied intention to the contrary by reason of the owner in fee having an interest in keeping the charge alive.

But where a tenant for life only becomes by bequest owner of a charge on the estate, the charge is *primâ facie* unmerged and is capable of being raised by the executor of the tenant for life. But this *primâ facie* presumption of non-merger can be rebutted by evidence of intention on the part of the tenant for life that the charge should merge in the inheritance.—*Godley's Estate, Re*, CH.D. (Ir.).

METROPOLIS MANAGEMENT:—

1. *Building—Buildings to be carried out under a contract—London Building Act*, 1894 (57 & 58 *Vict.* c. 213), *s.* 212.—The provision in section 212 of the London Building Act, 1894, which exempts from compliance with its requirements buildings to be carried out under any contract entered into before the Act, includes buildings to be carried out under a building agreement made for the development of an estate.—*Tanner* v. *Oldman*, Q.B.D., 63.

2. *Building—General line of buildings—"Building, structure, or erection"—Wall and advertisement hoarding—Appeal from architect's certificate—Issue of summons—Metropolis Local Management Act*, 1862 (25 & 26 *Vict.* c. 102), *s.* 75.—The appellants were the owners of a house the forecourt of which had for many years been bounded by a dwarf wall between 2 and 3 feet high, with an iron railing upon it 5 feet 6 inches high. Upon this wall the appellants erected a hoarding for advertisements, which was removed in consequence of a notice from the London County Council. The appellants then replaced the old wall by a new wall 11 feet high and 14 inches thick, to act as a screen for advertisements. A summons was taken out by the London County Council charging the appellants with having erected a structure beyond the general line of buildings, contrary to section 75 of the Metropolis Local Management Act, 1862. The summons was taken out before the superintending architect had given his decision as to the general building line, and was heard by the magistrate while that decision was still under appeal. The magistrate ordered the demolition of the wall.

Held, that the magistrate had jurisdiction to deal with the summons, and that the appellants' new wall was a "building, structure, or erection" within section 75 of the Act.—*Lavy* v. *London County Council*, C.A.

3. *Buildings, general line of—Site of old building—Land occupied with house—New street—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict.* c. 102), *ss.* 74, 75.—A new street was formed in the metropolis, opening at a right angle into an existing street, in which there was a contiuous row of houses with forecourts in front and gardens behind. The plan for the new street submitted to the London County Council contained a note stating that two of the above-mentioned houses were (among others) to be pulled down, and the new street, as shown by the plan, occupied the whole site of one of them with the forecourt and garden belonging thereto, and part of the site of the other and of the forecourt and garden belonging thereto, which were respectively forty-eight and ninety feet in depth. These houses having been pulled down, the owner of the last-mentioned of them was erecting on so much of its site and the forecourt and garden on each side of it as was not thrown into the new street a block of buildings fronting to the new street, which projected beyond the general line of buildings in that street as fixed by the superintending architect of the county council.

Held, that he was not building on the site of a previously existing building within the meaning of section 74 of the Metropolis Management Amendment Act, 1862, and therefore was infringing the provisions of section 75 of that Act, which forbids the erection of buildings beyond the general line of buildings in the street.

Lord Auckland v. *Westminster District Board of Works* (L. R. 7 Ch. 597) distinguished.—*London County Council* v. *Pryor*, C.A.

4. *Building—Party wall—Wall extending above adjoining building—Wall dividing a building of the warehouse class extending to more than* 250,000 *cubic feet—London Building Act*, 1894 (57 & 58 *Vict.* c. *ccxiii.*), *ss.* 59 (1), 75.—By the London Building Act, 1894, *s.* 75, it is enacted that buildings of the warehouse class above a certain size shall be divided by party walls.

Held, that it was not intended that a wall which was a party wall for the purposes of the section up to a certain height should necessarily continue to be a party wall above that height, so as to be subject, as to the upper portion, to the provisions of the Act with regard to party walls.—*Drury* v. *Army and Navy Co-operative Society*, Q.B.D., 560.

4*a*. *House Refuse—Removal of—Refusal to allow scavengers to enter house for removal of refuse—"Wilful obstruction"—Public Health (London) Act*, 1891 (54 & 55 *Vict.* c. 76), *ss.* 16, 30, 31, 116.—Under the provisions of section 16 of the Public Health (London) Act, 1891, the London County Council made a bye-law that the sanitary authority should remove at least once in every week the house refuse on premises within their district, but they had made no bye-law as to the duties of occupiers of houses for the purpose of facilitating the removal of such refuse, and an authority under this bye-law appointed a certain day in each week for the removal of such refuse, and gave due notice of the same. The respondent objected to the weekly removal of refuse as being an unnecessary annoyance, and on a certain day he refused to allow the scavengers of the authority to enter his house for the purpose of removing the refuse.

Held, that the respondent, in so refusing, was guilty of "wilfully obstructing" the officers of the authority in the execution of the Act within the meaning of section 16 of the Act, and was liable to the penalty imposed by that section—*Borrow* v. *Howland*, Q.B.D.

5. *Sewer—Drain—Combined drain—Pipe draining*

two houses—Disconnection of one of the houses—Nuisance—Liability of Vestry—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 250.—A pipe, prior to 1895, drained two houses. It was not proved when the combined drain was constructed, or that it was made under the order of the Vestry. In 1895, in compliance with a notice of the Vestry complaining of a nuisance, the owner of one of the houses cut off his drainage from the pipe in question, which thereupon only drained one instead of two houses. Shortly afterwards the respondent, who was the owner of the other house, received a notice from the Vestry under section 4 of the Public Health (London) Act, 1891, stating that a nuisance existed, and requiring him to abate it. Upon the respondent refusing to comply with this notice, the Vestry took out a summons against him.

Held, that the pipe in question was, prior to 1895, a sewer, not a drain; that when once a pipe becomes a sewer it always remains a sewer; that such sewer remained vested in the Vestry, there being no statutory provision divesting them of it; and consequently, that the Vestry, not the respondent, was bound to abate the nuisance.—*St. Leonard's, Shoreditch Vestry*, v. *Phelan*, Q.B.D. 427.

6. "*Sewer*"—"*Drain*"—*Combined system of drainage—Connection with drain made without authority—Nuisance—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250—*Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 2.—By section 250 of the Metropolis Management Act, 1855, a drain which, without an order of the sanitary authority, drains more than one house is a sewer; and by the same Act the duty of repairing sewers lies upon the local authority.

A sanitary authority approved a combined system of drainage submitted by a building owner in respect of certain semi-detached houses about to be built by him, by which each pair of houses was to drain by one drain into the sewer. In building the houses the building owner departed from his scheme, and drained four houses into one drain. Subsequently the houses were sold without any notice to the purchasers as to the system of drainage. The purchaser of one of the houses was summoned for not complying with a notice under section 1 of the Public Health (London) Act, 1891, requiring him to abate a nuisance arising from defective drainage at his premises.

Held, that the part of the drain which received the drainage of the other three houses was a sewer, and that the purchaser was not estopped by the default of the building owner from disputing his liability to repair that part of the drain.—*Kershaw* v. *Taylor*, C.A., 28.

7. *Sewer—Drain—Liability to repair—Combined system of drainage—Drain made without order of vestry—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 250.—The fact that a sewer has been unlawfully made does not prevent it vesting in the vestry or district board of works under section 68 of the Metropolis Management Act, 1855, so as to become repairable by them under section 69.

A drain for draining a group of houses by a combined operation was made without an order of the vestry:

Held, that the drain so made was a "sewer" within the definition in section 250 of the Metropolis Management Act, 1855, so as to vest in and be repairable by the vestry.

Decision of the Divisional Court, ante, p. 559, affirmed.—*Reg.* v. *St. Matthew, Bethnal Green, Vestry*, C.A., 697.

8. *Sewers—London County Council—Power of county council to order vestries to construct sewers—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 170), *s.* 138.—The London County Council have no power, under section 138 of the Metropolis Local Management Act, 1855, to order the vestry of a parish in the metropolis, in which parish certain houses are situate which discharge their sewage directly into the River Thames, to construct a new sewer for the purpose of receiving the drainage of such houses and preventing its discharge into the river.—*Reg.* v. *St. George, Hanover Square, Vestry*, Q.B.D., 16.

9. *Street—Erection of buildings with quadrangle in centre—Quadrangle for use of tenants only—Sanction of London County Council—"Laying out street for carriage traffic"—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 7.—The appellant, who was the owner of a site where formerly a brewery business had been carried on by him, resolved to use the ground for building, and he accordingly erected, fronting on the public street, a building with shops on the ground floor and flats above, and with an archway through the middle of the ground floor. He afterwards proposed to build round the other three sides of the quadrangle formed by clearing away the old houses, and when the buildings would be completed there would be forty-two flats with a quadrangle or courtyard in the centre from which there would be two staircases to the flats. There would be no exit or entrance to or from the quadrangle except by the archway, which was closed by an iron gate, and the quadrangle would be for the use only of the tenants of the flats and those visiting them, and the public would be entirely excluded from it.

Held, that this quadrangle was not a "street" within the meaning of section 7 of the London Building Act, 1894, and that the appellant, in commencing to lay out the quadrangle, had not "commenced to form or lay out a street for carriage traffic" within the meaning of that section, and did not, therefore, require the previous sanction of the London County Council.—*Wood* v. *London County Council*, Q.B.D., 144.

10. *Street—New street—Paving expenses—Apportionment—Owners of land—Discretion of local authority—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.—A vestry or district board, in apportioning the expenses of paving a new street, under section 77 of the Metropolis Management Amendment Act, 1862, has a discretion, if it thinks fit, to charge particular owners of land in a less proportion than other owners of land.—*Metropolitan District Railway Company* v. *Fulham Vestry*, C.A., 53.

11. *Street—New street—Road with houses on one side only—Widening of road—New Footpath—Cost of paving—Apportionment—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105.—In 1870, a road, which was then an unpaved "new street," with houses and a footpath on the north side only, and vacant land on the south side, was paved to the satisfaction of the local authority under the provisions of section 105 of the Metropolis Local Management Act, 1855. The expenses of such paving were apportioned upon and were paid wholly by the owners of the houses on the north side, and the vestry afterwards kept the whole of such pavement in repair, and paid the cost out of the general rates. In 1888 the owner

of the vacant land on the south side, by an arrangement with the vestry for widening the road, set back his fence 13 feet, and dedicated this strip, and the vestry kerbed a new footpath 7 feet in width on the south side, and paved and metalled the remaining 6 feet, making it uniform with the carriage-way already paved, and they paid the expenses, as well as the expenses of the subsequent repairs, out of the general rates.

The only part left unpaved was the new footpath of seven feet, and, houses having been built on the south side of this footpath, the vestry resolved in 1894 to pave this footpath, being, as they said, a "new street," and they apportioned the expenses of paving the new footpath on the owners on the north side of the road as well as on the owners on the south side.

Held, that the apportionment was upon a wrong basis; that, as in 1870, the whole breadth of the road was completely paved to the satisfaction of the local authority under section 105, and as they had exercised their powers under the section, and compelled contribution from the owners of the houses adjoining, they had no jurisdiction afterwards to declare this road a "new street," and that the only "new street" was the new footpath which formed no part of the old road, and that, as the houses on the north side did not abut on this new footpath, the owners of such houses could not be called upon to contribute to the expenses of paving the same.—*White* v. *Fulham Vestry*, Q.B.D.

12. "*Street, place, or row of houses*" *in which building situate—Determination of—Superintending architect—Magistrate—Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.—For the purposes of section 75 of the Metropolis Local Management Act, 1862, it is the function of the superintending architect, and not of the magistrate, to determine the question in what "street, place, or row of houses" a building is situated.

Barlow v. *Vestry of St. Mary Abbotts, Kensington* (34 W. R. 521, 11 App. Cas. 257) considered and applied.—*Allen* v. *London County Council*, C.A.

See also BURIAL; POOR LAW, 1, 4; WATER, 1.

MILK.—See ADULTERATION, 6-8.

MINES:—

Justices—Offences against the Mines Act, 1872—*Proceedings instituted by the Inspector of Mines—Information laid by his "agent"—Jervis's Act*, 1848 (11 & 12 *Vict. c.* 43), *ss.* 10, 16—*Metalliferous Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 77), *ss.* 33, 35.—Notwithstanding section 35 of the Metalliferous Mines Regulation Act, 1872, an information for an offence against this Act can, having regard to section 10 of 11 & 12 Vict. c. 43 (Jervis's Act), be laid by an inspector of mines through an agent lawfully authorized in that behalf by him.—*Le Neve Foster* v. *Fyfe*, Q.B.D., 524.

See also CANAL.

MISREPRESENTATION.—See COMPANY, 8, 9, 20, 21; VENDOR AND PURCHASER, 10.

MORTGAGE:—

1. *Building society — Statutory receipt — Reconveyance—Mistake discovered after mortgage vacated—Building Societies Act*, 1874 (*c.* 42), *s.* 42.—Where the mortgagor of a building obtained a statutory receipt upon the deed of mortgage that he had redeemed the mortgage; and the society had made a mistake against themselves, in the amount to be paid by him in order to redeem:

Held, that in the absence of fraud the society could not recover the balance, or re-open the mortgage account.—*London and County United Building Society* v. *Angell*, Q.B.D.

2. *Consolidation — Redemption — Assignment of mortgages to one person.*—In 1863, Banks mortgaged Nos. 1 and 2 to J.; later on, in 1863, No. 3 to H.; and in 1865-1866, Nos. 4, 5, 6, and 7 to other mortgagees. Afterwards, in 1866, Banks made a second mortgage to Brockman of 4, 5, 6, and 7; and in 1868 he made a second mortgage of 1, 2, and 3, and a third mortgage of 4, 5, 6, and 7 to Brockman and Harrison. The appellant became the transferee from Brockman and Harrison of their equity of redemption of all the seven properties in 1885. The respondents (the executors of Brockman) held the first mortgage on Nos. 1, 2, 4, and 5, by transfers to their testator (1871 to 1873), and by transfer in 1890 they also held the first mortgage on No. 3.

Held, in an action by the appellant seeking to redeem No. 2 alone, that the respondents were entitled to consolidate their mortgages on all the seven properties.

Decision of the Court of Appeal, 43 W. R. 50, [1895] 1 Ch. 51, affirmed.

Vint v. *Padgett*, 6 W. R. 641, 2 De G. & J. 611, approved.

Per Lord Davey.—The doctrine of consolidation is applicable where, at the date when redemption is sought, all the mortgages are united in one hand and redeemable by the same person; or where, after that state of things has once existed, the equities of redemption have become separated.—*Pledge* v. *White*, H.L., 589.

3. *Equitable charge on land—Locke King's Amendment Act*, 1877 (*c.* 34), *s.* 1.—Where land is made security for a debt by any instrument which gives to the person entitled to the charge an equitable interest in the land, such instrument creates an equitable charge within the meaning of Locke King's Amendment Act, 1877.—*Sharland, Re, Kemp* v. *Rozey* (*No.* 2), C.A.

4. *Mortgagee in possession — Repayment — Six months' notice or interest.*—A mortgagee who takes possession is not entitled to notice or interest in lieu of notice, when the principal interest and costs have been tendered, even though the tender is before the day fixed for payment in the deed, as entry into possession is equivalent to a demand for payment.—*Bovill* v. *Endle*, CH.D. KEKEWICH, J., 523.

5. *Power of sale—Mortgage by tenants in common—Sale by private tender to one of mortgagors for exact amount of mortgage debt — Other mortgagors not informed of sale—Validity of sale.*—A mortgagee is not a trustee of a power of sale for the mortgagor, and is entitled to look after his own interests first, provided that he does not fraudulently, wilfully, or recklessly sacrifice the property of the mortgagor.

A sale under the ordinary power of sale in a mortgage was made by the mortgagee, by private contract to one of several of the mortgagors, at a price exactly equal to the amount of the principal interest and costs, but without the knowledge or consent of the other mortgagors;

Held, that such a sale was not necessarily invalid; and it appearing that an out and out sale was in fact intended, and that the mortgagee had previously given all the mortgagors the fullest opportunity of obtaining a transfer of the mortgage or of selling, if they could, the transaction was upheld as a valid sale to—not a mere redemption by—one of the several mortgagors.

Dictum of Lindley, L.J., in *Farrar* v. *Farrars*

(*Limited*), 37 W. R. 196, 40 Ch. D. 395, explained. *Kennedy* v. *De Trafford*, C.A., 454.

6. *Practice — Foreclosure — Judgment — Account — Special circumstances.*—Any special matter affecting the state of the account as between mortgagor and mortgagee in a foreclosure action should be brought forward at the trial, and the judgment should direct the chief clerk to have regard to any such matter specifically.

Where the common account was directed in a foreclosure judgment, and there was no special direction to the chief clerk,

Held, that it was not open to the mortgagor on the taking of the ordinary account to bring forward for the first time a claim to redeem on payment of the amount at which the mortgagee had valued his security in the mortgagor's bankruptcy, and that a summons to vary the certificate by the addition of a finding of the claim to redeem must be dismissed. —*Sanguinetti* v. *Stuckey's Bank*, CH.D. CHITTY, J., 309.

7. *Priority—Equitable mortgage by deposit—Subsequent mortgage by deed registered—Priority—Actual fraud—Yorkshire Registries Act*, 1884 (47 & 48 *Vict. c.* 5), *ss.* 3, 7, 14.—The expression "actual fraud" used in section 14 of the Yorkshire Registries Act, 1884, means fraud in the ordinary popular acceptation of the term.

A. acted as solicitor on behalf of B. in arranging that D. should deposit with a bank the deeds relating to certain property in Yorkshire for the purpose of indemnifying B. against an overdraft at the bank. The deposit was made, but not registered. Subsequently A. took from D. a mortgage by deed of the same property, and, having registered such mortgage, claimed priority against the mortgage by deposit to the prejudice of B.

Held, that if A.'s claim to priority were allowed he would be guilty of actual fraud towards B., and that consequently he ought not to obtain such priority.—*Hobson, Re, Battison* v. *Hobson*, CH.D. STIRLING, J., 615.

8. *Priority—Fraud—Trust for sale—Conveyance obtained by fraud—Receipt in body of deed—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 54, 55, 2 (*viii.*).—Real property worth about £700, which belonged to H., who died in October, 1892, was at that time subject to a legal mortgage made by him to a building society. H. devised the equity of redemption to N. upon trust for sale. C., the solicitor who acted for the society, and also for H., and for N. after H.'s death, fraudulently represented to the society that notice had been given to pay off the mortgage, and procured the statutory receipt for the mortgage money to be indorsed upon the deed pursuant to section 42 of the Act of 1874. The receipt was dated December, 1892. C. obtained the deed thus indorsed, but neither C. nor the society ever received the money. About the 29th of December, 1892, C. deposited with the plaintiffs, as security for £650 advanced to him, all the title deeds except the mortgage to the society, which was not disclosed by the deposited deeds. They included a conveyance of the property to C., which C. on the 29th of December, 1892, obtained from N. This purported to be in pursuance of a contract for sale by N. to C., but the consideration money was never in fact paid.

Held, that the society had not parted with the legal estate, which still remained in them as security, and in respect of that legal security the society had priority over the plaintiffs.

Held, also, that the plaintiffs were entitled to rely on the receipt for the consideration money in the body of the conveyance of the 29th of December, 1892, in accordance with sections 54 and 55 of the Conveyancing Act, 1881, and therefore had priority in equity over N. and his *cestuis que trustent.*

Shropshire Union Railways and Canal Co. v. *Reg.*, 23 W. R. 709, L. R. 7 H. L. 496, distinguished.—*Lloyds Bank* v. *Bullock*, CH.D. CHITTY, J., 633.

9. *Receiver — Company mortgagee—Mortgagee in possession—Appointment of director of mortgagee company as receiver—No allowance for fees for collection of rents.*—The defendant company, who were mortgagees, had gone into possession of the mortgaged property, and appointed one of their directors to collect the rents as their agent.

Held, that the director could not be allowed any commission for collection out of the rents.—*Kavanagh* v. *Working Man's Benefit Building Society*, C.A. (Ir.).

10. *Sale—Purchase of mortgaged property—Payment off by purchaser of incumbrance—Intention to keep alive incumbrance—Presumption.*—Where a purchaser of a property pays off a mortgage on it without showing an intention to keep it alive, still, if its continuance as an existing charge is beneficial to him, it will be treated in equity as subsisting unless an intention to the contrary can be inferred from the terms of the purchase deed or from other legitimate evidence. But the opportunity of making a very doubtful claim against third parties is not such a benefit as is meant in this enunciation of the doctrine. Further, if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the property was assigned to the purchaser, the charge cannot be treated as still subsisting simply because the purchaser afterwards finds it would have been better for him to have kept the charge alive.

So held, by Lindley and A. L. Smith, L.JJ. (Kay, L.J., dissenting), affirming the decision of North, J.

Toulmin v. *Steere*, 3 Mer. 210, questioned.—*Liquidation Estates Purchase Co.* v. *Willoughy*, C.A., 612.

11. *Settlement—Charge on inheritance—Payment by tenant for life—Presumption of intention for own benefit—Relation of parent and child.*—The fact that the relationship of parent and child exists between a tenant for life and remaindermen, though not immaterial, is not of itself sufficient to rebut the presumption that a tenant for life who pays off a charge upon the inheritance intends to keep the charge alive for his own benefit, and not for the benefit of the remaindermen.—*Harvey, Re, Harvey* v. *Hobday*, C.A., 242.

See also CHURCH BUILDING ACTS; COMPANY, 4; NEGLIGENCE, 2; PRACTICE, 3, 53; SHIP, 22; SOLICITOR, 9; TENANT IN COMMON; TRUSTEE, 14; WILL, 26.

NEGLIGENCE :—

1. *Gas company—Explosion—Evidence.*—Excavations made by Commissioners of Sewers within two and a half feet of a gas main laid at a depth of ten and a half inches under a highway, caused one of the gas pipes to be deprived of support, and the weight of the traffic above thereupon cracked the pipe, resulting in an escape and explosion of the gas, which explosion injured a person in the street. The gas company did not in fact know of the escape of the gas nor of the excavation made by the Sewer Commissioners.

Held, that the character of the crack in the pipe,

the length of time the gas was escaping, and the absence of anyone on behalf of the gas company at the excavation, were evidence of negligence on the part of the gas company.—*Price* v. *South Metropolitan Gas Co.*, Q.B.D.

2. *Lease—Surrender—Prior equitable mortgage—Notice—Priority.*—A lessee who had deposited his lease by way of equitable mortgage with B. afterwards by deed surrendered the term to the lessor. The surrenderee at the time of surrender had asked the lessee to deliver up the instrument of lease, and was falsely informed by the lessee that he had left it with a friend, but that he (the lessee) had neither assigned nor charged his interest, nor pledged the instrument of lease. The surrenderee had no actual notice that the lease had been deposited by way of mortgage with B.

Held, that the surrenderee had not, under these circumstances, been guilty of gross or wilful negligence, and was consequently entitled, as the holder of the legal estate, to priority over B., the prior equitable mortgagee.

Hewitt v. *Loosemore*, 9 Ha. 449, and *Espin* v. *Pemberton*, 7 W. R. 221, 3 De G. & J, 547, followed. —*Brown* v. *Stedman*, CH.D. CHITTY, J., 458.

3. *Principal and agent—District council—Contractor — Damage — Remoteness.* —A district council employed a contractor to construct a sewer in a public thoroughfare. The contractor in constructing the sewer negligently left a gaspipe in use unsupported, so that the pipe broke, and gas escaped therefrom into the plaintiffs' house, and an explosion occurred, whereby the plaintiffs suffered damage.

Held, that there was a duty on the district council to so construct the sewer as not to cause damage to the public; that the district council might delegate that duty to a contractor, but if the contractor failed to perform the duty, the district council were liable for the damage resulting from such failure.

Held, also, that the damages claimed were not too remote.—*Hardacre* v. *Idle District Council*, C.A., 323.

4. *Public body—Nonfeasance—Liability to an individual under a contract—Deposit of goods for safe custody—Inspection of premises—Risk of injury to goods—Duty of bailee.*—The principle of exemption from liabilities afforded to public bodies for mere nonfeasance, as enunciated in *Municipality of Pictou* v. *Geldert*, 42 W. R. 114, [1893] A. C. 524, and other cases, has no application to a case in which the parties charged with the nonfeasance are under obligations to an individual member of the public to perform the duty, which they have neglected to his prejudice, in consideration of their being remunerated by him for its performance.

A depositor of goods for safe custody, who by himself or his servants has had an opportunity of observing defects in the storehouse, incurs no obligation from this circumstance, for he is entitled to rely upon the care and skill of his paid bailee.—*Brabant* v. *King*, P.C., 157.

5. *Railway company—Level crossing—Contributory negligence.*—The plaintiff's husband was killed by a train at a level crossing on the defendants' line. The crossing was one for vehicles, and also for foot passengers. A man was stationed there by the defendants, and occupied a cottage close to the crossing. It was the duty of this man to go out and signal the trains as they passed, to show that the line was clear. The plaintiff's husband, who was acquainted with the man and lived in the neighbourhood, called at the cottage, and almost immediately after he left it was run over and kille by a passing train. The man gave no warning to the plaintiff's husband that a train was approaching, and did not go out to signal the train. There would have been no statutory duty for the defendants to have a man at the crossing if it had been a crossing for foot passengers only.

Held, that there was evidence to go to the jury of negligence on the part of the defendants.

Held, also, that there was evidence from which the jury might infer that the plaintiff's husband had not been guilty of contributory negligence, and that the evidence was not such that the circumstances were equally consistent with the accident having been caused by the plaintiff's husband's negligence as by the defendants'.—*Smith* v. *South-Eastern Railway Co.*, C.A., 291.

See also CARRIER; COUNTY COURT, 7; DOG, 1; MASTER AND SERVANT, 4; PARTNERSHIP, 5; PRACTICE, 34; RAILWAY, 5, 6; TRUSTEE, 8.

NEW SOUTH WALES, LAW of:—

1. *Bye-laws—Construction—Levying water-rate—Lands outside rateable limits—Act XXVII. of* 1892, *s.* 35.—Where the appellants were authorized by their incorporating Act (XXVII. of 1892), s. 35, to make bye-laws levying a water-rate "in respect of lands and tenements distant not more than sixty yards from any main . . . although such lands or premises are not actually connected with any main":

Held, that they had no authority to levy a rate on lands without the prescribed limit merely because such lands formed one holding with other lands within the prescribed limit.—*Hunter District Water Board* v. *Newcastle Coal Co.*, P.C.

2. *Parliamentary allowances to members—53 Vict. No.* 12, *s.* 2.—On the true construction of the Parliamentary Representatives Allowance Act (53 Vict. No. 12) s. 2, an annual grant to "every member of the Legislative Assembly now serving or hereafter to serve therein" applies to every successive Legislative Assembly of the Colony, and is not limited to the particular Assembly existing at the date of the Act.—*New South Wales* (*Attorney-General*) v. *Rennie*, P.C.

NEWSPAPER:—See CONTEMPT; LOTTERY; PRACTICE, 19.

NONFEASANCE:—See NEGLIGENCE, 4.

NUISANCE:—

1. *Noise—Lawful trade—Character of neighbourhood.*—The defendants had, since July, 1894, carried on the business of newspaper forwarding agents at premises in the City of London. The plaintiffs were respectively the leaseholders and the part occupiers of certain residential premises erected in 1886, and which were opposite to the defendants' premises. The occupying plaintiffs and others of the tenants of the plaintiffs' premises had been so disturbed by the noise of the defendants' carts and the shouts of their drivers and other of the defendants' employees between 2 a.m. and 6 a.m. that they were in many cases unable to sleep; and some of the plaintiffs' tenants had in consequence left and others had threatened to leave.

Held, that the defendants' business had caused a nuisance by noise so continuous and of such a character as to entitle the plaintiffs to an injunction. —*Bartlett* v. *Marshall*, CH.D. ROMER, J., 251.

2. *Public Health—Overcrowding in a house—Premises—Inmates—Public Health* (*London*) *Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 2.—The chief officer in charge of a Salvation Army shelter was summoned

by the local sanitary authority under section 2 of the London Public Health Act, 1891, for non-abatement of a nuisance caused by the overcrowding of the shelter, so as to be injurious or dangerous to the health of the inmates. A magistrate made an order for abatement. In the notice served by the local authority, as also in the summons and the magistrate's order, the shelter was not described as a "house" (the word used in the Act), but as "premises."

Held, that the notice, and the summons and order made thereon, were substantially in accordance with the words of the Act.

Reg. v. *Mead*, 59 J. P., approved.—*Reg.* v. *Slade* (*No.* 2), Q.B.D.

See also LOCAL GOVERNMENT, 14, 15; METROPOLIS MANAGEMENT, 5.

PARTNERSHIP:—

1. *Accounts—New partnership—Concealed fraud—Statute of Limitations.*—A father carried on business in partnership with his two sons A. and B. from 1856 until the father's death in 1886, without articles of partnership. On the father's death the partnership accounts were signed by A. and B. for probate, and they continued the partnership, sharing profits equally, on the same terms as before. A. died in 1893, and his executrix brought an action against the surviving partner B. to wind up the affairs of the partnership, and for an account since 1886, the date of the death of the father. B., by way of defence, alleged concealed fraud on the part of A., and counter-claimed for an account from 1870, the date of A.'s marriage, when a fresh arrangement was made by the partners as to their shares, and if necessary from 1856, the commencement of the partnership; the Statute of Limitations was thereupon relied on by the plaintiff by way of defence to the counter-claim.

Held (reversing the decision of Wright, J.) that, the concealed fraud having been proved, the Statute of Limitations commenced to run only from the time when the concealed fraud had been in fact discovered, and could not be set up as a defence to the counter-claim.

It is the duty of a partner to trust his co-partner without examining the partnership books to ascertain if any fraud is being committed.

Rawlins v. *Wickham*, 7 W. R. 145, 3 De G. & J. 304, followed.—*Betjemann* v. *Betjemann*, C.A., 182.

2. *Arbitration clause—Action for dissolution—Application to stay—Jurisdiction—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.—Where articles of partnership contain an arbitration clause providing in effect for the reference of all matters in difference between the parties, such a clause covers a claim for dissolution of the partnership, and the arbitrators can, if they think fit, award a dissolution.

Where, therefore, in such a case, an action is brought by one of the partners for dissolution of the partnership, the judge may, in the exercise of his judicial discretion, order a stay under section 4 of the Arbitration Act, 1889.

Walmsley v. *White*, 40 W. R. 675, followed.—*Vawdrey* v. *Simpson*, CH.D. CHITTY, J., 123.

3. *Brewery business—Death of one partner—Purchase of business by surviving partner—Valuation—Tied public-houses—Goodwill.*—Two persons carried on the business of a brewery for twenty-one years under partnership articles, which provided that, on the death of a partner without nominating a son to succeed him (which event happened), the property, stock, goods, and effects were to be valued, and the surviving partner was to have the option to purchase at such valuation.

The partnership was continued upon the same articles by a deed of covenant for a further period of seven years and afterwards without any written or verbal agreement.

One partner died, and the surviving partner exercised his option to purchase the business at the valuation.

Held, that, in taking such valuation, the goodwill of the business ought to be valued separately (except so far as it related to tied public-houses forming part of the partnership property at the death of the partner) on the footing of the surviving partner being at liberty to carry on the business.

Hall v. *Barrows* (4 De G. J. & S. 150), applied.—*Page* v. *Ratliffe*, CH.D. STIRLING, J.

4. *Goodwill—Vendor and purchaser—Making list of customers with view to use after expiration of partnership—Injunction.*—Although a person who has sold the goodwill of his business is not thereby precluded from starting a similar business, yet he is not at liberty to solicit custom from the old customers specifically. And this is equally so when partners have agreed that the goodwill shall on the expiration of the partnership belong exclusively to one of the partners.

Labouchere v. *Dawson*, 20 W. R. 309, L. R. 13 Eq. 322, followed.

Pearson v. *Pearson*, 32 W. R. 1006, 27 Ch. D. 145, overruled.

Decision of the Court of Appeal, 43 W. R. 371, [1895] 1 Ch. 462, reversed.—*Trego* v. *Hunt*, H.L., 225.

5. *Managing partner—Authority—Action against firm—Solicitor—Entering appearance in names of partners—Duty of solicitor—Information to partners of progress of action—Negligence.*—The managing partner in a trading firm has authority to defend an action brought against the firm.

A solicitor employed by the managing partner in a firm to defend an action brought against the firm has authority to enter an appearance in the names of each of the partners.

Judgment was recovered in an action against a firm. The solicitor for the firm communicated this fact to the partner who had instructed him to act, but not to the other partners.

Held, that there was no evidence of negligence on the part of the solicitor.—*Tomlinson* v. *Broadsmith*, C.A., 471.

See also ADMIRALTY, 1; CONTRACT, 3; GAMING, 2; INLAND REVENUE, 1, 20; INSURANCE, 13; SOLICITOR, 15; TRUSTEE, 5.

PATENT:—

1. *Action for infringement—Discontinuance—Costs of particulars of objections—Patents Act*, 1883, *s.* 29, *sub-section* 6—*Patent Amendment Act*, 1852, *s.* 43.—Section 29, sub-section 6, of the Patents Act, 1883, is not confined in its application to those cases only where an action is brought to trial; and the costs of particulars of objections will not be allowed unless there be a certificate by the court or a judge that the same were reasonable and proper.—*Middleton* v. *Bradley*, CH.D. STIRLING, J.

2. *Infringement — Dismissal — Agreement not to appeal — Amendment of specification — Subsequent action—Vexatious proceeding*—Res judicata.—An action was brought by H. against S. for infringement of a patent. During the course of the trial H. stated that he would be content with the decision of the judge on the question of disconformity between the provisional and the complete specifications. The action was dismissed on the ground

that the patent was invalid for want of novelty in the invention, and also on the ground that there was disconformity between the specifications. Thereupon H. amended his complete specification to meet the objection of want of novelty, but not that of disconformity. Several years afterwards H. commenced a fresh action against S. for infringement of the patent as amended. S. then moved to dismiss the action as being frivolous and vexatious, and an abuse of the process of the court.

Kekewich, J., dismissed the action on the ground that the question of the validity of the patent was *res judicata* by reason of the judgment in the former action.

Held, on appeal, without deciding the point on which Kekewich, J., based his judgment, that what took place at the trial of the former action amounted to an undertaking on the part of H. that, as between himself and S., the decision of the judge on the question and disconformity should be treated as final; and that, therefore, on that ground, the action should be dismissed as a vexatious proceeding.—*Horrocks* v. *Stubbs*, C.A.

3. *Infringement — Specification — Claim of "any other driving motion" — Validity — Amendment — Patents, Designs, and Trade-Marks Act* 1883 (46 & 47 *Vict. c.* 57), *ss.* 18-21.—Where a specification has been amended under the Patents Act, 1883, the amended claim is to be substituted for all purposes for the original claim, and no argument against the validity of the patent can be founded upon an alleged discrepancy between them.

An inventor took out a patent for certain improvements in machinery to be driven in a manner described, or by "any other suitable driving motion."

Held, that this alternative claim did not make the patent invalid, the particular source from which the motive power was obtained not being essential, or claimed as a part of the patent.—*Marsden* v. *Moser*, H.L.

4. *Infringement—Validity*—Res judicata—*Estoppel —Second action between same parties—Validity denied on different grounds.*—In an action by a patentee claiming damages for an infringement and an injunction, the defendant denied the infringement. He also denied the validity of the patent, alleging, amongst other things, that it had been anticipated by certain specifications.

The Court upheld the validity of the patent, but granted no injunction or damages on the ground that the evidence as to the alleged infringement was, under the circumstances, not admissible. In a second action between the same parties in respect of the same patent, the defendant again denied the validity of the patent, alleging that it had been anticipated by certain specifications which were not before the Court in the first action, and which he had discovered since that action.

Held, that the validity of the patent was *res judicata*, and that the judgment in the first action estopped the defendant from again denying the validity of the patent.—*Shoe Manufacturing Co.* v. *Cutlan* (*No.* 2), CH.D. ROMER, J.

5. *Infringement action — Undertaking offered and refused—Injunction—Costs.*—A plaintiff in a patent action is not entitled to an injunction as a matter of course, and if the infringement is innocent, and the defendant offers an undertaking, it should be accepted.—*Jenkins* v. *Hope*, CH.D. NORTH, J., 358.

6. *Design—Infringement—Similarity in essential features—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 51, 52, 58, 60—*Designs Rules*, 1890, *r.* 9.—The plaintiffs were the registered proprietors of two designs for upright hexagonal oil-stoves. The first design consisted of a church window, with tracery above and below it. The second design was a modification of the first, and showed an extended base. The defendants sold upright hexagonal oil-stoves similar to those of the plaintiffs, though the church window was of a different style of architecture and the tracery above and below was different.

Held, that, though there were differences in detail, the plaintiffs' and defendants' stoves were alike in their essential features, and that the defendants' stove was an "obvious imitation" of the plaintiffs' within the meaning of section 58 of the Patents, &c., Act, 1883.

The insertion in an application for registration of the words "pattern, shape, configuration, and ornamentation" does not prevent the registration from being a registration of the design as a whole.

There is nothing in the Act which deprives a person who has registered a design, of his right to protection if he mistakenly puts on articles that he sells registered numbers which ought not to be there.—*Harper* v. *Wright*, C.A., 274.

7. *Design — Registration — Copyright — Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 60—*Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50).—C. registered a design for a "Lamp for electric lighting, applicable for its shape." It was, in fact, a design for a lamp-shade, consisting of a reflecting screen which had been commonly used for gas lights, and a ventilating top not materially differing from those which had been used before for gas, except that a chimney which was required for gas lights, but not for electric lights was omitted:

Held that what C. had registered was substantially the old form of lamp-shade with the omission the chimney, which was useless when the shade was to be applied to electric lights, and that there was no such originality or novelty in the design as to make it a proper subject of registration.—*Clarke's Design, Re*, C.A.

See also INLAND REVENUE, 24; PRACTICE, 36; TRADE-MARK, 1-3, 5.

PEDLAR:—

Certificate—Market—Pedlar using horse—Hawker —Markets and Fairs Clauses Act, 1847 (10 & 11 *Vict. c.* 14), *s.* 13—*Pedlar Acts*, 1871 (34 & 35 *Vict. c.* 96), *ss.* 3, 6; 1881 (44 & 45 *Vict. c.* 45), *s.* 2.—By section 13 of the Markets and Fairs Clauses Act, 1847, "every person other than a licensed hawker" selling tollable articles within the limits of a market is liable to a penalty. By section 6 of the Pedlars Act, 1871, a pedlar's certificate shall, for the purpose of the Markets and Fairs Clauses Act, 1847, have the same effect as a hawker's license, and the term "licensed hawker" in the last-mentioned Act shall be construed to include a pedlar holding such a certificate.

Held, that a pedlar was exempted from the penalty imposed by section 13 of the Markets and Fairs Clauses Act only so long as he was trading as a pedlar as defined by section 3 of the Pedlars Act, 1871.

Howard v. *Lupton*, L. R. 10 Q. B. 598, 23 W. R. Dig. 132, not followed.—*Woolwich Board* v. *Gardner*, Q.B.D., 46.

PENALTY.—See ADULTERATION, 1; LANDLORD TENANT, 12: LOCAL GOVERNMENT, 4, 13; TRAMWAY, 3.

PENSION.—See BANKRUPTCY, 20.

POOR LAW:—

1. *Rating—Appeal—Assessment committee appearing by their clerk—Right of clerk to be heard—Order of the County of London Quarter sessions*, 1890, r. 10—*Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict.* c. 67), *ss.* 27, 62.—Under section 62 of the Valuation (Metropolis) Act, 1869, which provides that "an assessment committee may appear on any appeal by their clerk," the clerk is not entitled to be heard in court for the purpose of signifying his consent to an agreed order.—*Reg.* v. *London Justices*, C.A., 485.

2. *Rating—Exemption—Society for the purposes of the Fine Arts exclusively—Voluntary contributions*—6 & 7 *Vict.* c. 36, *s.* 1.—A society is not "supported by voluntary contributions" within section 1 of 6 & 7 Vict. c. 36, when it returns to every contributor the equivalent in moneys worth of his contributions. "Voluntary" does not there mean "non-compulsory"; it means "gratuitous"—*i.e.*, without any money or other merely material consideration.

Decision of Court of Appeal ([1894] 2 Q. B. 609) reversed.—*Savoy (Overseers)* v. *Art Union of London*, H.L.

3. *Rating — Occupation — Beneficial occupation—London County Council—Assessment of public park—Annual value—Hypothetical tenant—London County Council (General Powers) Act*, 1890 (53 & 54 *Vict.* c. *ccxliii.*), *ss.* 4, 5.—The London County Council are not rateable for the relief of the poor in respect of land and buildings purchased and maintained by them for the use of the public as a park or recreation ground under the London County Council (General Powers) Act, 1890, the occupation of such park not being of any net annual value to them as hypothetical tenants.—*London County Council* v. *Lambeth (Churchwardens)*, C.A., 621.

4. *Rating—Occupation—Sessions house—Building used partly for Crown purposes and partly for county council administrative purposes—Proportionate rateability—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict.* c. 67)—*Local Government Act*, 1888 (51 & 52 *Vict.* c. 41).—A sessions house used partly by a county council for administrative purposes, and partly for Crown purposes as the sessions house and for other judicial business, is rateable for poor and other rates and assessments under the Valuation (Metropolis) Act, 1869, so far as it is used for local administrative purposes, and so far as it is used for Crown purposes it is not so rateable.—*Middlesex County Council* v. *St. George's Union Assessment Committee*, Q.B.D., 666.

See also COMPANY, 11.

PORTIONS.—See SCOTLAND, LAW OF, 1.

POST OFFICE:—

1. *Die for making fictitious stamp—Possession—Without lawful excuse—Post Office (Protection) Act*, 1884 (47 & 48 *Vict.* c. 76), *s.* 7 (c).—The respondent had in his possession a die for a fictitious stamp which he used for the purpose of making a representation of a postage stamp in a newspaper published in the interest of stamp collectors. The die was made abroad to the respondent's order.

Held, that the respondent had committed an offence within section 7 (*c*) of the Post Office (Protection) Act, 1884, which provides that a person shall not, unless he shows a lawful excuse, have in his possession a die for making a fictitious stamp.—*Dickens* v. *Gill*, Q.B.D., 686.

2. *Railway—Conveyance of postal parcels—Outwards and inwards stations—Post Office (Parcels) Act*, 1882 (45 & 46 *Vict.* c. 74).—In the Post Office (Parcels) Act, 1882 (45 & 46 Vict. c. 74), "inwards station" means the station to which a receptacle containing postal packets is directed, no matter to what station the packets themselves are ultimately to be carried; and "outwards station" means the station at which such a receptacle is delivered to the railway company, no matter whether or not it is the station at which the parcels themselves were originally delivered to the railway company to be carried by them.

Railway companies A. and B. had a joint station at C. The Postmaster-General established at C. a sorting office for parcels. Parcels intended ultimately to be carried to various stations on the A. and B. companies' railways were despatched by the Postmaster-General from London in receptacles directed to C., and there sorted, and afterwards sent back to A. or B. company to be carried to their ultimate destination. Some of these stations were nearer London than C. A. and B. companies refused to perform the labour of carrying parcels sent to C., but intended ultimately to be carried elsewhere, from the Postmaster-General's vehicles to the trains, on the ground that as regards them C. was neither an outwards nor inwards station within the Act, and that therefore they were under no duty to perform this labour. The parcels were sent to C. for the convenience of the Postmaster-General, and he should bear all expense incidental to the transfer of the parcels both from the trains to the sorting office, and back again to the trains.

Held, that the companies were bound to perform this duty, as inwards station merely meant a station to which a receptacle containing postal parcels is directed; and outwards station one where such a receptacle is delivered to the railway company for conveyance under the Act.—*Reg.* v. *London and North-Western Railway Co.*, Q.B.D.

POWER:—

1. *Appointment—Advancement—Implication.*—A power of appointment among children was created by a will which contained the usual hotchpot and advancement clauses; but the donee of the power was empowered to direct what power of advancement the trustees should have in respect of any appointed share. The donee exercised the power of appointment by a deed which contained no advancement clause.

Held, that the appointment was to be read into the will, and that the advancement clause in the will applied to the appointed shares.—*McMahon* v. *Gaussen*, V.C. (Ir.).

2. *Appointment — Execution — Irrevocable appointment to children—Subsequent appointment to wife—Subsequent appointment inoperative.*—A settlement contained a power enabling the tenant for life to appoint the trust funds in favour of his children, subject to a proviso enabling him to appoint one-fourth of the income to "his wife" for her life. The tenant tor life, who was married at the date of the settlement, in exercise of this power, irrevocably appointed the trust funds to his children, subject to his own life interest and "subject and without prejudice to" an appointment of one-fourth of the income to his wife for life, "if the same should take effect." His wife having died, on his remarriage he purported to appoint one-fourth of the income to his second wife for her life. His second wife survived him.

Held, that the words "his wife" meant the wife he had at the date of the settlement. But even if

this were not so, the irrevocable appointment in favour of the children, being subject only to his own life interest and the appointment in favour of his then wife and not reserving any power of appointing to a second wife, precluded him from making any further appointment.

Decision of Kekewich, J., *ante*, p. 426, affirmed.—*Hancock, Re, Malcolm* v. *Burford Hancock*, C.A., 545.

3. *Appointment—Validity—Remoteness—Contingent remainder.*—An appointment of real estate under a power in a marriage settlement, of which the appointors were tenants for life, was made to the use of A., B., and C. (children then living of a son of the appointors), and to all other the children of the said son who should happen to be living at the death of the survivor of the appointors, and to the heirs and assigns of such of them as should attain twenty-five; with a proviso that if the appointment to the after-born children of the son should fail, the deed should operate as an appointment in fee to A., B., and C., or such of them as should attain twenty-five. Subsequently to the appointment four other children were born to the son. They had not attained twenty-five at the death of the surviving tenant for life, but A., B., and C., had.

Held, to create legal contingent remainders to take effect upon the death of the survivor of the appointors; and that the seven children of the son took estates for life, with remainders in fee to A., B., and C. as tenants in common.

In re Lechmere and Lloyd, 18 Ch. D. 528, 30 W. R. Dig. 225, distinguished.—*Symes* v. *Symes*, CH.D. NORTH, J., 521.

4. *Extinction—Release—Benefit to releasor—Validity—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.—The principles of the law relating to fraudulent appointments do not apply to the release of a power. Such a release will not be invalidated by a benefit resulting to the releasor.

The *ratio decidendi* of *Smith* v. *Houblon*, 26 Beav. 482, 8 W. R. Ch. Dig. 53, and *In re Radcliffe, Radcliffe* v. *Bewes*, 40 W. R. 323, [1892] 1 Ch. 227, explained.—*Somes, Re, Smith* v. *Somes*, CH.D. CHITTY, J., 236.

5. *Jointuring—Jointure, Meaning of—Power to appoint portions—Benefit to appointor.*—A jointure is a provision for a wife after the death of her husband, and, except under special circumstances, the court will not give effect to an appointment under a power of jointuring which is to take effect during the lifetime of the husband.

Jamieson v. *Trevelyan*, 10 Ex. 269, 3 W. R. Dig. 220, commented on.

The court will look closely into any exercise of a power of appointment by which the appointor benefits, but the fact of the appointor benefiting thereby does not necessarily invalidate the appointment.

Henty v. *Wrey*, 30 W. R. 850, 21 Ch. D. 332, followed.—*De Hoghton, Re, De Hoghton* v. *De Hoghton* (*No.* 2), CH.D. STIRLING, J., 635.

See also WILL, 19.

PRACTICE:—

1. *Appeal—Action tried without jury—Issues of fact—Rule of Court of Appeal.—Per* Lord Esher, M.R., and Lopes, L.J.: Where an action is tried by a judge without a jury, the presumption is that his decision on the facts was right, and that presumption must be displaced by the appellant, and unless he can satisfactorily make out that the decision of the judge was wrong, the appeal will be dismissed; and this rule applies also to the case where the witnesses have not been examined before the judge in the court below.

Per Kay, L.J.—The appeal being in the nature of a rehearing, it is the duty of the Court of Appeal, where the witnesses have not been examined before the judge in the court below, to try the case itself, and to pronounce the judgment which it thinks that the judge ought to have pronounced.—*Colonial Securities Trust Co.* v. *Massey*, C.A., 212.

2. *Appeal—Divorce—Justices—Summary Jurisdiction (Married Women) Act*, 1895 (*c.* 39).—In an appeal to the Probate, Divorce, and Admiralty Division from the decision of a court of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895, the practice under the Divorce Acts has no application, and it is not necessary that any case should be stated or filed. The practice in such appeals is governed by ord. lix, rr. 4A, 7, 8, 10, 11, 12, and 16.—*Swoffer* v. *Swoffer*, P.D. & AD.D.

3. *Appeal—Leave to appeal after time expired—Alteration of law since judgment—Solicitor-mortgagee—Mortgagees' Legal Costs Acts*, 1895 (58 & 59 *Vict. c.* 25), *s.* 3.—A solicitor-mortgagee who, before the passing of the Mortgagees' Legal Costs Act, 1895, was held not entitled to charge profit costs against his mortgagor cannot get an extension of time for appealing from such order on the ground that such Act is retrospective, for the Act was not intended to affect orders which were made before the passing of the Act.—*Eyre* v. *Wynn-Mackenzie*, C.A., 273.

4. *Chambers—Appeal—Arbitration—Leave to revoke submission to arbitration—Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.—An appeal from a judge at chambers granting leave to revoke a submission to arbitration lies to the Court of Appeal and not to a Divisional Court.—*Portland Urban District Council and Tilley's Arbitration, Re*, Q.B.D.

5. *Chambers—Appeal—"Practice and procedure"—Garnishee order—Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.—An appeal from an order of the judge at chambers affirming an order of the master making absolute a garnishee order is a matter of practice and procedure within section 1, sub-section 4, of the Judicature Act, 1894, and the appeal therefore lies to the Court of Appeal, and not to the Divisional Court.—*Hockley* v. *Ansah*, Q.B.D., 666.

6. *Chambers—Chief clerk's certificate—Appointment to sign—Variation—Extension of time—Rules of Supreme Court*, 1883, *Order LV., rr. 66a*, 67, 70, 71.—No attendance is necessary by any of the parties on an appointment before a chief clerk to sign the certificate, as such attendance for signature is a purely formal matter.—*Lawe's Chemical Manure Co.* v. *Ingham*, CH.D. STIRLING, J.

7. *Chambers—Chief clerk's certificate—Inquiry as to personal estate—Charges of breach of trust involved—Power to deal with such charges on originating summons—Order LV., r.* 3.—In an action commenced by originating summons, it was declared that the trusts of a will ought to be performed under the direction of the court, and certain inquiries were directed, among others as to the value of the mortgage securities and whether they were sufficient, and whether they should be called in or retained, and in case they were insufficient "under what circumstances and by whom the moneys owing thereon were advanced, and what

valuations were taken by the persons advancing such moneys, and whether such investments were proper." Further inquiries and accounts were afterwards directed, and among others an account of the personal estate not specifically bequeathed of the testator's estate. The chief clerk certified that the investments were to a certain extent improper, and as to one of them that it was made on no sufficient valuation, and found that the defendants were liable thereon. A summons was then taken out by them asking that this might be varied, and it was so varied on the grounds that it was beyond the scope of the inquiry and not borne out by the evidence. The question now arose, the summons to vary coming on with the further consideration, what further relief there was, if any, as it lay in respect of a breach of trust, and could not presumably be given on originating summons.

Held, that the words of the inquiry above set out went too far, and that, if objection had been taken to it at the time, it would not have been proceeded with, but that not having been objected to it was now binding on the court. That that being so, it would be idle to send the applicants to commence another action, and that, as the account asked for was one upon which the defendants, if the case had occurred prior to the Judicature Acts, might have been held liable on the common account, the beneficiaries were entitled to have it taken. At the same time there was no intention of getting rid of the rule by a side wind which prevented contested cases being decided on originating summons, and if, therefore, it appeared on taking the account that it involved *viva voce* evidence, application should be made for directing the issue to be dealt with in the proper mode.—*Stuart, Re, Smith* v. *Stuart*, CH.D. STIRLING, J.

8. *Commercial cause—Entering in commercial list—Appearance of defendant—Power to deal with costs.*—After the writ in an action has been served the plaintiff may, before the defendant has entered an appearance, apply to the judge to whom commercial causes are assigned to enter the cause in the commercial list, and the judge may direct the costs of the application to be costs in the cause.

The defendant can, after entering an appearance, apply to have the order rescinded, but only on the ground that the cause is not a commercial cause.—*Barry* v. *Peruvian Corporation*, C.A., 487.

9. *Commercial Court—Rules of evidence—Transfer of action commenced in Chancery Division to Queen's Bench Division—Judicature Act*, 1894, *s.* 3.—The court established for the trial of commercial causes has no greater power than any other court to dispense with the technical rules of evidence. All its powers are derived under the Supreme Court of Judicature (Procedure) Act, 1894, and the rules made thereunder.

The circumstances under which the court will order the transfer of an action commenced in the Chancery Division to the Queen's Bench Division for trial, considered.—*Baerlein* v. *Chartered Bank of India*, C.A.

10. *Costs—Security for costs—Several defendants—R. S. C.*, 1883, *ord.* 65, *r.* 6.—The plaintiff, who resided in America, had brought an action against four persons, three of whom were trustees of a will, and the fourth was the heir-at-law of the testator. The three trustee defendants obtained an order that the plaintiff should give security for costs for £75; the fourth defendant, who appeared by a separate solicitor, subsequently applied that the plaintiff should give security for his (the fourth defendant's) costs.

Held, that there was no evidence to show that the sum of £75 was not sufficient security for all costs; and that it should stand as security for the costs of the fourth defendant as well as of the first three defendants.—*McHenry* v. *McHenry*, C.A. (Ir.).

11. *Costs—New trial motion—Shorthand notes—Summing up of judge.*—Upon a motion for a new trial, an application for the costs of the shorthand writer's notes of the summing up of the judge at the trial, will only be granted in exceptional cases.—*Andrews* v. *Mockford* (*No.* 2), C.A.

12. *Costs—Set-off—Husband and wife—Restitution of conjugal rights—Judicial separation.*—A petition by a wife for restitution of conjugal rights and a counter-claim by her husband for judicial separation were both dismissed with costs by the Court of Appeal, the costs of the one to be set off against the costs of the other in the court below, and no costs of the appeal being allowed. The husband having subsequently presented an appeal to the House of Lords, the Court of Appeal ordered that the taxation of the costs should be suspended until after his appeal was determined, on his undertaking to duly prosecute it.—*Russell* v. *Russell* (*No.* 2), C.A.

13. *Costs—Shorthand-writer's notes—Evidence at trial of action before a judge and jury—Summing up of the judge.*—In an ordinary case, in the absence of special directions, the practice is not to allow the costs of the shorthand-writer's notes of the evidence taken at the trial of an action before a judge and jury, but only of the judge's summing up.—*Pilling* v. *Joint Stock Institute*, C.A.

14. *Costs—Taxation—Witnesses expenses—Photographs—Notice to admit—R. S. C.*, 1883, *ord.* 65, *r.* 27 (9) (20) (29) (37) (38).—The costs of witnesses subpœnaed but not actually called, are within the taxing-master's discretion; and the taxing-master must exercise his discretion without reference to scales and rules before the Judicature Act, 1873,

Turnbull v. *Janson*, 26 W. R. 815, 3 C. P. D. 264, followed.

Semble, the costs of a photographer called as a witness simply to prove the photographs should not be allowed, unless notice to admit his proof has been given and the other side has refused to admit it.—*East Stonehouse Board* v. *Victoria Brewery Co.*, CH.D. NORTH, J.

15. *Discontinuance by trustee in bankruptcy of plaintiff—Fresh action by assignee of trustee—R. S. C., ord.* 25, *r.* 4.—A plaintiff having become bankrupt, his trustee in bankruptcy elected not to continue the action, and thereupon an unconditional order was obtained by the defendants staying further proceedings. B. having purchased the trustee's interest, commenced a second action for the same relief as that asked by the former action. Kekewich, J., dismissed the second action, as an abuse of the process of the court and as frivolous and vexatious. The trustee, who alone had the right of action in him, having by his election barred anybody subsequently becoming entitled through him to the same cause of action. On appeal:

Held, that the action ought not to be dismissed in a summary way as frivolous and vexatious, as the question was one that required consideration—namely, whether the order staying the proceedings in the former action was equivalent to a judgment for the defendants.—*Bean* v. *Fowler*, C.A.

16. *Discovery of documents—Demise—Forfeiture—Action to recover possesseon of demised premises.*—The

defendant in an action to recover possession of demised premises on a forfeiture for breach of covenant may be ordered to make an affidavit of documents, but he may refuse to disclose any documents which would establish the case of forfeiture against him.—*Seaward* v. *Dennington*, C.A., 696.

17. *Discovery — Documents from co-defendants—Order* 31, *r.* 12.—A railway company brought an action against contractors, the contractors putting in a counter-claim with their defence, to which they made an insurance corporation defendants, and in which they alleged that the company had obtained a guarantee from the corporation which was enforceable against them, and that the company were trustees of this guarantee for the contractors, and payment of the amount thereof was claimed. The corporation put in a defence that the guarantee had been released and satisfied, and the company in reply repudiated any collusion between them and the corporation. In the event of the contractors being successful in obtaining a declaration that the company were trustees of this guarantee and endeavouring to enforce the guarantee, the defence of the corporation would be that the company had released their liability, but this would not preclude the case, because the contractors would reply that that release was not binding as against them. The corporation having taken out a summons for discovery under Order 31, r. 12, against the company, their co-defendants:

Held, in these circumstances that there was "some right between these parties to be adjusted in the action," namely, whether or not the liability of the corporation under the guarantee was good, and that the case fell therefore within the rule.

Shaw v. *Smith*, 18 Q. B. D. 193, applied.—*Alcoy Railway Co.* v. *Greenhill* (*No.* 2), CH.D. STIRLING, J.

18. *Discovery — Interrogatories— Company—Leave to interrogate member—Notice of application— Ord.* 31, *r.* 5.—Where a company is a party to an action, notice of an application for leave to deliver interrogatories to a member of the company under ord. 31, r. 5, must be served vpon a member.—*Chaddock* v. *British South Africa Co.*, C.A., 658.

19. *Discovery—Interrogaties—Libel in newspaper Circulation of newspaper.*—In an action for libel against the proprietors of a newspaper the plaintiff delivered an interrogatory asking the number of copies printed and circulated of the issue of the newspaper containing the alleged libel. The defendants answered that a considerable number of copies were printed and published.

Held, that the answer was sufficient.

Parnell v. *Walter*, 38 W. R. 270, 24 Q. B. D. 441, overruled.—*Whittaker* v. *Scarborough Post Newspaper Co.*, C.A., 657.

20. *Discovery—Penal or criminal matter—Pollution of Rivers Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 10. —By the Pollution of Rivers Act, 1876, s. 10, the county court has power, where any offence against the Act is committed within its district, by summary order, to require any person to abstain from the commission of such offence, and, where the offence consists in default to perform a duty under the Act, to require him to perform such duty in the manner in said order specified. The county court has, under the same section, the further power, in case of default being made in complying with any such order, of ordering the payment of a penalty.

Held (affirming the decision of the Divisional Court, *ante*, p. 543), that proceedings instituted to obtain the former order were not proceedings in a penal or criminal matter, and that the county court judge had jurisdiction to make an order for discovery in them.—*Derbyshire County Council* v. *Derby* (*Mayor of*), C.A.

21. *Discovery — Privileged communications—Production—Fraud—Inspection by judge—R. S. C., ord.* 31, *r.* 19a, *sub-rule* 2.—Communications between a solicitor and his client as to the subject-matter of an alleged fraud are not privileged from production in an action where fraud is charged.—*Williams* v. *Quebrada Railway Co.*, CH.D. KEKEWICH, J., 76.

22. *Dismissing action for want of prosecution—Notice of trial—Trial not entered—Discretion as to form of order—Ord.* 36, *rr.* 12, 16, 20.—When the plaintiff has given notice of trial but has not entered the trial, and the defendant applies to dismiss the action for want of prosecution, the court or a judge has a discretion, under ord. 36, r. 12, either to dismiss the action or to order that it be dismissed unless notice of trial be given, and the trial entered within a certain time, or to make such other order as may seem just.—*Sievier* v. *Spearman*, C.A.

22a. *Evidence—Privilege—Statements made by one party to the solicitor of another party.*—Two persons were engaged in a joint adventure, in the course of which one of them had interviews with the solicitor of the other at that other's request.

Held, that statements made to the solicitor at such interviews were privileged.—*Rochefoucauld* v. *Boustead*, CH.D. KEKEWICH, J.

23. *Execution—Order for payment of costs—Solicitor — Attachment — Disciplinary jurisdiction of the court—Order in a criminal matter—Election in favour of one of two remedies—R. S. C.*, 1883, *ord.* 42, *r.* 24. —A person is not precluded from bringing an action to enforce an order of the court for the payment of costs, under ord. 42, r. 24, by reason only that he has a remedy by attachment under the order.

Where there is a remedy by action and also a remedy by attachment in respect of the same matter, the plaintiff is not precluded from exercising the one remedy by having made an unsuccessful attempt to enforce the other.

But, *semble*, per Lord Esher, M.R., and Lopes, L.J., that if the plaintiff had obtained a writ of attachment, and the defendant had been taken under it, the plaintiff's remedy by action would have gone.

An order for the payment of the costs of proceedings taken to have the name of a solicitor struck off the rolls is not an order in a criminal matter.—*Godfrey* v. *George*, C.A., 245.

24. *Indorsement of claim—Title of action—Plaintiff suing on behalf of himself and others—R. S. C., ord.* 3, *r.* 4.—The fact that a plaintiff is suing in a representative capacity on behalf of himself and others ought to appear in the title of the action, and not buried in the statement of claim.

Eyre v. *Cox*, 24 W. R. 317, distinguished.—*Tottenham, Re, Tottenham* v. *Tottenham*, CH.D. NORTH, J., 539.

25. *Injunction—Notice of action—Evasion of writ —Light.*—On May 23 A. wrote to B. complaining of a building B. was erecting as interfering with ancient lights. On May 24 A. commenced an action. B. evaded service till May 28, and in the meantime hurried on the building and carried it up to its full height.

Held, that A. was entitled to a mandatory injunction as to that part of the building erected between May 24 and 28.—*Von Joel* v. *Hornsey*, C.A.

25a. *Injunction—Notice of motion—Service out of*

the jurisdiction—Foreign subjects—R. S. C., 1883, *ord.* 11, *r.* 1 (*f*), *ord.* 52, *r.* 9.—Leave to serve notice of motion for an interlocutory injunction, with notice of the writ in an action, out of the jurisdiction, upon some of the defendants who are foreign subjects, will be given, without prejudice to any question which may arise on the order.—*Overton* v. *Burn*, C.A.

26. *Injunction—Suspension of injunction by Court of Appeal—Further suspension—Court to which application should be made.*—In an action commenced in the Chancery Division an injunction which was asked for was refused, and an inquiry as to damages was ordered. On appeal the Court of Appeal varied such order and granted an injunction, but suspended its operation for six months.

An application to further suspend the operation of the injunction was made to the court of first instance.

Held, that such application had been properly made to the court of first instance.—*Shelfer* v. *City of London Electric Lighting Co.*, C.A., 198.

27. *Joinder—Causes of action—Waiver—R. S. C.*, 1883, *ord.* 18, *r.* 2.—Appearance to a writ does not waive objection to a joinder with an action for recovery of land, of causes of action other than those specified in ord. 18 r. 2.

Re Pilcher, *Pilcher* v. *Hinde*, 27 W. R. 789, 11 Ch. D. 905, followed.

A claim for a declaration that a mortgage is not charged upon property and for possession, and, in the alternative, for an account of what is due and redemption, is within ord. 18, r. 2.—*Hunt* v. *Worsfold*, CH.D. NORTH, J., 461.

28. *Judgment by consent—Order passed and entered by the registrar—Consent given under mistake—Motion to vary judgment—Power of court to alter judgment—R. S. C., ord.* 28, *r.* 11—*Fresh action to set aside judgment.*—A court can only, except possibly with the consent of all parties to the action, interfere with a judgment passed and entered (not being an order made on an interlocutory application) (1) in the case of an accidental slip which can be rectified under R. S. C., ord. 28, r. 11; (2) where the court finds that the judgment as drawn up does not state what it decided and intended.

The proper remedy for a party who has consented to a judgment under a mistake is to proceed by a fresh action to set aside such judgment.—*Ainsworth* v. *Wilding*, CH.D. ROMER, J., 540.

29. *Mayor's Court—Appeal—Notice of appeal—Condition precedent—Extension of time—Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii*), *s.* 8—*R. S. C.*, 1883, *ord*, 59, *r.* 16.—It is a condition precedent to the right of appeal under section 8 of the Mayor's Court of London Procedure Act, 1857, that the appellant should give notice of appeal within two days. This provision is not affected by the general power conferred on the High Court by ord. 59, r. 16, to extend the time for bringing an appeal from an inferior court.—*Kirby* v. *North British and Mercantile Insurance Co.*, C.A., 529.

30 *Particulars, Application by defendants for—Discovery, Application by plaintiffs for—Fraud—Discretion of court to order discovery before particulars.*—There is no general rule that delivery of particulars by the plaintiff should precede the making of discovery by the defendant in all cases except those where there is a fiduciary relation between the parties.

The judge must in every case exercise his discretion, having regard to all the circumstances.

Dictum of Kay, L.J., in *Zierenburg* v. *Labouchere*, 41 W. R. 675, [1893] 2 Q. B. 183, at p. 189, explained.—*Waynes Merthyr Co.* v. *Radford*, CH.D. CHITTY, J., 103.

31. *Particulars—Slander of title—R. S. C.*, 1883, *ord.* 19, *r.* 7.—A statement of claim alleged that the defendant had slandered the plaintiff's title to certain lands by publishing certain words "just before the exposure to sale by auction of said lands," "whereby the persons desirous of buying were prevented from bidding" to the plaintiff's loss.

Held, that the plaintiff should give the defendant particulars of the occasions when and where such words were spoken, and also of the persons present on such occasions; and the best particulars that could be given of the persons desirous of buying and who were prevented by reason of the words complained of.—*Roche* v. *Meyler*, Q.B.D. (Ir.).

32. *Parties—Bankruptcy of defendant—Receiving order—Official receiver wrongfully added as a party to the action—R. S. C.*, 1883, *ord.* 17, *r.* 4—*Bankruptcy Acts*, 1883 *and* 1890.—The mere making of a receiving order does not cause any change or transmission of interest or liability.

Consequently, where a receiving order had been made against the defendant in an action, and an *ex parte* order adding the official receiver as a defendant thereto obtained by the plaintiff under R. S. C., 1883, ord. 17, r. 4, the latter order, upon the application of the official receiver, was discharged.—*Berry, Re, Duffield* v. *Williams*, CH.D. STIRLING, J., 346.

33. *Parties—Death of plaintiff—Survival of cause of action—Action of* mandamus—*Statutory duty—Right of executors to continue action—R. S. C.*, 1883, *ord.* 17, *rr.* 1, 4.—An action was brought by the owner of a mill against a local authority for a *mandamus* commanding the defendants to make proper sewers in accordance with section 15 of the Public Health Act, 1875, and to give facilities for carrying the plaintiff's liquid refuse into the sewers under their control in accordance with section 7 of the Rivers Pollution Prevention Act, 1876. The plaintiff having died while the action was pending,

Held, that the cause of action survived, and that the executors of the plaintiff were entitled to an order allowing them to continue the action.—*Peebles* v. *Oswaldtwistle Urban District Council*, C.A., 513.

34. *Parties—Joinder—Action under Lord Campbell's Act* (8 & 9 *Vict. c.* 93)—*Maritime collision.*—In a suit under Lord Campbell's Act numerous plaintiffs sought to recover separate damages as due to each plaintiff or group of plaintiffs for injuries resulting from a maritime collision said to have been caused by the negligence of the defendants.

Held, that there was no express or implied authority in the Rules of Court to warrant the joinder in one suit of different and distinct causes of action not being causes of action by and against the same parties.

Smurthwaite v. *Hannay*, [1894] A. C. 494, followed.—*Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima*, P.C.

35. *Parties — Joinder of defendants — Distinct causes of action—Ord.* 16, *r.* 4.—Separate tortfeasors cannot, since the Judicature Acts, be joined as co-defendants in an action for damages.

Semble, that the action would not be maintainable if the claim was limited to an injunction.

Judgment of the Court of Appeal, *ante*, p. 50,

affirmed.—*Sadler* v. *Great Western Railway Co.*, H.L.

36. *Patent action—Jurisdiction of Court of Appeal to allow amendment of particulars of objections*—46 & 47 *Vict. c.* 57, *s.* 29—*R. S. C., ord.* 58, *r.* 4.—The Court of Appeal has, under ord. 58, r. 4, jurisdiction to allow the amendments of particulars of objections; but

Held, that, on the merits, leave to amend ought not to be given, as the defendant would not be prejudiced by the judgment in the action if he afterwards sought to have the plaintiff's patents revoked.—*Shoe Manufacturing Co.* v. *Cutlan*, C.A., 92.

37. *Payment into court—Order for payment into court on motion—Admission by defendant of receipt of money—Improper payments by defendant.*—Upon an interlocutory motion, money will not be ordered to be paid into court by a constructive trustee unless it is actually in his hands. It is not sufficient that it has been in his hands and that he is responsible for it.

Neville v. *Matthewman*, 42 W. R. 675, [1894] 3 Ch. 345, and *Nutter* v. *Holland*, 43 W. R. 18, [1894] 3 Ch. 408, followed.—*Crompton* v. *Burton*, CH.D. NORTH, J., 60.

38. *Payment into court—Trust money—Admission of misapplication by trustee—Motion by some plaintiffs only—Discretion of court as to order—R. S. C.*, 1883, *ord.* 32, *r.* 6.—An application under R. S. C., 1883, ord. 32, r. 6, for an order on admissions of fact by a defendant in an action cannot be made on behalf of some only of the plaintiffs.

There is a judicial discretion as to the making of an order upon a trustee to pay into court trust money which he admits having received and wrongfully applied.—*Wright, Re, Kirke* v. *North*, CH.D. KEKEWICH, J., 125.

39. *Pleading—Counter-claim—Defendant to counter-claim not party to original action—Right to counter-claim against plaintiff—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-section* 3—*R. S. C.*, 1883, *ord.* 19, *r.* 3; *ord.* 21, *rr.* 11, 14.—A defendant to a counter-claim, not being a party to the original action, but brought in by the original defendant on his counter-claim, is not entitled to counter-claim against the original defendant and plaintiff.

Street v. *Gover*, 25 W. R. 750, 2 Q. B. D. 498, followed.

Toke v. *Andrews*, 30 W. R. 659, 8 Q. B. D. 428, distinguished.—*Alcoy Railway Co.* v. *Greenhill*, C.A., 117.

40. *Pleading — Document — Contents — Effect — Sufficiency—R. S. C.*, 1883, *ord.* 19, *r.* 21.—The statement of claim in an action for the recovery of land contained the following paragraph: "By the will of the said H. L., made on the 27th of February, 1785, and duly proved on the 18th of July of that year, the said M. L. become entitled to the said estates in fee in reversion on the determination of certain estates tail limited in the said will."

Held, that the paragraph was properly pleaded under ord. 19, r. 21, and that it was not necessary to set out the precise words of the will.—*Darbyshire* v. *Leigh*, C.A., 452.

41. *Pleading—Statute of Frauds—When it must be pleaded—R. S. C., ord.* 19, *r.* 15.—The plaintiffs, by a writ specially indorsed, claimed "£152, being the amount payable under a guarantee signed by the defendant, and dated the 11th of June, 1895, in respect of goods sold and delivered to, and work and labour done for, the Lux Publishing Co., between April, 1894, and the 13th of June, 1895. The defendant did not plead the Statute of Frauds, but he set out, in his defence, the guarantee, which was not sufficient to satisfy the statute.

Held, that the defendants could not rely upon the Statute of Frauds because he had not raised that defence by his pleading, and was not relieved from the necessity of pleading that defence by the statement in the statement of claim that the guarantee was in writing.—*Odhams* v. *Brunning*, C.A.

42. *Set-off—Costs—Solicitor's lien—Independent proceedings—Action in county court—Application to Chancery Division—R. S. C., ord.* 65, *rr.* 14, 27, *reg.* 21.—Costs incurred in the High Court cannot be set off against costs incurred in a county court in the same matter.

Construction of ord. 65, r. 14, adopted by the Divisional Court in *Edwards* v. *Hope*, 33 W. R. 672, 14 Q. B. D. 922, approved and applied.

A motion in the High Court to set off the costs of an application to the High Court, which had been dismissed with costs without any direction to stay execution, against costs to which the applicants became subsequently entitled by an order of a county court in the same matter, was dismissed with costs by the court in the exercise of its discretion. The applicants thereupon asked to be allowed to set off the costs of their unsuccessful motion against the costs due to them under the order of the county court.

Held, on the principle of *Edwards* v. *Hope*, that there was no jurisdiction to allow a set-off in such a case.—*Hassell* v. *Stanley*, CH.D. CHITTY, J., 405.

43. *Special case—Proceedings extra* Cursum Curiæ *—Appeal—Jurisdiction—Ord.* 34, *r.* 1.—Where a special case is calculated and intended to raise for decision questions of fact only, the proceedings are extra *cursum curiæ*, the judgment of the court is in the nature of an arbitrator's award, and an appeal cannot be entertained if its competency is objected to by the party holding the judgment. If in these circumstances the Court of Appeal reverses the judgment below, the House of Lords has no jurisdiction except to reverse as incompetent the judgment of the Court of Appeal.—*Burgess* v. *Morton*, H.L.

44. *Time — Enlargement — Redemption action — Order to pay into court—Default—Mistake—Payment in after time specified—Jurisdiction—R. S. C.*, 1883, *ord.* 64, *r.* 7.—In a redemption action an order was made giving leave to the plaintiff to lodge a sum of money in court to cover the amount due to the mortgagee, and directing that in default of payment being made within two months of the date of the order that "the action be dismissed, with costs."

Owing to a *bonâ fide* mistake on the part of the plaintiff's solicitor, the money was not paid in until after two months from the date of the order, though within two months of the date of the order being entered and passed. No application had been made to dismiss the action.

Held, that the action was still alive, and that the court had jurisdiction to extend the time for payment in.—*Collinson* v. *Jeffery*, CH.D. KEKEWICH, J., 311.

45. *Trial — Assessors — Scientific investigation — Ord.* 36, *r.* 5.—By ord. 36, r. 5, a judge may direct the trial without a jury of any cause, matter, or issue requiring any scientific investigation which in his opinion cannot conveniently be made with a jury.

The plaintiff's ship was sunk in the defendants'

docks while being moved by their tugs from one berth to another. As she was without cargo or ballast, compensation booms were attached to her to keep her upright while being moved. The operation of moving her was carried out in such a way that the tugs pulled the ship over, and she sank. The judge at chambers held that there was an issue in the action requiring scientific investigation, and he ordered the action to be tried before a judge with two assessors.

Held, by Lord Esher, M.R., and Rigby, L.J. (Lopes, L.J., dissenting), that there was in the action an issue requiring scientific investigation, and that therefore the judge at chambers had jurisdiction to make the order. — *Swyny* v. *North-Eastern Railway Co.*, C.A.

46. *Trial—Motion for new trial—Enlargement of time—Imposition of terms—Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict*, c. 44), *s.* 1—*R. S. C.*, 1883, *ord.* 64, *r.* 7.—A motion for a new trial or to set aside the verdict of a jury is, since the passing of the Supreme Court of Judicature Act, 1890, to be made to the Court of Appeal, and not to a divisional court. Consequently, on the hearing of any such motion, the Court of Appeal has power, by virtue of ord. 64, r. 7, to enlarge the time within which to move for a new trial, and to impose such terms as the justice of the case may require.—*Wilkins* v. *Wilkins*, C.A., 305.

47. *Trial — New trial — Libel — Misdirection — "Substantial wrong or miscarriage"—R. S. C., ord.* 39, *r.* 6.—In an action for libel the judge misdirected the jury in favour of the plaintiff upon a material part of the libel and the jury gave a verdict for large damages. The Court of Appeal thought that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict, even if the direction had been the other way, and refused the defendant's application for a new trial on the ground that in their opinion no "substantial wrong or miscarriage" had been occasioned by the misdirection, within the meaning of ord. 39, r. 6.

Held, reversing the decision of the Court of Appeal, that since the assessment of damages is the peculiar province of the jury in an action for libel, and since the jury had not had the defendant's real case submitted to them and might, in assessing the damages, have been influenced by the misdirection, there had been a substantial wrong or miscarriage within ord. 39, r. 6, and that there must be a new trial.—*Bray* v. *Ford*, H.L.

48. *Trial— Non-suit — Insurance—Fire policy — Compliance with condition in policy.*—Where in an action on a fire policy the plaintiff's evidence showed that they could have complied much more fully and completely than they had done, with a condition in the policy as to giving within fifteen days a detailed account of their loss "as the nature and circumstances of the case will admit."

Held, that they were rightly non-suited; for even if the question of compliance were for the jury, a verdict could not have been reasonably given in plaintiff's favour. — *Hiddle* v. *New Zealand National Fire Insurance Co.* P.C.

49. *Writ—Defendant's address—Mistake in writ—Ord.* 2, *r.* 3.—The defendant resided and carried on business in Ireland. He was served in England with a writ of summons in which he was described as "of L., in the county of Lancaster."

Held, that the mistake as to the defendant's address did not invalidate the writ.—*Smith* v. *Hammond*, Q.B.D., 478.

50. *Writ—Domiciled Scotchman carrying on business in England under firm name—Service on manager in England—Motion to set aside—Ord.* 48*a*, *r.* 11.—B., a domiciled Scotchman, residing in Glasgow, carried on business there and also in Liverpool under the firm name of G. & J. B., but the business belonged to B. alone. The plaintiffs, who had formerly carried on another business in partnership with B., issued a writ in the Palatine Court against G. & J. B., and served it upon the manager of the Liverpool office of G. & J. B. The writ was claimed relief in respect of the partnership formerly subsisting between the plaintiffs and B.

Held, that such service was not authorized by ord. 48*a*, r. 11, and must be set aside.—*MacIver* v. *Burns*, C.A., 40.

51. *Writ—Service out of the jurisdiction—Action for infringement of patent—Injunction—R. S. C.*, 1883, *ord.* 11, *r.* 1 (*f*).—Foreign manufacturers supplied goods to an English firm of retail dealers. The plaintiffs, alleging that such goods were an infringement of their patent, commenced an action against the English dealers, and applied *ex parte* to North, J., in chambers for leave to issue a concurrent writ and serve notice of it on the foreign manufacturers out of the jurisdiction.

Held (reversing the decision of North, J.), that the plaintiffs had made out a *primâ facie* case within R. S. C., 1883, ord. 11, r. 1 (*f*); and the leave asked for was granted.—*Badische Anilin Fabrik* v. *Johnson*, C.A., 308.

52. *Writ—Service out of the jurisdiction—Defendant domiciled in Scotland—Agreement to give court jurisdiction to order service—Ord.* 11, *r.* 1 (*e*).—Where the defendant is domiciled or ordinarily resident in Scotland or Ireland, the parties cannot by agreement give the court power to allow the writ to be served out of the jurisdiction under ord. 11, r. 1 (*e*).—*British Wagon Co.* v. *Gray*, C.A., 113.

53. *Writ—Specially indorsed writ—Action for recovery of land—Landlord and tenant—Mortgagor attorning tenant to mortgagee—Tenancy at will—Ord.* 3, *r.* 6 (f); *ord.* 14, *r.* 1.—By a mortgage deed the mortgagor attorned tenant to the mortgagee from year to year, there being a clause in the deed that the mortgagee might at any time, without giving any previous notice of his intention to do so, enter upon and take possession of the premises and determine the tenancy created by the attornment. The mortgagee having brought an action to recover possession of the premises,

Held, that the tenancy created by the attornment clause was a tenancy at will which the mortgagee could determine at any time; that the claim to possession was not based on a forfeiture; and that the writ could be specially indorsed under ord. 3, r. 6 (*f*), and judgment for possession signed under ord. 14, r. 1.

Arden v. *Boyce*, 42 W. R. 354, [1894] 1 Q. B. 796, distinguished.—*Kemp* v. *Lester*, 453.

See also ADMINISTRATION, 2-5; BANKRUPTCY, 1; COMPANY, 18, 39; COUNTY COURT, 10; DIVORCE, 15-23, 27; LANDLORD AND TENANT, 4, 10; LUNACY, 1, 10; MORTGAGE, 6; RAILWAY, 11; SHERIFF, 2; SOLICITOR, 3, 4.

PRINCIPAL and AGENT:—

1. *Company—Debentures—Trustees for debenture-holders—Receiver—Liability for goods ordered by receiver.*—By a deed made between a limited company and the defendants as trustees for debenture-holders, by which the business and property of the company were mortgaged to secure payment

of the debentures, it was provided that in certain events the trustees might by writing under their hands appoint a receiver of the mortgaged premises, who should have power to carry on the business, and that any receiver so appointed should be the agent of the company, who alone should be liable for his acts and defaults. The defendants were two of the members of a banking firm, who were the holders of the debentures. They appointed a receiver under the deed, stipulating that all moneys received by him as receiver should on the day of their receipt be paid in to an account to be opened by him with the banking firm, and that cheques drawn by him upon the account should be countersigned by their solicitor. Shortly after the appointment of the receiver an order was made for the compulsory winding up of the company. Subsequently to the winding-up order, the receiver continued to carry on the business, and in the course of so doing ordered goods from the plaintiffs. In an action against the defendants for the price of the goods,

Held, by Lord Esher, M.R., and Lopes, L.J., Rigby, L.J., dissenting, that the correct inference was that, at any rate after the winding-up order, the defendants were the principals for whom the receiver, as agent, carried on the business, and consequently the action was maintainable against them.—*Gaskell* v. *Gosling*, C.A.

2. *Contract — Company — Underwriting contract irrevocable to take shares not executed by agent—Subsequent acceptance by agent and withdrawal by principal—Authority coupled with interest—Irrevocability—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35.—A. executed an underwriting contract in form irrevocable to take shares in a company. The contract was not executed by the agent intrusted to subscribe on A.'s behalf in the form provided, but was accepted by him in terms by separate letter. Subsequently A. wrote the secretary withdrawing from the contract, but the company, on the initiative of the agent, proceeded to allotment. The agent received some substantial benefit from the contract.

On a motion by A. to have his name removed from the register of members on the ground that the allotment to him was made without his consent.

Held, that the underwriting contract was an authority coupled with an interest, and was therefore irrevocable.

Gaussen v. *Morton* (10 B. & C. 731) applied.—*Hannan's Empress Gold Mining Co., Re*, CH.D. STIRLING, J.

PRINCIPAL and SURETY:—

Co-sureties—Contribution—Alteration in bond—Materiality—Discharge of sureties.—A bond was given by the defendant C. as principal, and by the defendants N., E., P., and B., as sureties, by which they were jointly and severally bound to the plaintiffs in the sum of £150. The condition of the bond was that if C. duly accounted to the plaintiffs for all moneys received by him for them, the bond should be void. The bond provided that the liability of N. and E. should be limited to £50 each, and of P. and B. to £25 each. N. was the last surety to sign the bond, and after his signature added, in good faith, the words "for £25 only." The principal made default in the sum of £48.

Held, in an action against the principal and sureties, that the alteration by N. was a material alteration, casting an additional burthen upon the other sureties, and that as against them the bond was thereby rendered void; that the bond was also rendered void as against N., for his liability under the bond was undertaken on the faith of the joint liability of the other sureties.—*Ellesmere Brewery Co.* v. *Cooper*, Q.B.D., 254, 257.

See also EXECUTOR, 4; NEGLIGENCE, 3; TRUSTEE, 3.

PRIVILEGE.—See PRACTICE, 21, 22A.

PROBATE:—

1. *Administration—Bodily incapacity of executor—Grant during incompetency for use and benefit.*—Where a sole executor was bodily incapable of acting, and likely to remain so for some time, the court granted letters of administration with the will annexed to a residuary legatee for life, for the executor's use and benefit during his incompetency.—*Ponsonby, In goods of*, P.D. & AD.D., 240.

2. *Administration—Bond—Foreign sureties.*—An application to allow an administration bond to be given with foreign securities should be made to a judge in chambers.—*Scott, In goods of*, P.D. & AD.D.

3. *Administration—Grant* de bonis non—*Amount of security.*—On the application for a grant *de bonis non* the court allowed the grant to go, upon the usual bond being given in double the amount of the unadministered estate.—*Oakey, In goods of*, P.D. & AD.D., 432.

4. *Administratian—Intestacy—Married woman—Husband a bankrupt—Small estate—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 121—*Grant to Senior Official Receiver in Bankruptcy—Husband passed over—Citation dispensed with—Administrator's personal bond only—Sureties dispensed with.*—In the case of the estate of a married woman who had died intestate, leaving her husband, who survived her, an undischarged bankrupt, whose estate was vested in the hands of the Chief Official Receiver in Bankruptcy, under the Bankruptcy Act, 1883, s. 121:

The Court, upon motion by the Chief Official Receiver, made a grant to him of the personal estate and effects of the deceased intestate, and on account of the smallness of the estate, dispensed with any citation upon the husband of the deceased, and, as the administrator applied in his official capacity, accepted the administrator's personal bond without sureties.

In the Goods of Cope (15 P. D. 107), distinguished.

In the Goods of Jane Turner, deceased (12 P. D. 18), followed.—*Conolly, In Goods of*, P.D. & AD.D.

5. *Administration — Intestate's estate of value under £500—Grant to executor of widow who had not taken administration—Intestates' Estates Act*, 1890 (53 & 54 *Vict. c.* 29), *s.* 1—*Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—A widow died without taking administration to her husband's estate, which was of the net value of under £500, and, as he died without issue, belonged exclusively to her, under section 1 of the Intestates' Estates Act, 1890. The court granted administration to her executor, under section 73 of the Probate Act, 1857.—*Bryant, In Goods of*, P.D. & AD.D.

6. *Administration—Residuary legacy for benefit of convent—Death of legatee and executor—Grant to head of convent—Charity—No scheme required.*—Where a residuary legacy was given by a will to C. H. "to be disposed of as she shall think fit at her discretion for the benefit of" a certain convent, and the only executor of the will and C. H. both died during the testatrix's lifetime, the court granted letters of administration with the will

annexed to the Reverend Mother the head of the convent, on being satisfied of the permanence of the institution, and the fitness of the Reverend Mother, having regard to her powers, to receive and apply the legacy in question, the court being satisfied that it was not necessary to require a scheme to be propounded, on the authority of *Walsh* v. *Gladstone*, 1 Ph. 290.—*McAuliffe, In Goods of*, P.D. & AD.D., 304.

7. *Administration—Small estate—Creditor's application—Citation of next of kin dispensed with—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—On the application of a creditor for administration of a small estate, the court made the grant, under section 73 of the Court of Probate Act, 1857, on notice of motion to the next of kin, without requiring them to be cited.—*Teece, In Goods of*, P.D. & AD.D., 400.

8. *Administration— Will—Foreign and English independent wills—Probate of English will only.*—If a testator makes two independent wills, one disposing of property in England, and the other of property abroad, the former alone is entitled to probate in England.

A testator, a domiciled Englishman, made a will relating exclusively to his property in America, in which he directed the executors thereof to realize his property there, and remit the proceeds to his London bankers, to be placed to the account and credit of the executors of any will he might make dealing with his English property, or of his administrators if appointed in England. Subsequently he made a will in England with totally different executors to those of the American will, and by it he directed the executors of that (the English will) to stand possessed of the moneys remitted from America in the manner before mentioned on the same trusts as those declared by the will of the residue of his English property, with power to direct the American executors when they should realize.

The court held that these were independent wills, and refused to admit the American will to probate.—*Murray, In Goods of*, P.D. & AD.D., 414.

9. *Administration with will annexed—Sole executrix and residuary legatee a lunatic not so found by inquisition—Citation of other next of kin—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Limited grant to nominee of guardians.*—The sole executrix and residuary legatee of a testatrix, who was also one of her next of kin, did not prove the will, and, some time after the death of the testatrix, became and remained chargeable to the rates as a pauper lunatic not so found by inquisition.

The court required that the other next of kin should be cited, and, upon this being done, and no appearance being entered on their behalf, made, under section 73, a grant of letters of administration with the will annexed in favour of the nominee of the guardians of the union, for the use and benefit of the lunatic executrix, limited to the duration of her lunacy.—*Hockin, In Goods of*, P.D. & AD.D.

10. *Administration with will annexed—Will in execution of power of appointment—Foreign domicile of testatrix.*—A testatrix having at time of her death a French domicile, executed in pursuance of a power of appointment a will in English form, but invalid according to French law.

Administration with the will annexed was granted in England, the court considering itself bound by *In Goods of Alexander*, 29 L. J. P. & M. 93.—*Huber, In Goods of*, P.D. & AD.D.

11. *Amendment of grant—Error in name of executor.*—A grant of probate was made to an executor in the name F. M., he being so described in the will, but his real name was F. J. M. The Bank of England refused to register the will or transfer stock belonging to the estate owing to this discrepancy.

The court allowed the grant to be amended by making it to "F. J. M., known in the will as F. M."—*Honywood, In Goods of*, P.D. & AD.D., 256.

12. *Will—Attestation—Witnesses dead—Difficulty in proving handwriting—Secondary evidence—Presumption* Omnia rite esse acta—*Position of signatures—Lord St. Leonards' Act* (15 *Vict. c.* 24), *s.* 1.—The testator executed a holograph will in 1874 and died in 1886. There was no attestation clause to the will, and one of the witnesses predeceased the testator; the other died in 1887. The signature of one attesting witness appeared above that of the testator himself. The handwriting of the testator and of one witness to the will was proved by oral evidence and by comparison of samples of handwriting; but the only sample of writing of the other witness, apart from his signature on the will, was a signature in the register of his own marriage in the year 1822. Evidence was given to show that every possible effort had been made to prove the handwriting of this witness, and evidence was also given to show that the person who purported to have signed the will as a witness was the same who was married in 1822, and who purported to have signed the marriage register in that year. Evidence was also given to show that the two witnesses and the testator had lived together in the same institution at the date of the will, and that the testator had stated that the document in question was his will, and that the two persons, whose names appeared upon it, had witnessed it.

Held, that the will was entitled to probate, as there was sufficient to support the presumption of law *Omnia rite esse acta*, and the position of the signatures was covered by Lord St. Leonards' Act.—*Byles* v. *Cox*, P.D. & AD.D.

13. *Practice—Evidence—Presumption of death—Filing letter of Life Insurance Co.*—Where the only proof of death of the testator was by presumption from his disappearance, coupled with the fact that notice of the motion for probate of testator's will had been given to the insurance company in which testator had insured his life, and that a letter had been received from the company stating they did not intend to interfere in the proceedings:

Held, that probate could be granted subject to the letter being filed.—*Saul, In Goods of*, P.D. & AD.D.

14. *Practice—Evidence—Presumption of death—Necessity for advertisements.*—On an application for leave to swear an affidavit of the death of a person who had disappeared, the court, though the estate was small, and the person had not been heard of for twenty-five years, ordered that advertisements requesting information concerning him should be published in newspapers.—*Robertson, In Goods of*, P.D. & AD.D.

15. *Practice—Necessity for lodging documents in registry.*—The court refused to hear a motion for the revocation of a grant of probate, and a declaration of the validity of a draft will, where the probate and draft had not been lodged in the registry. *Riley, In Goods of*, P.D. & AD.D.

16. *Will—Attestation—Words following signature—Incorporation by reference.*—Testator by his will devised and gave all his property to "my trustees and executors hereinafter named, upon trust."

The will was signed and attested, but below the signature and attestation clause was written these words: "I find on reading the above previous to the execution thereof that I omitted to name my trustees and executors. I hereby appoint my son and my friend X. my executors and trustees."

It was proved that these words were written by testator before the execution of the will:

Held, that the added words could not be included in the probate.—*White, In Goods of*, P.D. & AD.D. (Ir.).

17. *Will—British subject domiciled in Kentucky—Property in England—Decree of foreign court—Administration, with last will annexed, revoked—Probate of earlier will.*—A British subject, domiciled in Kentucky, died leaving several wills, the last of which was proved in one of the inferior courts of that State, and thereupon administration, with the will annexed, was granted to the attorney in England of the widow, who was the sole executrix. Subsequently, the superior courts of Kentucky upset the will, and the widow commenced a suit for revocation of the said letters of administration, and for probate of an earlier will. Upon affirmative proof of the testamentary capacity of the deceased:

The Court revoked the letters of administration, and granted probate of the earlier will, now propounded by the plaintiff.—*Newcomb* v. *Newcomb*, P.D. & AD.D.

18. *Will — Executor — Chain of executorship — Executor of executor—Disappearance of executor to whom power to prove reserved—Citation by advertisement.*—Probate of a will was granted to one of two executors, power being reserved to make the like grant to the other executor. The acting executor died, not having fully administered; at the date of his death the other executor had not been heard of for fourteen years. The daughter and sole next of kin of the testator, with the assent of the executors of the acting executor, moved for a grant to herself of letters of administration *de bonis non*.

Held, that the grant could not be made, as, upon the non-appearance to a citation of the executor to whom power to prove had been reserved, the chain of executorship would be continued in the executors of the acting executor without any fresh grant from the court. Leave given to effect service of the citation on the absent executor by advertisement.

In the Goods of Noddings (2 Sw. & Tr. 15, as amended by the corrigenda in that volume) followed.—*Reid, In Goods of*, P.D. & AD.D.

19. *Will—Foreign will—Some assets in England—German law—Executor according to the tenor—Probate of copy.*—The will of a domiciled German was proved by his widow in Germany and deposited with a committee of the parish council, and by the law of Germany could not be removed from their custody. By the will the widow had the same duties and rights as an executor here.

Held, that probate might be granted of a notarial copy of the original will properly proved to the widow, as executrix according to the tenor, limited to such time as might elapse before the original will should be brought in.—*Linden* (*Baron Von*), *In Goods of*, P.D. & AD.D., 448.

20. *Will — Lunatic's will — Executors — Costs.*—Executors propounding the will of a lunatic which showed signs of insanity on the face of it, were held liable for costs, although they had evidence showing they were unaware of the condition of the deceased.—*Rogers* v. *Le Cocq*, P.D. & AD.D.

21. *Will—Married woman—Lapsed bequest—Administration to husband refused.*—Where a married woman made a duly executed will and appointed an executor:—

Held that although by reason of a lapse no property passed by the will, yet that the executor named should prove; and consequently that an application by the husband for a grant of administration should be refused.—*Dodsworth, In Goods of*, P.D. & AD.D.

See also ADMINISTRATION, 6; MARRIED WOMAN, 7.

PROMISSORY NOTE.—See BILL OF EXCHANGE, 4, 5; INLAND REVENUE, 27, 28.

PUBLIC HEALTH. — See JUSTICES, 6; LOCAL GOVERNMENT, 2, 8, 10, 13-20; METROPOLIS MANAGEMENT, 4A, 6; NUISANCE, 2.

QUEENSLAND, LAW of:—

Charity—Religious and Charitable Institutions Act, 1861, *s.* 3—*Incorporated body.*—Where a bequest was made to the "Presbyterian Church at Spring Hill, Brisbane, called St. Paul's, and its congregation," and it appeared that the congregation had voluntarily joined the Presbyterian Church of Queensland, which body had been incorporated under the Religious and Charitable Institutions Act, 1861:

Held, that the congregation, having regard to the terms of incorporation, had become constituent members of the Church, so that the bequest in their favour was a bequest to the incorporated body, and was invalid by reason of its not having been registered or attested in the mode prescribed by the Act.—*McSwaine* v. *Lascelles*, P.C.

QUO WARRANTO.—See CORPORATION, 2.

RAILWAY:—

1. *Arbitration—Umpire's fees paid by landowner—Action to recover—Taxation—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 34, 35.—A landowner who himself takes up the award of the umpire in an arbitration and pays the umpire's fees cannot recover them from the railway company, though such fees may be costs which, under the statute, are payable by the promoters of the undertaking.

Where such fees have been paid by the landowner and the amount has been disallowed on taxation by the taxing-master, the decision of the taxing-master cannot be reviewed in an action against the railway company.—*Shrewsbury* (*Earl*) v. *Wirrall Railways Committee*, C.A., 19.

2. *Customer—Special Act—Competing railways—Excessive rates.*—By a special Act, promoted by one railway company and opposed by another, running powers were given to the promoters over the line of their opponents, but these were to remain in abeyance so long as they should afford all reasonable facilities for goods and mineral traffic . . . . "at rates per mile not greater than the lowest rate" charged by the opponents for like traffic to or from three distinct places.

Held (Lord Halsbury, L.C., Lords Watson, Ashbourne, Macnaghten; Lord Morris dissenting), that the Act was for the advantage of the public; that the railway company were under a legal obligation to the appellants as customers who could insist on its provisions; and that the appellants, therefore, were entitled to ascertain the mileage rate to each of the three different places, and to

take the lowest of the three as the basis of the rate to be charged.

By Lord Watson.—The provisions of a Railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature. And when provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties, who are sufficiently designated, I am of opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation *inter alios* in which they may have an interest, but have no title to enforce.

Decision of the Court of Appeal, 42 W. R. 215, [1894] 1 Q. B. 43, reversed.—*Davis* v. *Taff Vale Railway Co.*, H.L., 172.

3. *Footway—Highway—Railway carried across public footpath—Duty to build bridge—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 46.—Where a railway crosses a public footway there is no obligation imposed upon the railway company by section 46 of the Railways Clauses Consolidation Act, 1845, to build a bridge so as to carry the railway over the footway, or the footway over the railway. Such an obligation, if any, can only be imposed by the company's special Act.—*Reg.* v. *Bexley Heath Railway Co.*, C.A., 501.

4. *Leaseholds—Compulsory purchase—Payment out of purchase money—Charges and expenses incident thereto—Letters of Administration—Lands Clauses Act*, 1845 (8 *Vict. c.* 18) *s.* 80.—A railway company purchased under their compulsory powers leaseholds which were bequeathed by the will of A. in trust for B. for life, remainder to C. absolutely, and the purchase money was paid into court. C. having died intestate, and an order having been made for payment out of the money,

Held, that the costs of taking out administration to C. must be borne by the company.

Ex parte Kelly, 31 L. R. Ir. 137; 41 W. R. Dig. 113, followed.

Held, also, that the company were not liable to pay the costs of taking out administration *de bonis non* to the estate of A.—*Lloyd and North London Railway Co., Re*, CH.D. STIRLING, J., 522.

5. *Negligence—Level crossing—Contributory negligence—Onus of proof with regard to contributory negligence.*—A railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A watchman who was employed by the railway company to take charge of the gates and crossing during the day was withdrawn at night.

The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head light, but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line.

An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff.

Held (12 App. Cas. 41), affirming the decision of the Court of Appeal, that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident: that there was therefore no case to go to the jury, and that the railway company were not liable.

Observations as to the onus of proof with regard to contributory negligence.—*Wakelin* v. *London and South-Western Railway Co.*, C.A.

6. *Passenger's luggage—Negligence—Ticket taken by servant—Luggage belonging to master—Right of master to sue.*—The plaintiff's servant took a ticket as a passenger by the defendants' railway, and handed his portmanteau as his personal luggage to one of the defendants' servants, who, in carrying it to the train, negligently dropped it on to the line, and it was run over by a train, and the portmanteau and its contents were destroyed. The portmanteau contained a suit of livery, which was the property of the plaintiff, and which the plaintiff had provided for the servant to wear while in her service. In an action by the plaintiff to recover damages for the loss of the livery,

Held, that, though there was no contract between the plaintiff and the defendants, the defendants were liable to the plaintiff for the misfeasance of their servants, which caused the loss.—*Meux* v. *Great Eastern Railway Co.*, C.A.

7. *Severed land—Communication by level crossing—Severance of ownership—Easement—Abandonment—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 68.—A railway company in 1855 constructed their line through the lands of R., and made a level crossing between the severed parts. In 1885 R. sold the land on the one side to P., and reserved no right to cross the line himself, and gave P. no right to cross. In 1888 R. sold the land on the other side of the line to T., the predecessor in title of G. The railway company removed the gates and erected fences on their own land where the gates had been. G. claimed the right to use the level crossing, and removed the fences.

Held, that the conveyance of 1885 was a final abandonment by R. of his right to use the level crossing. The obligation on the railway company by virtue of section 68 of the Railways Clauses Act, 1845, to maintain the accommodation work at all times, ceased when the ownership of the adjoining lands was severed, and was a duty which the company owed to the private individual as owner, and not a public duty.—*Midland Railway Co.* v. *Gribble*, C.A., 133.

8. *Statutory Powers—Expiration of period for completion of works—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 16.—Section 16 of the Railways Clauses Consolidation Act, 1845, empowers a railway company, subject to the provisions of the special Act, to execute various works and "from time to time" to alter, repair, or discontinue the before-mentioned works and substitute others in their stead.

Held, that the powers of this last clause were not subject to a restriction in the special Act as to the time for the completion of the railway.—*Emsley* v. *North Eastern Railway Co.*, C.A.

9. *Traffic—Carriage of merchandise—Disintegrating rate—Total charge below maximum for conveyance alone—Duty of company to disintegrate—Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 33, *sub-section* 3.—The provisions of section 33, sub-section 3, of the Railway and Canal Traffic Act, 1888, which require a railway company to render an account dividing the charge claimed for the carriage of merchandise, and distinguishing the charge for conveyance from the terminal charges (if any), are not confined to cases where the total charge claimed exceeds the amount which

is authorized for conveyance alone, but apply equally where the total charge is under the maximum for conveyance alone; but where the whole charge claimed is below the maximum for conveyance, it is a sufficient compliance with the terms of the sub-section if the company state in a formal document, and take the responsibility of such statement, that the whole charge is for conveyance alone, and that no part of it is for terminal or other services.

Form of order in such cases set out.—*New Union Mill Co.* v. *Great Western Railway Co.*, Q.B.D.

10. *Traffic—Increase of rates—Standard of reasonableness—Railway and Canal Traffic Act*, 1894 (57 & 58 *Vict. c.* 54), *s.* 1, *sub-section* 1.—By the Railway and Canal Traffic Act, 1894, s. 1, sub-section 1, "Where a railway company have, . . . since the last day of December, 1892, directly or indirectly increased . . . any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any Provisional Order confirmed by Act of Parliament."

In a case where rates for the carriage of coal had been indirectly increased on the 1st of January, 1893,

Held, by Collins, J., that the effect of the Act was not necessarily in all cases to declare the increased rates void, but that all future increases of rates must be tried by the standard of reasonableness, depending on circumstances existing or apprehended before the increase was made, and therefore, in the case then before the court, before the Act came into operation.—*Derbyshire Silkstone Coal Co.* v. *Midland Railway Co.*, *Rickett & Co.* v. *Same*, *Grassmoor Co.* v. *Same*, Q.B.D.

11. *Traffic—Increase of rates by several railway companies—Joinder of all—Practice—Railway and Canal Traffic Act*, 1894 (c. 54), *s.* 1.—Where a complaint is made under section 1 of the Railway Traffic Act, 1894, that an increased rate made by a railway company jointly with other railway companies is unreasonable, all such railway companies shall be made respondents.—*Mapperley Colliery Co.* v. *Midland Railway Co.*, Q.B.D.

12. *Traffic—Railway Commissioners—Jurisdiction Cartage charges—Increase of rate—Complaint of unreasonableness—Railway Rates Confirmation Acts*, 1891, 1892—*Railway and Canal Traffic Act*, 1894 57 & 58 *Vict. c.* 54). *s.* 1, *sub-section* 1.—Where a railway company have, since the last day of December, 1892, increased a rate or charge for cartage, and complaint is made that the rate or charge is unreasonably, exclusive jurisdiction is not vested in an arbitrator appointed by the Board of Trade under the Railway Rates Confirmation Acts, 1891, 1892, but the Railway Commissioners have jurisdiction to hear and determine the complaint.—*Mansion House Association of Railway Traffic* v. *London and North-Western Railway Co.*, Q.B.D.

See also LANDS CLAUSES ACTS, 1,2; MASTER AND SERVANT, 4; NEGLIGENCE, 5; POST OFFICE, 2.

RES JUDICATA.—See PATENT, 2, 4.

RESTRAINT OF TRADE:—

Covenant—Validity—Reasonableness—Partial enforcement.—The defendant, on entering the service of the plaintiff, a milkman, agreed that he would not during the continuance of such service, or at any time thereafter, serve, solicit, or interfere with, for his own benefit or for the benefit of any person other than the plaintiff, "any of the customers which shall at any time be served by or then belonging to the employer" in his business; the plaintiff's business was then carried on exclusively in the locality of St. George's-in-the-East.

Held, that the agreement referred only to the business as then carried on by the plaintiff in that locality, and would not apply to a new business started by the plaintiff in any other locality, and that the restraint was reasonable as to space; that the covenant was severable, and an injunction could be granted restraining the defendant from serving persons who were customers of the plaintiff during the time when the defendant was in plaintiff's service.—*Dubowski* v. *Goldstein*, C.A., 436.

RETAINER.—See EXECUTOR, 4, 5.

RIVER:—

1. *Foreshore—Thames—Right to dredge and raise sand—Thames Conservancy Act*, 1894 (*c.* 187), *s.* 87.—Grantees from the Crown of the foreshore of the tidal portion of the Thames are entitled to dredge and raise sand and gravel on their own property without obtaining a licence from the Thames Conservators.

The expression "bed and soil" in section 87 of the Thames Conservancy Act, 1894, does not include foreshore.—*Pearce* v. *Bunting*; *Reg.* v. *Wedd*, Q.B.D.

2. *Riparian owner—River bed—Accretion.*—The owner of a several fishery in a public navigable river is, in the absence of evidence to the contrary, presumed to be the owner of the bed of the river. The mutual rights of the owner of the bed of a river by virtue of a several fishery, and the riparian proprietors are not affected by accretions to the bed or by the lowering of the water, so long as the accretions or the soil from which the river has receded still remain part of the river bed.

Decision of Romer, J., *ante* p. 184, reversed.—*Hindson* v. *Ashby*, C.A.

See also PRACTICE, 20.

SALE OF GOODS:—

1. *Agreement for hire and purchase—Mercantile agent—Goods passed to mortgagees as part of the appurtenances of ship—Possession of goods with consent of owner—Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *ss.* 2, 9—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 5, 9, 35.—Under a hire and purchase agreement A. supplied a trawl warp to B., the master of a fishing smack which was at that time mortgaged, together with its equipments. By the terms of the agreement, the hirer B. was to pay £4 a month until the full sum of £15 5s. was made up, when the warp should become the property of B., but until then it should remain the absolute property of A.; the agreement contained stipulations enabling A. to put an end to the agreement and retake possession of the warp in certain events; but no stipulation enabling B. to terminate the agreement by delivering up the warp to A. Subsequently, before all the instalments on the warp were paid, the mortgagees took possession of the smack, and claimed the warp as forming part of the appurtenances of the ship, which passed to them under the terms of their mortgage.

Held, that the mortgagees' claim was valid, as B. had "agreed to buy" the warp within the meaning of section 9 of the Factors Act, 1889, and the addition of the warp to the equipment of the mortgaged ship was a sufficient delivery or transfer to the

mortgagees by a mercantile agent under a "disposition," within the meaning of the provisions of that section.

Lee v. *Butler*, 42 W. R. 88, [1893] 2 Q. B. 318, followed.

Helby v. *Matthews*, 43 W. R. 561, [1895] A. C. 471, discussed.—*Hull Rope Co.* v. *Adams*, Q.B.D., 108.

2. *Hire and purchase agreement—Agreement to buy—Disposition by hirer—Factors Act*, 1889 (52 & 53 *Vict.* c. 45), *s.* 9.—W. had obtained possession of goods from the plaintiffs under an agreement by which W. agreed to hire the goods, value £23, "and to pay the sum of 12s. 6d. per month for the hire thereof, commencing with the date of this agreement, and payable in advance on the seventh day of each succeeding month until the full sum of £23 be paid, at which time, and on the completion of such payments, the said company agree to give up all claim to the said goods." There was a stipulation that, upon default in payment, W. would give up possession of, and that the plaintiffs might seize the goods; and there was also a declaration that the goods should remain the property of the plaintiffs until the sum of £23 was paid, and that they were only lent on hire.

Held, that W. was in possession of the goods under an agreement to buy within the meaning of section 9 of the Factors Act, 1889, and that a transfer by way of pledge by him to the defendant, who received the goods in good faith and without notice of the claim of the plaintiffs, was valid.—*Thompson* v. *Veale*, C.A.

3. *Hire and purchase agreement—Possession of goods by hirer—Fraudulent sale by hirer before property has passed—Conviction of hirer for larceny as a bailee—Revesting of title in owner by such conviction—Sale of Goods Act*, 1893 (56 & 57 *Vict.* c. 71), *s.* 24.—Decision of Queen's Bench Division in *Payne* v. *Wilson* (43 W. R. 250) reversed on appeal, in consequence of the decision of the House of Lords in *Helby* v. *Matthews*, 43 W. R. 561.—*Payne* v. *Wilson*, C.A.

4. *Warranty—Implied condition of fitness—Sale of Goods Act*, 1893 (*c.* 71), *s.* 14.—By the Sale of Goods Act, 1893, s. 14, where goods are supplied under a contract of sale, and "the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose; provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose."

Coals were supplied under a written contract of sale containing no mention of the particular purpose for which they were required, though prior to the making of such contract the buyers made known that purpose to the sellers, who were coal agents, and relied on their skill and judgment. In an action for damages for breach of warrant by the sellers:

Held, that evidence of what took place between the parties prior to the making of the contract was admissible to raise the implication of the condition specified in section 14, and therefore by virtue of that section a warranty or condition by the sellers that the coals were reasonably fit for the purpose for which they were required must be implied:

Held, also, that a contract for the sale of coals under a particular description known in the coal trade was not "a contract for the sale of a specified article under its patent or other trade name" within the meaning of the proviso to section 14.—*Gillespie & Co.* v. *Cheney & Co.*, Q.B.D.

See also DAMAGES, 2.

SCHOLARSHIP:—

Education—Award—Passing best examination—Number of marks—Discretion of examiner.—When a scholarship under a trust is to be awarded to such candidate as shall have passed the best examination in subjects to be determined by an examiner, such scholarship may be refused to the candidate who has obtained the highest number of marks if, in the opinion of the examiner, he has not passed a satisfactory examination.—*Rooke* v. *Dawson*, CH.D. ROMER, J., 77.

SCHOOL:—

Vendor and Purchaser—Purchase of land by agreement—Person injuriously affected—Elementary Education Act, 1870 (33 & 34 *Vict.* c. 75), *ss.* 19, 20—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 18), *s.* 68.—When a school board acquires land, whether by agreement or compulsion, for the purposes of the Elementary Education Act, 1870, and purchase with notice of a restrictive covenant to which the land was subject in the hands of the vendor, the covenantee cannot maintain an action against the school board for breach of covenant; his only remedy is compensation under section 68 of the Lands Clauses Consolidation Act, 1845.—*Kirby* v. *Harrogate School Board*, C.A.

See also CHARITY, 2; INLAND REVENUE, 15, 16; JUSTICES, 4; LOCAL GOVERNMENT, 18.

SCOTLAND, LAW of:—

1. *Portion—Satisfaction—Double portions.*—The English rule against double portions to children does not obtain in Scotland. In an ante-nuptial marriage settlement made on the marriage of his adopted daughter the testator covenanted to pay £4,000 with interest at the rate of 4 per cent. from his death, to be held on trusts declared by reference to the trusts of the adopted daughter's property; with the exception that on the failure of children of the marriage, the £4,000 should be held on trust for the testator absolutely. By the marriage contract the adopted daughter assigned to her trustee all after-acquired property. Subsequently the testator, by his trust disposition and settlement, or will, among other "legacies and annuities" directed his trustees to pay "a legacy of £4,000" to his said adopted daughter "who shall be allowed interest at 5 per cent. on that sum so long as she shall prefer to allow it to remain as part of the share in the indigo concern."

Held, affirming the Court of Session, Scotland (22 Ct. Sess. Cas. 4th Series (Rettie), 396), that by Scottish law, coupled with the words of gift used, the £4,000 given by the will was not intended by the testator to be in satisfaction of the £4,000 covenanted to be paid in the marriage settlement, but a legacy in addition thereto.—*Johnstone* v. *Haviland*, H.L.

2. *Superior and vassal—Obligation in feu charter to rebuild—Disposition of feu after obligation has become enforceable—Conveyancing (Scotland) Act*, 1874 (37 & 38 *Vict.* c. 94), *s.* 4, *sub-section* 2.—A proprietor by feu-contract disponed certain subjects to a company "and its successors and assignees whomsoever," under the condition, *inter alia*, "That the company and its foresaids" should be bound to erect buildings suitable for a hydropathic estab-

lishment of not less value than £15,000, and to uphold buildings of that value in all time coming, and to keep the same insured against fire to the extent of not less than that sum, and in case the said buildings should be destroyed by fire to rebuild the same so as to maintain the total value of £15,000. Buildings were erected of the stipulated value, and insured. The company sold the subjects to the first-named appellants. On November 7th, 1893, the buildings were destroyed by fire, and on the 27th of the same month the superior, the respondent, raised an action against the first appellants for performance of the obligation to rebuild. Before defences were lodged the first appellants, by a duly recorded disposition, conveyed the subjects to the second appellants, who subsequently conveyed them to one John Wilson. All these were thereafter made parties to the action.

The first appellants then pleaded that, as they were no longer vassals in the feu, they were not liable in the performance of the obligation.

The First Division of the Court of Session decided that the obligation, having become prestable during the first appellant's tenure, continued to be binding upon them; and (2) that all the defenders were jointly and severally liable to rebuild in respect that the obligation was a condition of the grant remaining unfulfilled during the respective periods of their tenure of the subjects (22 Rettie, 954).

Upon appeal to the House of Lords the appellants, after argument, consented that the appeal should be dismissed.—*Callander Hydropathic Co.* v. *Marshall*, H.L.

SETTLED LAND:—

1. *Act of Parliament—Settlement—Tenant for life—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98), *s.* 1—*Will—Next of kin—Executor of deceased next of kin—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-sections* 1, 5; *s.* 58, *sub-section* (1) V.—The survivor of two next of kin and the executors of the deceased next of kin were, under the joint operation of a will and the Thellusson Act, entitled during the life of another to receive the rents of the property subject to the trusts of the will in equal moieties.

Held, that, inasmuch as the definition of a settlement in section 2, sub-section (1), of the Settled Land Act, 1882, included a will and an Act of Parliament, the will and the Thellusson Act together created a settlement within the meaning of the Act.

Held, also, that the survivor of the next of kin and the executors of the deceased next of kin together either constituted the tenant for life for purposes of the Act, by virtue of section 2, sub-section (5), of the Act, or had the powers of a tenant for life under the Act by virtue of section 58, sub-section (1) V., of the Act.—*Vine* v. *Raleigh*, CH.D. CHITTY, J., 169.

2. *Improvements—Costs of where no prior scheme—Payment by tenant for life—Application for repayment out of capital moneys*—45 & 46 *Vict. c.* 38, *s.* 26—53 & 54 *Vict. c.* 69, *s.* 15.—A tenant for life having actually paid the cost of improvements in respect whereof no scheme under section 26 of the Settled Land Act, 1882, had ever been submitted, applied to the court under section 15 of the Settled Land Act, 1890, to be recouped out of capital moneys in the hands of the trustees.

Held, that the court has jurisdiction to allow such recouping; but that, the works having been executed and paid for, the application must be considered with greater strictness than if the work was still to be done.—*Tucker's Settled Estate, Re*, C.A.

3. *Married woman—Person having the powers of a tenant for life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (1), 58 (1) (*ix.*).—Under a will land was limited to the use of trustees during the life of a married woman upon trust to pay the income to her for her separate use without power of anticipation, with remainder to such uses as she should by will appoint, and in default of such appointment to the use of herself in fee.

Held, that by virtue of section 58 (1) (*ix.*) of the Settled Land Act, 1882, the married woman was entitled to exercise the power of sale conferred by that Act upon tenants for life.—*Pocock's Contract, Re*, CH.D. STIRLING, J., 247.

4. *Settlement—Capital money—Investment—Tenant for life, Direction by—Trustees—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22 (2), 53.—The tenant for life under a settlement has power conferred on him by the Settled Land Act, 1882, of directing the mode of investment of capital money arising under the Act, and selecting the particular investment, subject only to the limitations expressed in the Act itself, and cannot be controlled by the trustees or the court in the exercise of this statutory power so long as he really and honestly exercises his discretion.—*Coleridge's (Lord) Settlement, Re*, CH.D. CHITTY, J., 59.

5. *Settlement—Limited power to purchase land—Money "liable to be laid out in the purchase of land"—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 33.—Under the trusts of a settlement by which the moiety of certain freehold lands and also certain personalty were settled, the trustees were authorized, at the request of the tenant for life, to invest the personalty in the purchase of the unsettled moiety of the freehold lands.

Held, that money in the hands of the trustees forming part of the personalty might be applied by the trustees under section 33 of the Settled Land Act, 1882, as capital moneys in the purchase, jointly with the owner of the other moiety, of adjoining convenient freeholds.—*Hill Re, Hill* v. *Pilcher*, CH.D. KEKEWICH, J., 573.

See also LUNACY, 6, 8; MARRIED WOMAN, 8; TRUSTEE, 16; VENDOR AND PURCHASER, 11.

SETTLEMENT:—

1. *Mortgage by trustees for a term—Repayment by arrangement in eighteen months with additional sum representing interest for a further year—Tenant for life and remainderman.*—A fund settled by will on a person for life, with remainder to others in fee, was invested by the trustees on mortgage with a covenant that it should remain on the security for ten years. Afterwards an agreement was made under which it was repaid with interest in about eighteen months from the date of the agreement, with an additional sum representing in amount interest for a further year at the old rate.

Held, that the additional sum was capital, not income, and belonged wholly to those entitled in remainder to the fund.—*Searancke Re, Simonds* v. *Huntington*, CH.D. NORTH, J.

2. *Voluntary assignment—Death of beneficiary—"Failure of gift"—Residuary trust—Resulting trust*—T., who was contingently entitled to a prospective share in certain property, voluntarily assigned it, in 1880, to trustees upon trust (among other trusts) to pay a sum of £500 to one K., and as to the residue upon other trusts. T. became entitled to her share in the property in 1894, and, by a letter, in 1895, directed that a portion of it should be

transferred to the trustees of the voluntary assignment of 1880. K. died in 1888, intestate, and the question now arose as to his £500, which was claimed (1) by his personal representative, (2) by those entitled to residue, and (3) by the settlor as upon a resulting trust.

Held, (1) that, following *Re Corbishley's Trusts* (18 Ch. D. 846), a person dead at the date of the execution of a deed could take no benefit under it, and the confirmation of the deed by the letter in 1895 only set up such trusts as were then subsisting, and had no retrospective effect; (2) that, following *Page* v. *Leapingwell* (18 Ves. 463), the failure of the gift to K. did not make it fall into residue, and that the donees of the residue could only take an aliquot portion; and (3) that the £500 belonged to T., the settlor, by way of resulting trust.—*Tilt Re, Lampet* v. *Kennedy*, CH.D. CHITTY, J.

See also INLAND REVENUE, 2, 4, 5; LUNACY, 3; MARRIED WOMAN, 10; MORTGAGE, 11; SETTLED LAND, 4, 5; TRUSTEE, 18.

SHERIFF:—

1. *Execution — Writ of* fi. fa.—*Breaking open outer door—Shop.*—It is lawful for a sheriff in executing a writ of *fi. fa.* to break open the outer door of a shop which is not connected with a dwelling-house.—*Hodder* v. *Williams*, C.A., 98.

2. *Practice—Seizure under* fi. fa.—*Claim—Claim admitted by execution creditor—Interpleader summons—Application by sheriff for protection—R. S. C., ord.* 57, *rr.* 1, 15, 16, 17.—The sheriff, having seized goods under a *fi. fa.* which were claimed by a third person, gave notice of the claim to the execution creditor, who five days afterwards gave him notice to admit the claim and to withdraw from possession. The sheriff did not withdraw, but took out an interpleader summons, upon the hearing of which the judge made no order, and refused to order that no action should be brought against the sheriff.

Held (dismissing the appeal), that the judge had properly refused to make an order protecting the sheriff from any action.—*Sodeau* v. *Shorey*, C.A.

See also BANKRUPTCY, 17.

SHIP:—

1. *Bill of lading—Cargo of frozen meat—Refrigerating machinery—Implied warranty of fitness at time of shipment.*—In a bill of lading stated to be for the carriage of a cargo of frozen meat there is an implied warranty that the ship is, at the time of shipment, fit to carry such a cargo. Exceptions in the bill of lading freeing the shipowner from liability for damage from a failure of machinery do not apply to the condition of the machinery at the commencement of the voyage, but only to contingencies which may occur during the progress of the voyage.—*Maori King* (*Owners of*) v. *Hughes*, C.A., 2.

2. *Bill of lading—Carriage of goods—Short delivery—Burden of proof.*—A shipowner is bound to deliver the full amount of goods signed for by the master in a bill of lading, unless he can prove that the whole or some part of it was in fact not shipped.

In an action for freight for the conveyance of 1,000 bales of jute against the appellants, onerous indorsees of the bills of lading, the appellants claimed to retain the value of twelve bales short delivered of the 1,000 shown by the bills of lading signed by the master to have been shipped at the port of loading. There was no clear evidence as to how or where the missing bales had disappeared.

Held (reversing the Court of Session), that there was nothing to displace the evidence supplied by the bills of lading that the missing bales had been received on board the vessel, and that the appellants were entitled to the deduction claimed by them.—*Smith* v. *Bedouin Navigation Co.*, H.L.

3. *Bill of lading—Damage to cargo—Bill of lading incorporating the Harter Act* (*Act of Congress, February* 13, 1893)*—Negligence in "management" of the vessel in port of discharge.*—Goods were shipped under a bill of lading incorporating the Act of Congress known as "the Harter Act," by which the owner of the vessel is not to be "held responsible for damage or loss resulting from faults or errors in navigation or in the management of" the vessel.

After the arrival of the vessel at her port of destination, and during the discharge of the cargo, it became necessary to stiffen the ship. For this purpose the engineer ran water into a ballast tank, but negligently omitted first to ascertain the condition of the sounding-pipe and casing, which had, owing to heavy weather during the voyage, become broken. The owner of the goods damaged by the water getting to the cargo sought to render the shipowner liable.

Held, that the shipowner was exempt from liability, as the damage resulted from a fault in the "management" of the vessel, and the operation of the exception as to "management" was not limited to the period during which the vessel was at sea, but extended to the period during which the cargo was being discharged. — *Glenochil, The*, P.D & AD.D.

4. *Bill of lading—Liability of owner—Exception—Condition—Due diligence to make ship seaworthy—Want of diligence on part of servant.*—A bill of lading contained a clause exempting the shipowner from liability for loss resulting from faults in navigation, provided due diligence was exercised by him to make the ship seaworthy. The ship's carpenter, who was admitted to be a competent workman, omitted to close one of the portholes before the ship started, in consequence of which the ship was rendered unseaworthy.

Held, that the shipowner had not satisfied the proviso on which his exemption from liability depended.—*Dobell* v. *Rossmore Steamship Co.*, C.A., 37.

5. *Charter-party—Bill of lading—Charter-party making the master the agent of the charterers for certain purposes—Liability of owner of chartered ship on bills of lading signed by master—Constructive notice.*—A charter-party expressly stipulated that the captain and crew, although paid by the owners of the ship, should be "the agents and servants of the charterers for all purposes," and that in signing bills of lading the captain should "only do so as agent for the charterers," who thereby agreed to indemnify the owners from all consequences or liabilities that might arise from the captain signing bills of lading. Goods were shipped under a bill of lading which made no specific mention of this stipulation, but provided for delivery at the port of discharge, under certain conditions, "and all other conditions as per charter."

Held (1), that such a stipulation, though valid as between the charterers and the owners, did not protect the owners from a claim by the holders for value of the bill of lading, founded on the negligence of the master in delivering the goods to the wrong persons; and (2) that the words "all other conditions as per charter" did not incorporate into the bill of lading the above-mentioned stipulation

in the charter-party so as to make it binding by way of constructive notice upon a holder for value of the bill of lading who had no actual notice of such stipulation.

Observations on the undesirability of extending the equitable doctrines of constructive notice to commercial transactions. — *Manchester Trust* v. *Furness*, C.A., 178.

6. *Charter-party—Cargo—Liberty to call at other ports—Deviation—Damage.*—The defendant agreed to carry for the plaintiff in the defendant's ship "a cargo or estimated quantity of 470 quarters of wheat" from R. to G. The charter-party was headed "Dead weight capacity 125 tons," and contained the usual clause excepting sea perils, and a clause giving the ship liberty to call at any ports. The 470 quarters of wheat weighed 102 tons. The defendant shipped other goods besides the wheat for delivery at P. After discharging these goods at P., and while proceeding to G., the plaintiff's wheat was injured.

Held, that the plaintiff had not hired the full carrying capacity of the ship, and that the defendant was at liberty to call at other ports for the purpose of loading and discharging other cargo; that in going to P. he had not deviated from the chartered voyage, and was therefore not liable for the injury to the wheat.—*Caffin* v. *Aldridge*, C.A., 129.

7. *Charter-party—Demurrage—Colliery guarantee—Incorporation.*—By the charter-party it was agreed that the ship should receive "a full and complete cargo" to be loaded as customary at G., as per colliery guarantee, in fifteen colliery working days.

Held (Kay, L.J., dissenting), that the provisions of the colliery guarantee as to loading were incorporated into the charter-party.—*Monsen* v. *Macfarlane*, C.A.

8. *Charter-party—Demurrage—Damages in nature of—Lay days—Scottish Judicature Act*, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40.—A charter-party provided that the steamship *River Ettrick* should proceed to Bo'ness to receive a cargo of coal, demurrage to be paid at a specified rate, "lay days to count from the time the master has got the ship reported berthed." On the 17th of October the shipowner wrote to the the charterers "*River Ettrick* has left for Bo'ness," and asked them to supply cargo for the 19th. The vessel arrived in the roads of Bo'ness on that date, but in consequence of the crowded state of the dock she was not allowed to enter. On the 21st a loading berth became vacant in consequence of cargoes not being ready for vessels which had arrived before *The River Ettrick*. If the cargo had been ready for *The River Ettrick* she would have got this berth. No cargo being ready for her she was not allowed to enter the dock. A few days afterwards she got her cargo. The shipowner claimed damages for the delay caused by the alleged fault of the charterers in not having the cargo ready on the 21st, on the ground that there was an obligation on the charterers to have the cargo ready. On appeal a preliminary point was raised by the charterers that, inasmuch as this was a case originating in the Sheriff Court, the facts found in the interlocutor appealed from were final; and a fact given only in Lord Traynor's judgment could not be founded on.

Held, affirming the Court of Session, Scotland (22 Sess. Cas., 4th Series (Rettie), 796), that the claim of the shipowners was altogether unreasonable, even if the case could be gone into.—*Little* v. *Stephenson*, H.L.

9. *Charter-party—Demurrage—Discharge of cargo—Joint operation—Duty of Shipowner—Duty of consignee—Cargo of timber spars—Custom of timber trade.*—The operation of discharging the cargo of a ship is a joint operation, in which it is the duty of both the shipowner and the consignee to take part. This applies as well to a cargo of timber as to other kinds of cargo. Where a charter-party provides that the ship shall discharge a cargo of timber spars overside into lighters, the shipowner is not bound to do more than place the spars over the side of the ship in such a position that they may be within reach of the lighter; it is then the duty of the consignee to receive the spars and place them in the lighter.—*Petersen* v. *Freebody*, C.A., 5.

10. *Charter-party—Port charges—Light dues.*—In a charter-party providing for the payment of port charges, the expression port charges mean all charges which a vessel has to pay before she gets her clearance from a port, and therefore to include whatever light dues she may be required to pay at such port.—*Newman* v. *Lamport*, Q.B.D.

11. *Charter-party—"Safe port"—Ship unable to reach port without being lightened—Evidence of custom of port.*—A ship was chartered to proceed with a cargo of grain to a port of call "for orders to discharge at a safe port. . . . Discharge to be given with dispatch, according to the customs of the port of discharge, and to be all at one port. . . . Charterers to have the privilege of naming the discharging dock . . . the dock to be one into which the vessel can at once safely enter and lie afloat at all times." She was ordered to discharge at Gloucester. The basin at Gloucester is approached by a canal seventeen miles long. On arrival of the ship at Sharpness, which is at the entrance to the canal, she was found to be of too great a draught to proceed up the canal. The charterers requested the master to discharge a sufficient part of the cargo at Sharpness to allow of her navigating the canal, and to proceed to Gloucester with the remainder. The master refused to do so, and discharged the whole at Sharpness. Gloucester and Sharpness are for commercial purposes different ports. In an action by the charterers for breach of the charter-party:

Held, that the port of Gloucester, being one which the vessel could not safely reach with a full cargo, was not a safe port within the meaning of the charter-party; and that evidence of a custom of the port for vessels carrying grain to be lightened at Sharpness to allow of their proceeding up the canal to Gloucester was inadmissible, as being inconsistent with the terms of the charter-party by which the discharge was to be "at a safe port."

Neilsen v. *Wait* (16 Q. B. D. 67) distinguished.—*Reynolds* v. *Tomlinson*, Q.B.D.

12. *Cargo—Deck cargo—Horses and cattle on deck—Liability to light dues—Mode of measurement—The Merchant Shipping Act*, 1876 (39 & 40 *Vict. c.* 80), *s.* 23.—Horses and cattle carried as deck cargo on the deck of a vessel are "goods" within the meaning of section 23 of the Merchant Shipping Act, 1876, and such horses and cattle, and the cattle pens in which they were carried, are liable to be measured in, under that section, as part of the ship's tonnage in respect of which light dues are payable.

In measuring "the tonnage of the space occupied by such goods at the time at which such dues become payable," only the sheds or the parts of the sheds actually occupied by the horses or cattle at the time when the dues become payable,

that is at the time of the arrival of the vessel, are to be measured, and outside measurements of the sheds are not to be taken. The measurements are to be confined to the spaces actually occupied by the animals, making a fair and reasonable allowance for the free bodily motions of the animals, and making a proper difference in the case of pens in which smaller animals, such as sheep or pigs, are carried. — *Richmond Hill Steamship Co.* v. *Trinity House*, C.A.

13. *Collision—Bye-laws of the Port or Harbour of Newport*, 1894, *arts.* 12 *and* 13—*Regulations for Preventing Collisions at Sea*, *art.* 16.—Where there is a local rule regulating the sides on which vessels shall enter and leave a harbour such rule does not supersede the Regulations for Preventing Collisions at Sea when, according to the state of the tide, there is no defined entrance separating the harbour from the open sea.

A steamer entered the harbour of Newport to the westward of the Bell-buoy across the western flats, instead of entering to the eastward of the Bell-buoy, and collided with an outcoming steamer which had the incoming steamer on her own starboard hand.

Held, that it was the duty of the outcoming steamer under article 16 of the Regulations for Preventing Collisions at Sea, to keep out of the way of the incoming steamer, and that the incoming steamer was not to blame, as she was justified under the circumstances in proceeding on across the bows of the outcoming steamer, so as to go up on the right side of the channel as laid down in Rule 12 of the Bye-laws of the Port or Harbour of Newport, 1894.

The Harvest (11 P. Div. 90) distinguished.—*Winstanley, The*, P.D. & AD.D.

14. *Collision — Damage — Wreck — Expenses of raising—Basis of calculation—Remoteness of damage—The Mersey Docks Act*, 1874 (37 & 38 *Vict. c. xxx.*), *s.* 11.—The Mersey Docks and Harbour Board are by statute (37 & 38 Vict. c. xxx.), the conservancy authority of the port of Liverpool, and may (by section 11) raise any wreck, sell it, and out of the proceeds retain the expenses.

A lightship and a dredger, the property of the Board, were sunk by the negligence of those in charge of the defendants' vessels, and the Board, having raised the wrecks, sued the defendants for the damages sustained.

Held, that in respect of raising the wrecks, the Board were entitled to recover from the defendants such an amount as represented the cost of the apparatus necessarily used on the particular occasion and provided by the Board for such purposes; such cost comprising interest upon the capital invested in the apparatus, repairs, a depreciation fund, and the insurance of the apparatus against risk.

The Harrington, 13 P. D. 48, approved.

The Board claimed £1,500 damages for the loss of the use of the dredger during the fifteen weeks she was under repair, alleging that she might have been let at the rate of £100 a week after completing the work upon which she was engaged at time of the collision.

Held, that the damages were too remote to be recovered.—*Emerald, The*: *The Greta Holme*, C.A.

15. *Collision—Steamships—Narrowing of lights—Indications of risk—Regulations for preventing Collisions at sea, article* 18.—Where two steamships are approaching one another at sea in such a position as to pass in safety, the closing in and coming more into line of the masthead and a side light is not necessarily such an indication that the ship is altering her course so as to cause risk of collision and to impose upon the other ship the duty to obey article 18 of the regulations.—*Albis, The*, P.D. & AD.D.

16. *Collision—Tug and tow — Fog — Stopping—Regulations for Preventing Collisions at Sea*, 1884, *art.* 18.—By article 18 of the Regulations for Preventing Collisions at Sea, "Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."

A four-masted barque, in tow of a tug, in a dense fog at night in the St. George's Channel, was going at the rate of 1½ knots an hour, and did not stop, though she heard the whistle of a steamer on her port side gradually nearing and indicating danger. The steamer was proceeding at about 2½ knots an hour, and heard the whistle of the tug crossing her bows from starboard to port. She ported and reversed her engines on seeing the barque, but struck her at right angles on her port quarter, and was held to blame under article 18 for not stopping sooner.

Held, that the barque was not also to blame for not stopping, as a tug encumbered with a tow is not to be deemed a steamship for all purposes under the rules, and the speed was slow as was possible consistently with keeping the tow-rope sufficiently taut to prevent the risk of the two vessels being drawn together, and the propeller of the tug being fouled.—*Lord Bangor, The*, P.D. & AD.D.

17. *Freight—Damage to goods—Loss of merchantable character — Insurance — Profit on chartered freight—Warranted free from all average—Concealment of material fact.*—The plaintiffs, who were merchants, chartered a ship, the freight being a lump sum of £3,900, upon the terms that all freight earned by the ship should be for the plaintiffs. They insured with the defendants, who were underwriters, "profit on charter for £2,000 . . . warranted free from all average." The ship took a cargo on board, in respect of which the bills of lading freights amounted to £4,690. While the ship was proceeding to the port of discharge she was run into by another vessel and sunk. The cargo was subsequently got up, and it was found that one part, consisting of dates, was so damaged as to be unmerchantable as dates. In consequence, no freight was earned on the dates, and the bills of lading freights actually received by the plaintiffs came to less than the chartered freight.

Held, that the subject matter of the insurance was the anticipated profit on the charter; that there had been a total loss of the profit; and that the plaintiffs were entitled to recover from the defendants the difference between £3,900, the chartered freight, and £4,690, the total amount of the bills of lading freights.

At the time the insurance was effected the defendants were not told whether the chartered freight was a lump freight or a tonnage freight.

Held, that there had been no concealment of material facts by the plaintiffs, for the defendants knew that there was a charter-party in the usual form, and the plaintiffs were not bound to give information as to the freight unless the defendants asked for it.—*Asfar* v. *Blundell*, C.A., 130.

18. *General average — Prior particular average damage—Constructive total loss—Amount of general average contribution—Deduction of one-third new for old.*—A ship, after receiving a particular average damage, incurred a general average loss, and on

arrival in port was condemned as a constructive total loss, and sold.

Held, that, in order to ascertain the amount to be contributed to by ship and cargo in general average, the value of the ship must be taken just before the general average sacrifice was made; that such value was to be arrived at by deducting the estimated cost of repairing the particular average damage from the value of the ship before that damage; and that from the value so ascertained the amount realized by the sale of the ship must be deducted, the balance being the amount to be contributed to in general average.

Held also, that, in estimating the cost of repairing the particular average damage in such a case, a deduction of one-third new for old could not be made.—*Henderson* v. *Shankland*, C.A., 401.

19. *Light dues—Exemption—Order in Council of 16th May*, 1893.—The mere fact that the master of a ship lands at a port a few persons whom he had previously taken on board, who paid no passage money, but who paid a sum of money each to the master for food provided by him, does not deprive the owner of the ship of the exemption from light dues which he would be entitled to under the Order in Council of the 16th May, 1893, when the ship touches at that port merely for the purpose of obtaining bunker coals.—*Hay* v. *Trinity House Corporation*, Q.B.D., 188.

20. *Salvage—Service rendered under a contract for work and labour with third parties.*—The plaintiffs, with the knowledge and assent of her owners, undertook to lift a sunken vessel, under a contract with the insurers, who advanced to the plaintiffs before the work commenced 40 per cent. of the amount for which the vessel was insured. The vessel was successfully raised, but the operation of lifting proved more costly than was anticipated, and some of the underwriters in the meantime became insolvent. In an action of salvage brought by the plaintiffs against the defendants as owners of the vessel,

Held, that the contract with the underwriters, which was not dependent on success, precluded the plaintiffs from asserting a maritime lien on the vessel, and claiming salvage remuneration from her owners.—*Solway Prince, The*, P.D. & AD.D.

21. *Salvage—Tug—Scope of employment—Duty towards tow.*—A tug, which had been engaged to attend a vessel into harbour, accompanied her to the entrance, when, a fog coming on and before the tug had made fast, the vessel went ashore and was in a position of danger. The tug assisted to get her off.

Held, that such service was outside the scope of her engagement, and that she was entitled to salvage.

Semble, the existence of such an engagement has no practical effect in diminishing the amount of the award.—*Westburn, The*, P.D. & AD.D.

22. *Wages—Master's lien—Claim of mortgagee in possession—Priority.*—While a master's lien for wages against his ship takes precedence of an ordinary claim by mortgagees, it does not take priority of any part of the mortgage debt, the payment of which the master has personally guaranteed to the mortgagees.—*Bangor Castle, The*, P.D. & AD.D.

23. *Wreck—Obstruction in tidal river—Removal of wreck—Liability for expenses of removal—Owner, Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 *Vict. c.* 27) *s.* 56—*Aire and Calder Navigation Act*, 1889 (52 & 53 *Vict. c.* 32), *s.* 47.—By section 47 of the Aire and Calder Navigation Act, 1889, if any vessel shall be sunk in any part of the navigation of the undertakers, and the owner shall not forthwith remove the same, the undertakers may remove, and may detain and sell the same in payment of their expenses, and they shall pay the overplus, if any, to the owner; and by section 56 of the Harbours, Docks, and Piers Clauses Acts, 1847, "the harbour-master may remove any wreck or other obstruction in the harbour, and the expenses of removing any such wreck shall be repaid by the owner of the same."

Held, that, under both sections, the word "owner" means the person who was the owner of the vessel at the time when the expenses of removal were incurred, and not the person who was the owner when the vessel sank, and consequently that where the owner of a vessel, which had sunk in a tidal river, had completely abandoned all ownership in the vessel before the expenses of removal were incurred, he was not liable for such expenses.—*Barraclough* v. *Brown*, Q.B.D.

See also ADMIRALTY, 1-3, 7; CARRIER; CONTRACT, 6; INSURANCE, 5-15; MASTER AND SERVANT, 6; PRACTICE, 36; SALE OF GOODS, 1.

SHOPS.—See MASTER AND SERVANT, 5; SHERIFF, 1.

SOLICITOR:—

1. *Agreement with client as to costs—Payment—Work done before the magistrates and quarter sessions in respect of a criminal charge—Jurisdiction to set aside—Solicitors and Attorneys Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 8, 10.—A person, the subject of a charge of a criminal nature pending before a stipendiary magistrate, retained a solicitor to defend him, and paid him £25 down, and signed a document by which he agreed to pay for costs a lump sum of £75 in addition to the £25 already paid. He subsequently was committed for trial at quarter sessions, and was there acquitted.

Held, that although the above-mentioned document was not signed by the solicitor, yet that it was an agreement within the meaning of the Attorneys and Solicitors Act, 1870.

Held, further, that the High Court has jurisdiction to set aside such an agreement, and to order delivery of a bill of costs, and taxation.—*Jones, Re*, CH.D. STIRLING, J., 10.

2. *Application to committee of Incorporated Law Society—Allegations against solicitor—No* primâ facie *case of professional misconduct—Jurisdiction of committee—Discretion—Solicitors Act*, 1888 (51 & 52 *Vict. c.* 65), *s.* 13.—On an application under section 13 of the Solicitors Act, 1888, to the committee of the Incorporated Law Society appointed under the Act, that a solicitor might be required to answer allegations of professional misconduct contained in an affidavit, the committee were of opinion that the affidavit disclosed no *primâ facie* case of professional misconduct, and the committee declined to proceed further with the hearing of the complaint.

Held, that an application for a *mandamus* to the committee to hear and determine the matters complained of failed on two grounds—first, that the committee had a discretionary power to decline to proceed with the hearing if they were of opinion that the applicant's affidavit disclosed no *primâ facie* case of professional misconduct; secondly, that there was another remedy open to the applicant equally convenient and beneficial—viz., an application to the court.—*Reg.* v. *Incorporated Law Society*, Q.B.D.

3. *Costs—Business in magistrates' court and court of quarter sessions—Agreement as to costs—Jurisdic-*

tion of High Court to set aside—Attorneys and Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 8, 10, 15.—A document signed by a client alone relating to the payment of costs may be "an agreement in writing" within section 4 of the Attorneys and Solicitors Act, 1870.

Such an agreement relating to business done by a solicitor in a police court or in a court of quarter sessions is subject to taxation in the usual way, and may be examined, and, if necessary, set aside by a judge of the High Court.

The expressions "the court" or "a judge" in the Act of 1870 are inapplicable to a police magistrate or a court of quarter sessions, and are only applicable to a court of law or equity having, in the ordinary exercise of its jurisdiction, power to set aside such agreements.

So held, affirming Stirling, J., *ante*, p. 10.—*Jones, Re*, C.A., 146.

4. *Costs—Payment of costs to solicitor—Judgment reversed on appeal—Order on solicitor to repay the costs—Jurisdiction.*—Where the Court of Appeal allowed an appeal with costs, and after notice that a petition of appeal to the House of Lords had been lodged, the solicitors for the successful party obtained payment of the costs from the other party under threat of execution, and the House of Lords subsequently reversed the order of the Court of Appeal with costs,

Held, that the solicitors could not be ordered to refund the costs so received by them.

Semble, that the Court of Appeal had no jurisdiction to entertain the application.

Fitzmaurice v. *Jordan*, 32 L. R. Ir. 112, 41 W. R. Dig. 189, dissented from.—*Hood-Barrs* v. *Heriot* (*No.* 2), C.A., 487.

5. *Costs—Taxation—Agreement—Settled account—Previous payment—The Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73). *s.* 41—*The Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 8.—Where there is an agreement as to costs between a solicitor and his client the court can refer that to the taxing master to ascertain whether it is fair and reasonable, and if not, it is not to be treated as binding upon the client.

A settled account, though coupled with the retainer of agreed costs, is not payment as between solicitor and client unless a proper bill is delivered.

Decision of Chitty, J., *ante*, p. 404, affirmed.

Hitchcock v. *Stretton*, 40 W. R. 555, [1892] 2 Ch. 343, explained; *Re Frape*, 41 W. R. 417, [1893] 2 Ch. 284, distinguished.—*Baylis, In re*, C.A., 533.

6. *Costs — Taxation — Common order — Moneys alleged to have been received by solicitor for client—Counsel's fees—Set-off—General account—Practice.*—The clause in the common order to tax a solicitor's bill of costs, which provides that the "solicitor do give credit for all sums of money by him received of or on account of" the client, must be read as including and as confined to all moneys which the solicitor in his character of solicitor or agent of the client has received of or on account of, or is legally or equitably liable to pay over to such client and against which (if sued for by the client) the solicitor could set off his costs when taxed, but credit need not be given by the solicitor for moneys received by him on account of fees owing to the client as counsel in respect of matters not connected with the bill of costs.—*Le Brasseur, Re, Terrell, Ex parte*, C.A.

7. *Costs—Taxation—Common order for taxation obtained on behalf of a client of unsound mind not so found—Client subsequently found lunatic—Discharge of order—Duty of solicitor to disclose facts.*—A summons in lunacy having been issued against A. for the appointment of a receiver and manager of A.'s estate, A. instructed B., a solicitor, to act for her. B., on behalf of A., obtained *ex parte* against C. & Co., A.'s former solicitors, an order for the delivery and taxation of C. & Co.'s bill of costs against A., but did not disclose the pendency of the summons in lunacy. A. was subsequently found a lunatic. C. & Co. applied for the discharge of the said order, and that B. should pay the costs.

Held, that the order must be discharged; but

Held, that as there was no evidence that B. at the time he obtained the order knew that A. was of unsound mind, and as he acted in good faith, he ought not to be ordered to pay the costs.—*Armstrong, Re*, CH.D. STIRLING, J., 281.

8. *Costs—Taxation— Conducting sale—Auctioneer—Solicitors' Remuneration Act*, 1881.—A solicitor who pays the auctioneer's fees on a sale by auction may be entitled to the scale fee for conducting the sale. Where the auctioneer's fees are paid by the purchaser, the solicitor of the vendor is not entitled to a scale fee.

The conducting fee must be arrived at by adding together the value of the lots sold and the reserve price of the unsold lots, and not by making a minimum charge of £5 in respect of each lot.—*Cholditch* v. *Jones*, CH.D. NORTH, J., 124.

9. *Costs — Taxation — Remuneration — Debenture trust deed — Mortgage — Scale fee— Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 1882, *r.* 2 (a) (c); *Schedule I., Part I.*—The costs of the preparation and execution of a debenture trust deed, which was intended to be a mortgage security for moneys advanced, but under which no debentures were in fact ever issued, should be taxed under rule 2 (c) of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881.—*Bircham, Re*, C.A.

10. *Costs— Taxation— Remuneration— Long lease not at rack rent—Money premium as well—Solicitors' Remuneration Act*, 1881 — *General order—Schedule I., Part I., rr.* 7, 8—*Schedule I., Part II., r.* 5.—Where a long lease, not at a rack rent, is granted in consideration of a money payment or premium, the lessor's solicitor is entitled to be paid both the scale fee payable under Schedule I., Part II. (2nd scale), in respect of the rent, and the scale fee payable under Schedule I., Part I., on sales, purchases, and mortgages, in respect of the money payment or premium.—*Hellard, Re*, CH.D. NORTH, J., 475.

11. *Costs—Taxation— Remuneration—Scale fee—Grant of easement — Conveyance — Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Schedule I., Part I.*—A deed creating an easement for the first time does not come within the scale of charges prescribed by Schedule I., Part I., of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881.

In re Stewart, 37 W. R. 484, 41 Ch. D. 494, followed.

In re Earnshaw-Wall, 42 W. R. 567, [1894] 3 Ch. 156, distinguished.

Decision of North, J., *ante*, p. 309, affirmed.—*Sanders' settlement, Re*, C.A., 385.

12. *Costs—Taxation—Several bills—One barred by the Statute of Limitations—Common order to tax—Vendor and purchaser—Several lots purchased—One or more bills—Solicitors' Remuneration Act*, 1881, *General Order, Sched. I., Part I., r.* 8—The taxing master ought to tax statute-barred costs,

and leave the court to determine whether they ought to be paid.

Under a common order to tax obtained on application by the client, the client must pay what is found due on taxation; if the client wishes to raise the Statute of Limitations, he must obtain a special order.

Where several lots are bought for small sums, each having a separate title and separate abstract, a solicitor is entitled to the minimum scale fee in each case.—*Margetts Re*, CH.D. KEKEWICH, J., 462.

13. *Costs — Taxation — Several bills — Order of course to tax one only.*—A solicitor to whom a balance of £101 15s. was due upon seven bills, gave up the client's documents upon payment of £50, undertaking to return any sum found due from him upon taxation. He afterwards wrote accepting the £50 in full discharge of all claims. No answer was given to this letter, but a common order of course to tax one only of the bills was obtained by the client.

Held, that the order of course was right under the circumstances.—*Ward Re*, C.A., 484.

14. *Gift to Solicitor's wife—No independent advice —Presumption of undue influence.*—In the case of an irrevocable gift by a client to a solicitor, or to the solicitor's wife, made without independent advice, it is an irrebuttable presumption of law that there was undue influence on the part of the solicitor.—*Liles* v. *Terry*, C.A., 116.

15. *Improper use of solicitor's name—Fund in court—Order for payment out on fraudulent petition — Dummy petitioner — Partnership — Liability to refund.*—H., a solicitor, presented a fictitious petition, and thereby obtained an order for the payment out of a fund in court to a person whom he identified at the Paymaster-General's office as the supposed petitioner. H. had made use of the name of "C. & Co." (a firm of solicitors consisting of C. and G.) as if they were acting as solicitors for the supposed petitioner, and had briefed counsel in their name, and had done all this without the knowledge of either C. or G.

On the 10th of August the Paymaster-General's cheque was paid into, and cleared by, a bank in which H. had caused an account to be opened in the name of the supposed petitioner. On the 12th of August a large part thereof was drawn out of the said bank by the supposed petitioner, leaving, however, a sum of £2,000 still undrawn. On the same day C. was first told by H. that he had used the name of C.'s firm as solicitors in formal proceedings now completed and that there was a cheque at the Paymaster's office for the costs of C.'s firm. C. thereupon went at once to the Paymaster's office, obtained the cheque, and paid it into the account of his firm.

Subsequently to the 12th of August part of the £2,000 remaining in the bank was drawn out by the supposed petitioner, and although C. was then aware that his firm's name had been used without authority by H., he was ignorant of the fraud which had been committed by H. C.'s partner, G., knew absolutely nothing of the matter.

The Treasury having made good the fund,

Held, (1) that it was the duty of C., as an officer of the court, when, on the 12th of August, he first knew that his firm's name had been used by H. without authority in proceedings in court, to have at once informed the judge of that fact, and if he had done so that the £2,000 then in the bank would have been saved; (2) that C. by accepting the cheque for costs and placing it to the account of his firm had thereby condoned on behalf of his firm the unauthorized use by H. of the firm's name; and (3) that G., C.'s partner, was together with C. jointly and severally liable to make good to the Treasury so much of £2,000 as was drawn out after the 12th of August.

Re Dangar's Trusts, 37 W. R. 651, 41 Ch. D. 178, approved.—*Marsh* v. *Joseph*, CH.D. KEKEWICH, J., 462.

16. *Lien—Charging order—Assignment of sum recovered—Notice—Solicitors Act*, 1860 (23 & 24 *Vict.* c. 127), *s.* 28.—An action of damage by collision was compromised on the terms that the defendants, the owners of the steamship *Paris*, should pay to the plaintiff 50 per cent. of the damages sustained by the plaintiff's vessel, each party to bear their own costs of the action, and the amount of the damages to be ascertained by an arbitrator. Prior to the commencement of the action the defendants' solicitors had been pressing the plaintiff for a settlement of claims of clients of theirs against him, and for their own costs when acting for him; and the plaintiff, after the compromise of the action, but before the arbitrator made his award, wrote to the defendants' solicitors that he agreed to their settling the amount due to themselves and to certain named clients of theirs "out of the money coming in from *Paris* s.s."

By his award the arbitrator fixed the sum due from the defendants to the plaintiff, which, with the agreed costs of the reference, made a total of £405 11s. 8d., and the defendants' solicitors forwarded to the plaintiff's solicitors a cheque for a small amount as being the balance out of the above total sum after paying the named clients and themselves. The plaintiff's solicitors took out a summons under section 28 of the Solicitors Act, 1860, for a charging order. It was admitted that there was no collusion, and it was agreed that the award should be treated as a decree.

Held, that the plaintiff's solicitors in the action were entitled to an order charging the sum recovered with the plaintiff's costs to be taxed as between solicitor and client, on the ground that the fund recovered by the exertions of the plaintiff's solicitors was fixed, though not worked out, at the date of the compromise, and that the subsequent assignment of the fund was void under the statute as being an act done operating to defeat the right of the solicitors to a lien for costs—of which right, by reason of the fund being a sum recovered in the action, the defendants' solicitors, and their clients through them, were affected with notice.—*Paris, The*, P.D. & AD.D.

17. *Misconduct—Application to Law Society—* Primâ facie *case—Jurisdiction of committee—Solicitors Act*, 1888 (51 & 52 *Vict.* c. 65), *s.* 13.—Where the Committee of the Incorporated Law Society, upon an application under section 13 of the Solicitors Act, 1888, alleging professional misconduct against a solicitor, are of opinion that the affidavits disclose no *primâ facie* case of misconduct, they need not hear any further evidence or take any further proceedings in the matter, or make any report.—*Reg.* v. *Incorporated Law Society*, C.A., 307.

See also COUNTY COURT, 5; DIVORCE, 18; PARTNERSHIP, 5; PRACTICE, 3, 21, 22*a*, 23, 42; TRUSTEE, 5, 16; WILL, 4.

SPECIFIC PERFORMANCE:—

1. *Parol agreement — Possession prior to agreement—Continuance in possession—Statute of Frauds* (29 *Car.* 2, *c.* 3), *ss.* 1, 4.—Where a tenant in possession of premises continues in possession after a

verbal agreement for a lease exceeding three years, and such possession is unequivocally referable to the verbal agreement, it is an act of part performance sufficient to take it out of the Statute of Frauds.—*Hodson* v. *Heuland*, CH.D. KEKEWICH, J., 684.

2. *Vendor and purchaser—Defaulting defendant—Motion for judgment—Conveyance to be executed as an escrow and handed over to defendant on payment of purchase money to plaintiff—Order for payment to plaintiff.*—In a vendor's action for specific performance, the purchaser, the defendant, not having complied with the decree, was ordered to pay the purchase money into court within a limited time. The defendant not having complied with this order the plaintiff then applied for an order for the payment of the amount to the plaintiff, so that if default were made a writ of *fi. fa.* might issue.

The court made an order for a conveyance to be executed as an escrow by the plaintiff, to be delivered on payment of the purchase money; and for payment to the plaintiff by the defendant at a time and place to be fixed by the judge after the execution of the conveyance. The conveyance having been accordingly executed as an escrow, the defendant was ordered to pay the purchase money with interest, to the plaintiff, within one month from the date of the order.

Robinson v. *Galland*, 37 W. R. 396, followed.—*Jessop* v. *Smyth*, M.R. (Ir.).

See also CONTRACT, 7; VENDOR AND PURCHASER, 4, 9.

STAMP ACTS.—See INLAND REVENUE, 22-28.

STOCK EXCHANGE.—See COPYRIGHT, 2; GAMING, 3, 4; TELEGRAPH.

TAPESTRY.—See EXECUTOR, 1.

TASMANIA, LAW of:—

Practice—Special leave to appeal—Tasmanian Act, No. 10 of 1858, *ss. 5,* 8.—By Tasmanian Act No. 10 of 1858, s. 5, disputes concerning lands yet ungranted by the Crown are referred to the Supreme Court, whose decision is to be final; and by s. 8 the court is directed to be guided by equity and good conscience only, and by the best evidence procurable, even if not required or admissible in ordinary cases, and not to be bound by strict rules of law or equity or by any legal forms.

Held, that the Crown's prerogative to grant special leave to appeal is inapplicable to a decision so authorized.

Théberge v. *Laudry*, 2 App. Cas. 102, followed.—*Moses* v. *Parker*, P.C.

TELEGRAPH:—

Licensee—Tape instrument—Stock exchange—Contract—Injunction—Telegraph Act, 1863 (*c.* 112), *ss.* 2, 3, 41; 1868 (*c.* 110), *s.* 2; 1869 (*c.* 73), *ss.* 4, 5.—The defendants, who were licensees of the Postmaster-General under section 5 of the Telegraph Act, 1869, supplied by means of tape recording instruments, members of the Stock Exchange with the current prices each day quoted on the Stock Exchange, which prices were obtained by the permission of the Stock Exchange. The defendants contracted with the plaintiff, who was not a member of the Stock Exchange, to supply him with similar information by means of a tape recording instrument.

The Stock Exchange, having required the defendants to cease to supply outside brokers with the information collected in the Stock Exchange building, the defendants disconnected the plaintiffs tape recording instrument.

Held, that there was no duty imposed on the defendants under the licence they held from the Postmaster-General to supply the plaintiff with the information required.

Held also, that as the contract entered into by the defendants with the plaintiff was not expressed to be made subject to the rules of the Stock Exchange, the plaintiff was entitled to damages but not to an injunction, the contract being for personal service in reference to a chattel.—*Cochrane* v. *Exchange Telegraph Co.*, CH.D. CHITTY, J.

See also CRIMINAL LAW, 8.

TENANT IN COMMON:—

Sale by mortgagee—Improvements.—On a sale by a paramount mortgagee one-half the expenditure in improvements made by a person who was tenant in common in fee of one moiety and tenant for life of the other moiety was allowed out of the proceeds of sale, but it was provided that the sum so allowed should not exceed one-half the amount actually expended.—*Cook's Mortgage, Re, Lawledge* v. *Tyndall*, CH.D. NORTH, J., 646.

THEATRE:—

Public entertainment—Licence to perform stage plays—Licence granted conditionally on undertaking not to apply for excise licence—Discretion of licensing committee—Theatres Act, 1843 (6 *&* 7 *Vict. c.* 68).—On an application for a theatre licence the licensing committee granted it on condition that the applicant did not apply for an excise licence, they being of opinion that there were sufficient public-houses in the immediate neighbourhood.

Held, that the licensing committee had properly exercised their discretion, and that they were justified in taking into consideration the fact that an excise licence might be applied for, and, in view of the facts of the case, in imposing a condition on the granting of the theatre licence.—*Reg.* v. *Yorkshire West Riding County Council*, Q.B.D., 650.

TRADE-MARK:—

1. *Registration—Descriptive word—Fancy word—Bovril—Patents Act*, 1883 (*c.* 57), *s.* 64 (1).—The fact that a portion of the word "Bovril" has some connection with "ox" does not, the whole word being meaningless, make the work so descriptive as to prevent its being registered as a "fancy word," even though it is applied to extracts of meat.—*Bovril Trade-Mark, Re*, C.A.

2. *Registration—"Fancy word not in common use"—"Shakespeare" cigars—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *sub-section* 1 (*c*).—The word "Shakespeare" as applied to cigars is not a fancy word not in common use within the meaning of section 64, sub-section 1 (c), of the Patents, Designs, and Trade-Marks Act, 1883.—*Banks and James' Trade-Mark* (*Shakespeare case*) CH.D. CHITTY, J., 32.

3. *Registration—Name—Fictitious character—"Trilby" in ordinary type—Patents, Designs, and Trade-Marks Acts*, 1883-1888 (46 & 47 *Vict. c* 57), *s.* 64 (1) (a), (b), (d), (e).—The names of imaginary persons are "words" within clause (e) of section 64 of the Patents, &c., Acts, 1883-1888, and not names of "individuals" within clause (a). They may, therefore, be registered, though not "printed, impressed, or woven in a particular or distinctive manner."

So held by Lindley and A. L. Smith, L.JJ.; Kay, L.J., dissenting.

Decision of North, J., *ante*, p. 269, reversed.—*Holt* v. *Saunders* (*Trilby case*), C.A., 369.

4. *Registration—Restrictions upon—"Representations of the Royal Crown"—Instructions issued by Comptroller to persons wishing to register trade-marks.*—There is no positive rule binding upon the court or the Board of Trade prohibiting the registration of a trade-mark containing the representation of a crown. The instructions issued by the Comptroller-General of Trade-Marks to applicants for registration, containing a regulation that "representations of the Royal Crown" will not be registered as trade-marks or as prominent parts of trade-marks unless the marks have been used before the 13th of August, 1875, do not prohibit every form of crown, but only representations of the crown as it appears on the Royal Arms, namely, a circlet surmounted by two arches.

Whether these instructions are binding upon the court or not, the practice in the Trade-Mark Office, which has been based upon them since 1875, ought not now to be departed from.—*Konig and Ebhardt's Application, Re,* CH.D. STIRLING, J.

5. *Registration—"Words"—Burmese words—Disclaimer—Risk of deception—Undertaking that trade-mark shall be used only on goods exported to particular country—Patents, Designs, and Trade-Marks Acts,* 1883 *and* 1888 (46 & 47 *Vict. c.* 57; 51 & 52 *Vict. c.* 50).—Burmese words expressed in Oriental characters are "words" within the meaning of section 10 (*e*) of the Patents, Designs, and Trade-Marks Act, 1888. Regard must therefore be had, in deciding whether a trade-mark containing such words shall be registered, to the meaning of such words; and accordingly, on the principle of the *Red Star case,* 42 W. R. 420, [1894] 2 Ch. 26, when there are already on the register trade-marks containing a representation of a golden fan, a trade-mark including the Burmese words for "The Golden Fan Brand" will not (at any rate without a disclaimer of the exclusive right to use those words, as to the effect of which, *quære*) be allowed to be registered. The consent of the owners of the trade-marks resembling that for which registration is sought is not a sufficient ground for allowing such registration, for the court has also to protect the public from being deceived.

In such a case the court has no jurisdiction to allow registration upon an undertaking that the trade-mark shall be used only upon goods exported to a particular country, even if in that country there is no risk of deception.—*Dewhurst's Application, Re,* C.A., 672.

TRADE NAME:—

1. *Accurate and true description of goods—Right to use same name—Name calculated to mislead.*—The respondents sold their goods under a name which was an accurate and true description of them, but the name used was that by which the goods of another manufacturer had been known to the trade, and the result of doing this was to cause purchasers to believe that they were buying the goods of the appellants.

Held, that the respondents could be restrained from so selling their goods, and an injunction was accordingly granted.

Decision of the Court of Appeal (43 W. R. 294, [1895] 1 Q. B. 286) reversed.—*Reddaway* v. *Banham,* H.L., 638.

2. *Injunction—"Yorkshire Relish"—Probability of deception—Passing off.*—Where a man has long been the sole maker of a particular kind of article which he has always called by some name by which his goods are known and usually called by ordinary buyers, if it is impossible for a rival manufacturer profitably to use the old name and at the same time so to distinguish the two classes of goods as to prevent the goods of the rival manufacturer from being mistaken for those of the original manufacturer, the latter will be entitled to protection, and it is not necessary for him to prove fraudulent conduct on the part of the rival manufacturer.

The plaintiff had for a number of years sold a sauce under the name of "Yorkshire Relish," though his trade-mark consisting of those words had been expunged from the register. The defendants began selling, under the name of "Yorkshire Relish," a sauce of their own manufacture which, though not identical with the plaintiff's sauce, was very similar to it. There were considerable differences between the labels on the plaintiff's and defendants' bottles, but the evidence showed that in spite of these differences the defendants' sauce could be and was easily mistaken by ordinary purchasers for the plaintiff's.

Held, affirming the decision of Stirling, J., that the plaintiff was entitled to an injunction restraining the defendants from selling their sauce without better distinguishing it from the plaintiff's sauce.—*Powell* v. *Birmingham Vinegar Brewery Co.,* C.A., 688.

TRADE UNION:—

Strike—Picketing—Inducing persons not to contract with plaintiff—Intent to injure—Malice—"Watching or Besetting"—Interlocutory injunction—Trade Union Act, 1871 (*c.* 31)—*Conspiracy and Protection of Property Act,* 1875 (*c.* 86), *ss.* 3, 7.—The defendants, a trade union, ordered a strike against the plaintiff, a manufacturer, and also against S., a person who made goods for the plaintiff only; and their pickets had watched and beset the works of the plaintiff and S. for the purpose of compelling workpeople to abstain from working for the plaintiff.

Held, that this kind of picketing and the strike against S. for the indirect purpose of injuring the plaintiff were illegal acts, and an interlocutory injunction was granted to restrain the trade union and its agents from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for him, or for any other purpose than in order merely to obtain or communicate information. A similar injunction was granted in respect of the premises belonging to S.—*Lyons* v. *Wilkins,* C.A.

TRAMWAY:—

1. *Bye-law—Refusal to pay the fare in default of producing ticket.*—A bye-law made by a tramways company provided as follows: "Each passenger shall show his ticket (if any), when required so to do, to the conductor or any duly authorized servant of the company, and shall also, when required so to do, either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger"; another bye-law imposed a penalty for breach of any of the bye-laws. A passenger, who had already paid his fare, was unable to produce his ticket, having inadvertently torn it up, and refused to pay the fare a second time. He was summoned under the penalty bye-law.

Held, that the magistrate was bound to convict him.—*Hanks* v. *Bridgman,* Q.B.D., 285.

2. *Bye-law—Validity of—Passenger refusing to show his ticket—Tramways Act,* 1870 (33 & 34 *Vict. c.* 78), *s.* 46.—A bye-law of a tramway company, made in pursuance of the powers conferred by section 46 of the Tramways Act, 1870, provided that "Each passenger shall show his ticket (if any)

when required to do so, to the conductor or any duly authorized servant of the company"; and a penalty was attached to a breach of the bye-law.

Held, that the bye-law was a reasonable bye-law "for regulating the travelling in or upon" a tramcar, and was valid, and that a passenger who had duly paid his fare and received a ticket, but who had refused to show the same to an inspector of the company, ought to have been convicted under the bye-law for refusing to show his ticket. —*Lowe* v. *Volp*, Q.B.D., 442.

3. *Enforcing penalties against tramways company — Distress—Summary Jurisdiction Act*, 1879, *s.* 43—*Debentures—Receiver and manager—Tramways Act, Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 56.—There is nothing against public policy in allowing penalties imposed for the protection and the safety of the public to be enforced by distress and sale of the goods and chattels of a tramway company.—*Pegge* v. *Neath Tramways Co.*, CH.D. NORTH, J., 72.

TRESPASS.—See DAMAGES, 4.

TROVER.—See CONTRACT, 6; DETINUE.

TRUSTEE:—

1. *Account—Breach of trust—Trustee Act*, 1888 (*c.* 59), *s.* 8.—The plaintiff, an annuitant, claimed an account of the rents and profits of the real estate of testatrix received by the defendant as trustee, and an account of what was due from the defendant.

Held, that in taking the account the chief clerk should not allow any claim for moneys proved to have been parted with by defendant more than six years before the issue of the writ; such claims being barred by the Trustee Act, 1888.—*How* v. *Winterton* (*Earl*), CH.D. KEKEWICH, J.

2. *Breach of trust—Appointment not executed by joint appointors—Trust funds invested in assignment of appointed charge—Defect in title—Solicitor employed by trustees—Non-liability of trustees.*—The trustees of a marriage settlement invested part of the trust funds on an assignment of an appointed share of another fund. The appointment purported to be made in exercise of a joint power, but the deed of appointment had not in fact been executed by one of the joint appointors. The trustees had employed a competent solicitor to act for them in preparing the assignment, and to transact the legal business in connection with it.

Held, that the trustees were not liable to make good any loss arising by reason of the invalidity of the appointment.—*Rochfort* v. *Seaton*, V.C. (Ir.).

3. *Breach of trust—Fraud of agent—Liability of principal—Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*"Party or privy to" fraud—Trusts property still retained by trustee—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8.—The respondents, who were first mortgagees of property, and unaware that there was a second mortgage, sold under their power of sale in 1878. S., the mortgagor's solicitor, acted for them, and received the purchase-money, part of which he paid to the respondents in payment of what was due to them, the balance he retained for his own purposes. The appellant was second mortgagee, and S. concealed his fraud by continuing to send him the interest as heretofore. In 1892 S. became bankrupt, and the true state of things becoming known to the appellant he brought the present action against the respondents for an account and payment of what was due on the second mortgage.

Held, that the right of action arose in 1878; that S. could not be considered as the respondents' agent for the purposes of this fraud; that the concealment was entirely and exclusively the action of S.; that the balance of the purchase-money could not be considered as "still retained" by the respondents; consequently section 8 of the Trustee Act, 1888, applied, and the respondents were under no liability.

Decision of the Court of Appeal (42 W. R. 274, [1894] 1 Ch. 599) affirmed.—*Thorne* v. *Heard*, H.L., 155.

4. *Breach of trust—Investment — Unauthorized investment—Liability—Trustee Act* (1893) *Amendment Act*, 1894 (57 *Vict. c.* 10).—Section 4 of the Trustee Act (1893) Amendment Act, 1894, is not retrospective so as to relieve trustees from an obligation (*e.g.*, a breach of trust in retaining investments not authorized by law or by the instrument creating the trust) existing at the date of the passing of the Act.—*Chapman, Re, Cocks* v. *Chapman*, CH.D. KEKEWICH, J., 311.

5. *Breach of trust—Solicitor— Trustee* de son tort *— Constructive Trustee— Trust funds passing through solicitor's firm—Liability of partner.*—It is not within the scope of the implied authority of a partner in a solicitor's business to constitute himself a constructive trustee so as to bind his partner (who is not aware of the dealings by which the constructive trust is established) and make him also liable as a constructive trustee.

B., a partner in a firm of solicitors, acting as well for the *de facto* trustees as for the proposed new trustees of a marriage settlement, before the appointment of the new trustees, invested the trust funds on mortgages which resulted in a loss to the trust estate. In an action brought to make the solicitor and his partner liable to refund to the trust estate losses which had occurred in consequence of improper investments,

Held (reversing the decision of North, J., [1895] 2 Ch. 69), that on the evidence the solicitor had acted throughout merely as the solicitor of the trustees, and that neither he nor his partner could be held liable as a constructive trustee.—*Mara* v. *Browne*, C.A., 330.

6. *Breach of trust—Trustee beneficiary—Indemnity —Right to contribution from co-trustee.*—If one of two trustees who have been guilty of a breach of trust is also a beneficiary, he is liable to make good out of his share and to the extent of it the whole of the loss that has accrued to the trust fund, and can claim no contribution from his co-trustee when the breach of trust was committed for his benefit.—*Chillingworth* v. *Chambers*, C.A., 388.

7. *Company undertaking the business of trustee— Remuneration—Increased remuneration—Credit of company.*—When a company which makes it its business to undertake trusts demands, in view of increased responsibilities, increased remuneration, such a demand, especially if not persisted in, is not such a breach of trust as to justify its removal from the position of trustee.

Also, the mere fact of the credit of such company being impaired will not justify its removal if it cannot be shown that the interest of the *cestui que trust* has suffered or is likely to suffer thereby.—*Assets Realization Co.* v. *Trustees Insurance Corporation*, CH.D. ROMER, J., 126.

8. *Co-trustee—Contribution—Employment of outside broker—Negligence—Statute of Limitations— Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8, *sub-section* 1 (a) (b).—The employment by a trustee of an outside broker is not in itself a departure from his duty as a trustee. The right to contribution

between co-trustees is governed by the same principles as regulate the right to contribution between co-sureties. The principle laid down as regards co-sureties in *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, accordingly applies to the case of a trustee suing a co-trustee for contribution in respect of a liability incurred from loss occasioned to the trust estate by their joint default; and the Statute of Limitations does not begin to run as between the co-trustees until the claim of the *cestui que trust* is established against the trustee claiming contribution.—*Robinson* v. *Harkin*, CH.D. STIRLING, J., 702.

9. *Disclaimer—Partial disclaimer—Vendor and purchaser—Will—Trust for sale.*—A person resident abroad, who has been nominated as trustee, cannot refuse to act as trustee for any part of the trust property situate without the bounds of the country where he is resident, and at the same time intermeddle in the trusts of that part of the trust property situate in that country. A document containing such a refusal is a partial disclaimer only of the office of trustee, and is nugatory. The disclaimer, in order to be valid, must be of the whole of the trusts.—*Lord and Fullerton's Contract, Re*, C.A., 195.

10. *Discretion of trustees—Maintenance—Accumulations—Order.*—A trustee who has, under the instrument of trust, a discretionary power of accumulating and investing as capital any portion of income unapplied for maintenance, does not exercise his discretion if he obeys an order of the court to accumulate the whole of the income of the fund until further order.

Whether a trustee who has exercised his discretion in accumulating income as capital can afterwards apply the capitalized accumulations for maintenance, *quære.*—*Wise, Re, Jackson* v. *Parrott*, CH.D. NORTH, J., 310.

11. *Infant—Infant tenant in tail in possession—Vesting order—Form of order—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 31, 32, 50.—The effect of an order under the Trustee Act, 1893, appointing a person to convey the estate of an infant tenant in tail in possession for all such estate as the infant could if of full age convey, is to bar the estate tail and the remainders over; and no reference is needed to a disentailing deed or the Fines and Recoveries Act (as set out in Seton on Judgments, 5th ed., vol. 2, p. 1067, Form No. 21).—*Montagu, Re, Faber* v. *Montagu*, CH.D. KEKEWICH, J., 583.

12. *Investment—Discretion—Commission or bonus paid to trustee—Liability to make good loss.*—A testator gave the residue of his estate to trustees to invest in or upon such stocks, funds, and securities as they "shall think fit." The trustees invested £3,000, part of the trust estate, upon debentures at par of the New Travellers' Club, one of the trustees receiving, without the knowledge of his co-trustee, a bonus or commission of £300 on the transaction. The co-trustee assented to the investment, thinking it would benefit the trust estate. As a matter of fact the debentures were not, and never had been, of par value, and at the time the action was brought were of little or no market value.

Held, (1) that "as they shall think fit" meant "as they shall honestly think fit"; (2) that the commission or bonus of £300 received by one of the trustees was a bribe, and therefore that that trustee did not "honestly think fit," and that consequently he was liable to make good the loss occasioned to the trust estate by the investment of the £3,000; (3) that the co-trustee (on the facts) acted *bonâ fide*, and therefore did "honestly" think fit, and that consequently his estate was not liable to make good the loss; (4) that the £300 commission was received by the trustee as agent of the trust estate, and consequently must be paid by him thereto.—*Smith, Re, Smith* v. *Thompson*, CH.D. KEKEWICH, J., 270.

13. *Investment—Power to invest in the trustees' names—Securities to bearer—Power to postpone conversion—Discretion—Majority.*—R., by will, gave his residuary estate to trustees upon trust to convert and to invest in their or his names upon the public stocks, funds, or securities of Great Britain or of any foreign or colonial Government, and he gave them power to postpone for such time as should seem expedient the sale, conversion, or getting in of any part of the trust estate. The testator's estate consisted chiefly of foreign stocks and bonds, some of which were payable to bearer. The trustees retained these securities for some years, then one trustee wished to realize; the other three thought it best to further postpone the sale.

Held, on a summons taken out by the trustee who wished to realize, that under the power to invest in their names the trustees had not power to purchase foreign Government bonds payable to bearer; that they had power to postpone the sale of such bonds possessed by the testator at his death, but that this power to postpone could only be exercised by the trustees unanimously, and if one trustee objected the bond or other unauthorized securities must be converted.—*Roth, Re, Goldberger* v. *Roth*, CH.D. NORTH, J.

14. *Mortgage by* cestui que trust—*Power to first mortgagee to give receipt for payment of the fund—Puisne incumbrancers—Whether first mortgagee can compel trustees of fund to pay whole fund mortgaged to him.*—Where the *cestui que trust* of a fund in the hands of trustees assigned the trust premises by way of first mortgage with power to the mortgagee to demand payment of, and give receipts for, the same; and afterwards executed further mortgages of the trust premises:

Held, following the settled practice applicable to the case of a fund in court, that the trustees of the fund, having notice of puisne incumbrancers, could not be compelled by the first mortgagee to pay over to him the whole fund, but only what was due to him on his security.—*Bell, Re, Jeffery* v. *Sayles*, C.A., 99.

15. *New trustee—Appointment—Person nominated for that purpose—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 10.—Where under a trust instrument a named person has power to appoint new trustees in certain events, on the happening of an event not specified in the instrument, but specified in the Trustee Act, 1893, the power of appointment is not exercisable by the named person.—*Wheeler and Dr. Rochow's Trusts, Re*, CH.D. KEKEWICH, J., 270.

16. *New trustee—Appointment—Trustee resident "abroad"—Solicitor for the tenant for life—Settled Land Acts*, 1882, 1890.—The tenant for life under a will was empowered to appoint a new trustee of the will in the place of any trustee thereof who should, *inter alia*, be "abroad." In 1893 P., a trustee of the will, went to live at Lisieux, in Normandy, a place within sixteen hours' rail of London. He continued to attend meetings of the trustees, with rare exceptions; and declared his intention of returning to reside in England in 1898. In 1895 the tenant for life, in exercise of her power, appointed her solicitor a new trustee of the will in the place

of P., on the ground that P. was "abroad" within the meaning of that power.

On a summons taken out by the trustees to test the validity of the new appointment,

Held, that P. was "abroad" within the meaning of the power, and that the tenant for life was consequently entitled to appoint a new trustee in his place.

Held, also, that though the court would not itself appoint or confirm the appointment of the tenant for life's solicitor as a trustee of a settlement, yet it would not interfere with such an appointment when made by the tenant for life in good faith.—*Stamford (Earl of) Re, Payne* v. *Stamford*, CH.D. STIRLING, J., 249.

17. *New trustee—Decrease in number of trustees—Vesting order—Jurisdiction—Trustee Act*, 1893, *ss.* 26, 35.—Where one of four trustees of a settlement has been adjudicated a bankrupt and absconded, the court has jurisdiction to make an order vesting the estate in the other three trustees, although the number of trustees be thereby diminished.—*Lee's Settlement Trusts, Re*, CH.D. CHITTY, J., 680.

18. *Settlement — Breach of trust — Satisfaction — Advancement.* — By a marriage settlement certain sums of stock, the property of the wife, were vested in trustees upon trust for the wife for life for her separate use, and after her death for the husband for life, and after the death of the survivor (in default of appointment) for the children of the marriage in equal shares. There was issue of the marriage two sons only, each of whom attained his majority and married. The father obtained sole control of the trust funds, and appropriated them to his own use, but at the same time made handsome settlements on the two sons upon their respective marriages, and also various other gifts and advances to them out of his own property. The marriage settlement of one of the sons included a sum of stock which was an investment of part of the proceeds of the misappropriated trust funds. The various gifts and advances to the sons did not, in respect either of quantity of interest or amount, correspond with the shares to which they became entitled in the trust funds. The mother and sons all predeceased the father, who subsequently died.

Held, that the facts and correspondence rebutted any presumption that the father made the settlements and advances in satisfaction of any part of the trust funds, and that his estate was liable to make good to the representatives of the two sons their shares in the trust funds misappropriated by him without accounting for the properties settled upon, or given or advanced to, the sons by the father, including the sum of stock comprised in the son's marriage settlement, which was an investment of part of the proceeds of the misappropriated trust funds.

Decision of North, J. (*ante*, p. 203) on this point reversed.

Held by North, J. (*ante*, p. 203), there is no resulting trust in favour of a father of land purchased by him in his son's name, to qualify the son to act as a justice of the peace, because beneficial occupation is necessary for such qualification.—*Crichton* v. *Crichton*, C.A.

19. *Vesting order—Refusal by trustee to transfer stock for twenty-eight days.*—A petition founded on the refusal for twenty-eight days to transfer stock under section 35 (2) (*d*) of the Trustee Act, 1893, must not be presented or served before the expiration of the twenty-eight days. On petition for such an order there is jurisdiction to order the trustee to pay the costs.—*Knox's Trusts Re*, C.A.

See also ADMINISTRATION, 7; APPORTIONMENT; BANKRUPTCY, 31; MARRIED WOMAN, 9; PRACTICE, 37, 38; SETTLED LAND, 4; SETTLEMENT, 1; VENDOR and PURCHASER, 12, 13; WILL, 23, 24, 27.

VENDOR and PURCHASER:—

1. *Bankruptcy—Deed of assignment for benefit of creditors—Conveyance by trustee under deed of assignment—Concurrence of trustee in bankruptcy*—13 *Eliz. c.* 5.—A trader unable to pay his debts executed a deed whereby he conveyed and assigned to a trustee for his creditors all his estate and effects, including his freehold dwelling-house and shop where he carried on his business, upon trust to permit him to carry on his business for the purpose of paying off his debts by certain instalments which he thereby covenanted to pay; and upon default in the payment of such instalments the trustee was empowered to enter into possession of the whole of the property and sell the same, and pay the creditors rateably out of the proceeds; and the trader thereby appointed the trustee his attorney for executing every document necessary or expedient for carrying into effect the trusts and provisions of the deed, which was registered under the Deeds of Arrangement Act, 1877. Five months after the date of the deed the trader made default in payment of the instalments, and the trustee entered into possession of the property comprised therein, and a month after such entry into possession by the trustee the trader was adjudged bankrupt.

Two months after the trader's bankruptcy the trustee under the deed sold the trader's house and shop by auction, and the purchaser required the concurrence of the trustee in bankruptcy in the conveyance of the property to him by the trustee under the deed. It was admitted that all the creditors of the trader did not assent to the deed.

Held, that, although the deed was not void under the statute of the 13 Eliz. c. 5, as there was nothing to show that the trader thereby intended to defeat, hinder, or delay his creditors, yet the purchaser was right in his contention that the concurrence of the trustee in bankruptcy in the conveyance to him was necessary to confer a good title to the property, as otherwise he would be liable to legal proceedings at the instance of such trustee.—*Poppleton and Jones' Contract. Re*, CH.D. NORTH, J.

2. *Building estate—Building scheme—Restrictive covenants—Right to enforce covenants—Acquiescence in breach—Change in character of property.*—A person who, by virtue of a building scheme, has a right to enforce a covenant prohibiting the carrying on of a trade or business upon certain land may lose that right by acquiescing in systematic breaches of the covenant, or by a total change in the character of the building estate. But the fact that on a part of the building estate remote from the plaintiff's property businesses have been carried on in breach of the covenant is not, unless it appears that the plaintiff knew of what was being done, proof of acquiescence by him; and a change in the character of the property must, to deprive the plaintiff of his right, be so complete as to make the object for which the covenant was imposed impossible of attainment.

Held, upon the facts of the particular case, that the plaintiff had not lost his right.

Duke of Bedford v. *Trustees of the British Museum*, 2 My. & K. 552; *Sayers* v. *Collyer*, 33 W. R. 91, 28 Ch. D. 103; and *German* v. *Chapman*, 26 W. R. 149, 7 Ch. D. 271, considered.—*Knight* v. *Simmonds*, C.A., 580.

3. *Condition—Expenses of obtaining documents of title not in vendor's possession—Liability of purchaser*

where no special condition—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-section* 6.—A purchaser of land or leaseholds under a contract which contains no special condition as to the expenses of procuring documents of title or information not in the vendor's possession is liable, under section 3, sub-section 6, of the Conveyancing Act, 1881, to pay the expenses of procuring or ascertaining the whereabouts of a document which is the root of the title abstracted.

In re Johnson and Tustin, 33 W. R. 737, 30 Ch. D. 42, and *Moody to Yates*, 33 W. R. 785, 30 Ch. D. 344, distinguished.—*Stuart and Seadon's Contract, Re*, C.A., 610.

4. *Condition restricting objections to title—Specific performance—Bad holding title—Deposit—Right to return of.*—The plaintiff offered for sale by auction a leasehold house which was purchased by the defendant. One of the conditions of sale provided that the purchaser should make no objection or requisition as to the title between the date of an under-lease and the date of an assignment of that under-lease, but should assume that the assignment vested in the assignee a good title for the residue of the term.

The defendant discovered that, owing to a breach of trust and the fraudulent concealment of a will during the period covered by the condition, the title offered by the plaintiff was positively bad even as a holding title. He therefore refused to complete.

The plaintiff brought an action for specific performance, and the defendant counter-claimed for a return of the deposit which he had paid.

Held, that the plaintiff was not entitled to specific performance; and that the defendant was not entitled to a return of the deposit.—*Scott* v. *Alvarez* (*No.* 2), C.A.

5. *Gavelkind—Enfeoffment by infant—Insufficient consideration.*—Where a vendor's title to gavelkind lands is derived from a conveyance and enfeoffment of the said lands respectively made by adults and infants, and where the said transaction shows on the face of it that the infants did not receive a proper proportion of the purchase money paid in respect thereof, a purchaser from the vendor cannot be compelled to accept such title.—*Maskall and Goldfinch's Contract, Re*, CH.D. STIRLING, J.

6. *Lease—Agreement for sale of lease—Under-lease—Misdescription.*—Under a contract of sale a vendor agreed to sell two messuages described as held by an indenture of lease dated the 1st of August, 1872, for the unexpired residue of the term of eighty years computed from the 15th of March, 1866. The title was to commence with the lease; and the purchaser was to be deemed to buy with full notice thereof. The lease contained covenants referring to the lessor and his superior landlord. The lease was in fact an underlease.

Held, that, as the purchaser could not be considered to have had notice that the property she was intending to purchase was in fact held by an under-lease, the representation that it was held by a lease was a fatal misdescription, and that a good title had not therefore been shown.—*Broom* v. *Phillips*, CH.D. KEKEWICH, J.

7. *Leaseholds—Sale by administrator* durante minore ætate—*Power of sale.*—An administrator *durante minore ætate* has for the time all the powers of an ordinary administrator, including a power to sell the estate if it is necessary in due course of administration, although not necessary for the payment of debts.—*Thompson and McWilliam's Contract*, C.A. (Ir.).

8. *Leaseholds—Sale by auction—Onerous covenants—Non-disclosure by vendor—Constructive notice.*—A., at a sale by auction in the City of London, bought from B. certain leasehold property. The lease contained onerous covenants of which no mention was made in the particulars and conditions, nor did the particulars or conditions state that the lease was open for inspection. A. had no actual knowledge of the contents of the lease. B. alleged that A. had had a fair opportunity of obtaining such knowledge, the lease being in fact open to inspection before the sale at the offices of B.'s solicitors in accordance with the usual custom, and being also brought by B.'s solicitor to the sale for inspection. A., however, was ignorant alike of these facts and of the custom.

On a summons by A. under the Vendor and Purchaser Act, 1874,

Held, that A. was entitled to have the contract rescinded.—*White and Smith's Contract, Re*, CH.D. STIRLING, J., 424.

9. *Memorandum in writing—Condition of the essence of the contract—Right of vendor to waive condition—Specific performance.*—By a memorandum, signed by the plaintiff and the defendant, it was provided that the former should sell to the latter a leasehold house "subject to the preparation by my (the plaintiff's) solicitor of a formal contract." The plaintiff having brought an action for specific performance upon the memorandum,

Held, that this stipulation was a condition precedent to a concluded agreement between the parties; that it could not be waived by the plaintiff, as being for his exclusive advantage; and therefore that the action must fail.—*Lloyd* v. *Nowell*, CH.D. KEKEWICH, J., 43.

10. *Misrepresentation*—Laches—*Rescission.*—When a purchaser discovers that a representation made to him by a vendor is untrue, if the vendor suggests that, if time be given him, the representation may be cured, and the purchaser put in as good a position as if the representation had been true, the purchaser, by giving the vendor time, does not lose his right to rely on the misrepresentation and determine the contract if, at the end of the time, the vendor fails to make good his suggestion.—*Tibbatts* v. *Boulter*, CH.D. ROMER, J.

11. *Settled land—Tenant for life—Improvement rent-charge—Release of part of land charged—Consent of incumbrancers—Improvement of Land Act*, 1864 (27 & 28 *Vict. c.* 114), *ss.* 68, 69—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 5, 30.—The tenant for life of an estate which was subject to an improvement rent-charge created under the Improvement of Land Act, 1864, agreed to sell a portion of the settled estate free from the rent-charge. The tenant for life proposed, with the consent of the owners of the rent-charge, to exonerate the land sold from the rent-charge by virtue of section 5 of the Settled Land Act, 1882; but the purchasers took the objection that under section 68 of the Improvement of Land Act, 1864, the consent of the Board of Agriculture (who now represented the commissioners referred to in the Act) must be obtained.

Held, that the consent of the Board of Agriculture was not necessary, and that a good title had been shown.—*Strafford* (*Earl*) *and Maples' Contract, Re*, C.A., 259.

12. *Trustee—Married woman—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, 18, 24.—Land was conveyed by deed in 1885 to three trustees, one of whom was a female. In 1889 the

female trustee married. In 1896 the three trustees contracted to sell the property.

Held, that the concurrence of the husband of the female trustee was necessary. — *Harkness and Allsopp's Contract, Re*, CH.D. NORTH, J., 683.

13. *Will—Charge of legacies on residue—Power of sale to trustees—Concurrence of residuary devisees absolutely entitled.*—A testator by his will, after directing payment of his debts, funeral and testamentary expenses, and after making various pecuniary and specific bequests, devised and bequeathed the residue of his real and personal estate to trustees upon certain trusts as to specific parts, and the residue thereof he devised and bequeathed to certain persons equally, share and share alike; and the testator further declared that the trustees should have power to sell the whole or any part of his real estate at such times and in such manner as they should deem expedient, and should hold the proceeds upon the trusts of the will. The testator's personal estate was insufficient to pay the debts and expenses and provide for the legacies.

Held, that the trustees could under the power of sale make a valid assurance of freehold property comprised in the testator's residue to a purchaser without the concurrence of the residuary devisees. —*Dyson and Fowke's Contract, Re*, CH.D. KEKEWICH, J.

See also MORTGAGE, 5, 10; PARTNERSHIP, 4; SCHOOL; SPECIFIC PERFORMANCE, 2.

VICAR.—See CHURCH BUILDING ACTS; LANDS CLAUSES ACTS, 3.

VOLUNTARY ASSOCIATION:—

Member—Retirement—Acceptance.—The members of a voluntary trade protection society became such by election, and paid an annual subscription, in return for which they were entitled to legal assistance for the purposes of their trade and to some other benefits. By the rules the members incurred no obligation beyond the payment of their subscriptions. The rules contained no provision as to the retirement or expulsion of members.

Held, that a member was entitled to retire at any time without any consent of the other members; that on the receipt by the society of a letter from a member stating his wish to retire, he at once ceased to be a member, without the necessity of the acceptance by the society of his resignation; that he could not before acceptance withdraw his resignation; and that he could not become a member again without re-election.—*Finch* v. *Oake*, C.A.

VOLUNTEER CORPS:—

Power to make rules—Failure of volunteer to become efficient—Loss of capitation grant—Rule ultra vires—*Volunteer Act*, 1863 (26 & 27 *Vict.* c. 65), *s.* 24.—By section 24 of the Volunteer Act, 1863, "The officers and volunteers belonging to a volunteer corps may from time to time make rules for the management of the property, finances, and civil affairs of the corps."

A volunteer corps made (*inter alia*) the following rule: "Any . . . member of the corps who shall fail to make himself efficient and to earn the Government capitation grant . . . shall pay to the funds of the corps a sum equal to the amount of Government capitation grant which he has in consequence failed to earn."

Held, that there was no power under the section to make such a rule, and that it was therefore *ultra vires*.—*Reg.* v. *Lewis and Moss*, Q.B.D.

WARRANTY.—See SALE OF GOODS, 4.

WATER:—

1. *Metropolis—Constant supply of water—Failure of water company to give—Right of private individual, being aggrieved, to sue for penalties—Metropolis Water Act*, 1871 (34 & 35 *Vict.* c. 113), *ss.* 7, 16, 44, 45—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict.* c. 17), *s.* 43.—When a water company which comes within the operation of the Metropolis Water Act, 1871, fails to give a constant supply of water within section 7 of the Act, a private individual who may be aggrieved in consequence of such non-supply cannot sue for the penalties imposed by section 16 of the Act. For such penalties for failure to give a constant supply to districts the metropolitan authority alone can sue, and if a private individual be aggrieved his remedy is not under the Act of 1871, but under section 43 of the Waterworks Clauses Act, 1847, under which section it is a condition precedent of his right to sue that he shall have paid or tendered the water rate in advance.—*Kyffin* v. *East London Waterworks Co.*, Q.B.D., 446.

2. *Watercourse—Water percolating underground—Malicious intention—Bradford Waterworks Act* (17 & 18 *Vict.* c. *cxxiv.*), *s.* 49.—The legal right of a landowner to divert or take water which percolates underground in undefined channels into adjoining land is not affected by his motive for doing so.

The Bradford Waterworks Act, 1854 (17 & 18 Vict. c. cxxiv.), s. 49, held to preserve these rights of the respondent.

Decision of the Court of Appeal, 43 W. R. 189, [1895] 1 Ch. 145, affirmed.—*Bradford* (*Mayor of*) v. *Pickles*, H.L., 190.

WEIGHTS and MEASURES.—See LOCAL GOVERNMENT, 3.

WILL:—

1. *Absolute gift — Condition subsequent — Repugnancy.*—A testator gave all his property, real and personal, to trustees for division among his children, their shares to be paid when they respectively attained twenty-eight. The will further contained a clause cutting down the children's shares to £1,000 each in the case of sons, and to £500 in the case of daughters, if any of them should embrace a religious life.

Held, following *Saunders* v. *Vautier*, Cr. and Ph. 240, that there was an absolute gift to the children vesting on the testator's death, and the provision as to payment at twenty-eight was nugatory; and that the clause as to embracing a religious life was a condition repugnant to the former gift, and must be disregarded.—*Thompson, Re, Griffith* v. *Thompson*, CH.D. CHITTY, J., 582.

2. *Absolute gift—Legacies out of proceeds of sale—Repugnancy.*—T. E., by his will, appointed the plaintiff, M. A. K., his sole executrix, and gave her all his tea plantations in Assam and all other his property, and continued: "On any sale by the said M. A. K. of the said tea plantations I will and direct her to pay my brother, J. E., the sum of £1,000 out of the proceeds of such sale. Also the further sum of £500 out of the proceeds of such sale to I. B.," who was the testator's sister.

Held, that no obligation was imposed on the plaintiff to sell the plantations, and that the direction to pay the sums of £1,000 and £500 was repugnant and void.—*Elliot, Re, Kelly* v. *Elliot*, CH.D. CHITTY, J., 632.

3. *Advances— Hotchpot — Interest chargeable on advances as from period of distribution only.*—The testator gave to his sons in succession an option, exercisable after twenty-one, to succeed to his

business, the son electing to succeed to be debited with the value thereof; and gave his residuary estate to trustees upon trusts for conversion. The testator empowered his trustees until the period of distribution to apply income of the residuary trust estate for the maintenance, &c., of his children, and directed the surplus income to be accumulated for a term of years; and upon the determination of such term he directed his trustees to stand possessed of the trust estate for his children then living and the issue *per stirpes* of deceased children. He also empowered his trustees to advance his sons out of capital, any sums so advanced to be taken in part satisfaction of each son's share.

Held, that no interest was chargeable until after the period of distribution (1) in respect of the value of the business against the son who succeeded to it; nor (2) in respect of advances made out of capital to another son (Rigby, L.J., dissenting on the second point).—*Dalmeyer, Re*, C.A., 375.

4. *Annuity charged on income of residue—Provision for annuity—Payment of residue to residuary legatees—Refusal of annuitant to consent—Costs improperly incurred—Liability of solicitor—Ord.* 65, *r.* 11.—Where an annuity is charged upon a residuary estate with a direction that upon the death of the annuitant the residue is to be divided, the court has jurisdiction, in spite of the opposition of the annuitant, to order the residue to be paid to the residuary legatees upon provision being made for the payment of the annuity.

The court, being of opinion that the appeal had been brought, not in the interest of the appellant, but really by the appellant's solicitor for his own purposes, made an order, under ord. 65, r. 11, that the appellant's costs should be disallowed as between the appellant and her solicitor, and that the solicitor should pay the costs which the appellant had been ordered to pay to the respondents.—*Harbin* v. *Masterman*, C.A., 421.

5. *Construction—Bequest of house and furniture to A.—Power to B. to choose everything he might desire from the furniture.*—A testator, by his will, devised to A. a certain house and the furniture therein, except what he otherwise disposed of by will or codicil. By his codicil he empowered B. to choose everything he might desire from the furniture at the said house, except certain specified articles.

Held, that the testator intended B. to take all, or as much as he liked, of the furniture in question, other than the excepted articles, and B. was not bound to leave a substantial portion thereof,

Kennedy v. *Kennedy*, 10 Ha. 438, discussed and distinguished.

Arthur v. *Mackinnon*, 41 L. T. Rep. 275, 11 Ch. D. 385, approved and followed.—*Sharland, Re, Kemp* v. *Rozey* (*No.* 2), C.A.

6. *Construction—Bequest* per stirpes *or* per capita.—A testator bequeathed the income of his property to his wife for life, and after her death equally between his brother and sisters, and "at the decease of either of my before-named brother or sisters, their interest herein to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be sold . . . and to be equally divided between the children of the aforesaid, share and share alike."

The testator's wife survived both the brother and the sisters. Upon her death,

Held (reversing the decision of Stirling, J.), that the proceeds were divisible amongst the children *per capita*, and not *per stirpes*, notwithstanding the fact that the division was *per stirpes* so long as any brother or sister was living.—*Stone, Re, Baker* v. *Stone*, C.A., 235.

7. *Construction—Gift of income of residue until alienation—Time of vesting.*—A testator gave certain property to trustees upon trust after the death of his wife to pay to his son A. during his life so much of the income thereof "as would not, although the same were payable to him, be by his act or default or by operation or process of law so disposed of as to prevent his personal enjoyment thereof, and to apply so much of the income as would, if the same were payable to my said son, be disposed of as last aforesaid for the benefit of" B. and her children, at the discretion of the trustees and in manner thereinafter expressed.

After the death of the testator's widow the trustees' solicitors wrote to A. informing him that they had a sum of money in their hands, the income of the trust fund, payable to him. A. replied asking that the money should be paid to him, but was informed by the same solicitors that the trustees had since been served with a garnishee order *nisi* attaching the same. B. thereupon served the trustees with notice not to part with the income; but the trustees, the garnishee order having been made absolute, paid it over to the husband's creditors.

On a summons taken out by B. asking for payment to her of the income attached as aforesaid,

Held, that, unless A. had by his own act or default or by process or operation of law been deprived of the enjoyment of the income, he was entitled to receive the same the moment it came into the hands of the trustees; that such right could not be affected by subsequent events—*e.g.*, the garnishee order; and that therefore B. never became entitled to the benefit of the discretionary trust.—*Sampson, Re, Sampson* v. *Sampson*, CH.D. STIRLING, J., 557.

8. *Construction—Gift of "£400 invested in the B. Company"—Gift of "all my money"—Vested and contingent interests.*—A testatrix bequeathed "all my money, except the sum of £400 invested in the Belgravian Dairy Co., to" A. and B. She gave "the interest of the money invested in the Belgravian Dairy Co." to C., D., and E. in equal sums for life, and "on their deaths I will that the whole sum invested as above be used for the purpose of erecting an east window in St. Martin's Church, Epsom."

The testatrix died on the 5th of March, 1895, having survived the above-mentioned legatee C., who died on the 26th of December, 1891, after the date of the will.

The testatrix's estate, at the time of her death, consisted of cash, 500 shares of £1 each in the Dairy Co. aforesaid (the value whereof was at that time about 30s. per share), stocks and shares in other companies, and also a one-fourth share in certain railway stock in reversion to which she was contingently entitled on the death of the tenant for life without children.

Held, (1) that the gift of "£400 invested in the Belgravian Dairy Co." was a gift of 400 shares in that company, and not a gift of £400 sterling; (2) that the whole of the income arising from this bequest was payable to D. and E. in equal shares during their joint lives, and to the survivor of them for her life; and (3) that the words "all my money" included not only the residue of the personal property to which the testatrix was entitled in possession, but also the one-fourth share in the railway stock to which she was contingently entitled in reversion.—*Buller* v. *Giberne*, CH.D. STIRLING, J.

9. *Construction—"Issue living"—Child en ventre sa mère.*—A testator by his will gave one moiety of his estate, after the death of his wife, to his daughter K. absolutely in case she had issue living at the death of his wife; but in case she had no issue then living, then a life interest only in such moiety to K. The wife died on the 9th of March, 1895, and on the 10th of March, 1895, K. was confined of a living child.

Held, that K. had issue living at the death of the wife, and therefore took the moiety absolutely.

Dictum of Lord Eldon in *Thellusson* v. *Woodford*, 11 Ves. 112, at p. 149, followed.—*Burrows, Re, Cleghorn* v. *Burrows*, CH.D. CHITTY, J.

10. *Construction—Legacy—General or specific—Uncertainty—Charitable legacy—Gift for the encouragement of yacht racing—Validity of.*—A testator who had, at the date of his will and at his death, debentures and shares in company A., and debentures and no shares in company B., gave a legacy of "£500 debenture stock or shares" of the A. company and legacies of "350 ordinary shares," 250 "fully paid shares," and 50 "shares" in the same company. He also gave to his trustees £5,000 "debenture stock or shares" of the A. company, 350 "ordinary shares" in the same company, and £1,500 "debenture stock or shares" of the B. company upon trust to continue the same in their present state of investment, or to sell the same, and to hold the same upon the trusts therein mentioned.

Held, reversing the decision of Kekewich, J., that the gifts included the debentures in both companies, and upon the whole will that the legacies of debentures and shares were specific and not general legacies.

The testator gave a legacy of £2,000 to the Yacht Racing Association of Great Britain upon trust for the purpose of providing out of the annual income thereof a cup, to be given each year, for the encouragement of yacht racing; and the testator declared that if the Yacht Racing Association should cease to exist the trust fund should be made over to the Thames Yacht Club, to be held by them on similar trusts.

Held, affirming the decision of Kekewich, J., that the gift was not a charitable legacy, and was void for perpetuity.—*Nottage, Re, Jones* v. *Palmer*, C.A., 22.

11. *Construction—Legacy to persons who should have been in testator's employment for more than a specified time.*—A testator directed his trustees "to pay to each man who shall have been in my employ over ten years the sum of £10 for each year's service beyond the said ten years."

Held, that a man who had been in the testator's employment for fifteen years, but had left his employment before the date of the will, and was not in his employment at the time of his death, was entitled to a legacy of £50.—*Sharland, Re, Kemp* v. *Rozey*, CH.D. NORTH, J.

12. *Construction—Marshalling.*—A testatrix, to whose will the provisions of the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), did not apply, gave to a charity "all the rest and remainder of my personal estate whatsoever and wheresoever situate, save and except such parts thereof as cannot by law be appropriated by will to charitable purposes."

Held, that this did not amount to a direction to marshal, and that the gift, so far as it consisted of things savouring of land, failed, and was divisible among the next of kin.

Edwards v. *Hall*, 1 W. R. 348, 11 Ha. 1; on appeal, 4 W. R. 111, 6 De G. M. & G. 74, followed.—*Somers Cocks, Re, Wegg-Prosser* v. *Wegg-Prosser*, CH.D. KEKEWICH, J., 106.

13. *Construction—"Securities held by bank"—Shares—Inscribed stock.*—M., by will, gave to a charity "all the securities in my name now held, or which may hereafter be held for me by Lloyds Bank, of 54, St. James's-street, London, S.W." M. was living in India at the time of his death, and the bank then held, on his behalf, besides a number of bonds and debentures and certificates of debenture stock, the certificates for 200 ordinary shares of the Globe Telegraph Trust Co. The testator was also entitled to £3,000 India Three per Cent Stock, and had given the bank a power of attorney to receive the dividends thereon, and to sell the stock. The bank did not hold any certificate or document of title relating to this stock.

Held, that the Globe shares were not securities, and that the India Stock was not in any sense held by the bank, and therefore neither of these passed under the bequest.—*Maitland, Re, Chitty* v. *Maitland*, CH.D. NORTH, J.

14. *Construction—"Shares"—Debentures.*—A testatrix bequeathed her shares in the Grand Trunk Railway to A. absolutely. At the date of her will and at her death she held debenture stock of the Grand Trunk Railway, but she never had any shares.

Held, that the debenture stock passed under the bequest.—*Weeding Re, Armstrong* v. *Wilkin*, CH.D. NORTH, J., 556.

15. *Construction—Supplying words—Implication.*—W. by will gave all his residuary estate to trustees upon trust to pay and divide equally amongst all the children of his deceased father's brothers and sisters, and proceeded: "I desire that the child or children of any one of such brothers and sisters as may be dead shall take his, her, or their deceased parent's share."

Held, that the testator's intention clearly was that the children of the children of his cousins should take their parent's share, and that the words of the residuary gift as they stood, without supplying any words, could be construed as if the word "child" were inserted after the words "any one."—*Wroe, Re, Frith* v. *Wilson*, CH.D. NORTH, J.

16. *Conversion—Reversionary interest—Discretion of trustees—Intention—Rule in* Howe *v.* Lord Dartmouth.—Where a testator by his will has given his trustees power, if and when they consider it expedient, to sell all or any part of his estate, he has shown an intention that a conversion of his estate (which included a reversionary interest) shall take place at some time which need not be that at which the rule of the court, as laid down in *Howe* v. *Lord Dartmouth*, 7 Ves. 137, would make conversion necessary, and the rule of the court has accordingly no application.

In re Sewell, 19 W. R. 220, L. R. 11 Eq. 80, followed.—*Pitcairn, Re, Brandreth* v. *Colvin*, CH.D. NORTH, J., 200.

17. *Election—Onus of proof.—Primâ facie*, the court will construe the words of disposition as applying to an estate which the testator had power to dispose of, if the words of the will, looking at the whole scope of it, will fairly apply to it; and in order to raise a question of election, it must be clearly seen that the words used point to an estate which is not the testator's own, but that of another.

Lord Rancliff v. *Parkyns*, 6 Dow. 149, discussed.—*Minchin* v. *Gabbett*, M.R. (Ir.).

18. *Legacy to trustees to plant trees—Benefit of owner of the estate—Payment.*—A sum of money was bequeathed by testator, who was tenant for life only of a real estate, on trust to lay out the money in the planting of trees thereon, regard being had, as to the manner and place of planting such trees, to the wishes of the person for the time being entitled to such estate.

Held, that the trust was primarily for the benefit of the owners of the estate, and as the evidence showed that the planting of the trees would not be a benefit or improvement to the estate, that the persons who together constituted the absolute owners of the estate were entitled to the bequest for their own use.—*Bowes, Re, Strathmore* v. *Vane*, CH.D. NORTH, J., 441.

19. *Power — Appointment — Bequest of personalty upon trusts corresponding with trusts of realty—Alteration by codicil — Effect upon personalty.* — A testator by his will, dated in 1862, devised his real estate, subject to certain life interests, upon trust for his brother for life, and after his death upon trust for his brother's four sons in the order named in the will, and their respective heirs male in succession, and he directed that his personal estate should be held upon such trusts as would best correspond with the trusts declared as to the real estate.

By a codicil dated in 1873, after reciting the trusts declared by the will as to the real estate, he directed that his will should be read and construed and should take effect as if there were contained therein, immediately after the limitation upon trust for his brother for life, a limitation upon trust for his brother's four sons successively, and for their issue male in such order as the testator's wife should by deed or will appoint. The testator died in 1881. His wife died in 1894, having by her will, made in 1886, varied the order of the succession of the four sons to the real estate.

Held, that there was only one power of appointment given to the wife, and that it extended to the personalty as well as to the real estate, and that the will of the wife was a valid and effectual exercise of the power, and that the personalty went to the four sons in the same order of succession as the realty.

Martineau v. *Briggs* (33 L. T. Rep. 283) distinguished.—*Liddell* v. *Liddell*, H.L.

20. *Remoteness—Share settled on granddaughters of tenant for life—Splitting gift.*—A testator gave all his real and residuary personal estate upon trust for his wife for life, and after her death for his niece M. D. for life, and after her death for her husband J. D. for life, and after his death in trust for the daughter or daughters of M. D. who should attain twenty-one or marry under that age, with a proviso that the share of any such daughter should be settled upon her for life, with remainder to her daughters.

M. D. had three children—a son, a daughter who died an infant and unmarried, and the plaintiff, C. M. D., who had attained her age of twenty-one years during the testator's lifetime.

Held, that if M. D. had had a daughter born after the testator's death, the settlement over directed by the proviso would, so far as regarded the share of such after-born daughter, have been void for remoteness; yet the proviso was good as to the interest taken by the plaintiff, C. M. D., the proviso in no way mixing up the shares of the daughters, but operating separately upon each share.—*Russell, Re, Dorrell* v. *Dorrell*, C.A., 100.

21. *Reversionary interest — "Legal disability" preventing legatee from taking for his own benefit—Bankruptcy, subsequently annulled.*—A testator gave the income of his residuary estate to his wife for life, and subject thereto gave a moiety of such estate to his son; but in case the son should at the time of the wife's death be "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal and exclusive benefit," then the testator gave the same over to the son's wife and children.

During the widow's lifetime the son, who was one of the executors of the testator, was ordered to pay a sum of £5,188 to the estate, such sum being assets received by the son in the administration of the estate, and his reversionary interest under the will was declared liable to make good such sum The son had also mortgaged his reversionary interest.

On the day of the death of the tenant for life, but before the death, the son was, on his own application, adjudicated bankrupt; but the order of adjudication was shortly afterwards annulled on the ground that it ought never to have been made.

Held, that the words "legal disability" as used in the will indicated a disability imposed by act of law rather than a disability arising simply from the voluntary act of the legatee, and that therefore, on the above facts, no such legal disability arose as would cause the gift over to take effect; further, the bankruptcy, being a mere device on the part of the son, ought not to be regarded.

Decision of Stirling, J., *ante*, p. 296, affirmed.—*Carew* v. *Carew*, C.A., 700.

21*a*. *Substitutionary gift — Codicil — Annuity — Land sold subject to incumbrance — Jurisdiction to discharge incumbrance — Future interests — Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 5.—Where land has been sold subject to an incumbrance, the court has jurisdiction, under section 5 of the Conveyancing Act, 1881, to discharge such incumbrance, even though in so doing it may be deciding as to future interests therein.

A testator, by his will, gave an annuity of £300 to his granddaughter, to be paid half-yearly, and to be charged upon certain property; and after the death of his granddaughter he directed that the sum of £300 should be raised and paid to her children as she should appoint, and, in default of appointment, to all her children in equal shares. The testator, by a codicil to his will, after reciting that he had given to his granddaughter an annuity of £300, revoked the said annuity, and instead thereof gave and devised to his granddaughter an annuity of £150, to be payable and charged in the same manner and on the same hereditaments as the said annuity of £300 was by his will payable and charged.

Held (Rigby, L.J., dissenting), that the effect of the codicil was to revoke the whole annuity of £300, and to substitute for it an annuity of £150, payable to the granddaughter, her appointees, and children.—*Freme, Re, Freme* v. *Hall*, C.A., 164.

22. *Tenant for life and remainderman—Capital or income—Apportionment—Interest, rate of.*—Sum of money forming part of testator's residuary estate, but not recovered until some time after the residuary estate had become divisible.

Held, that the money so recovered (though it did not include interest) could not be treated as capital only, but that a fair proportion of it should be paid as income to the tenant for life of the residue.

Turner v. *Newport*, 2 Ph. 14, followed.—Interest,

however, to be calculated at 3 per cent. instead of 4 per cent.—*Cleveland's (Duke of) Estate, Re, Hay* v. *Wolmer*, CH.D. KEKEWICH, J.

23. *Tenant for life and remainderman—Leaseholds—Wasting security—Trustee—Power to raise charge by sale or mortgage or out of rents and profits—Apportionment.*—Testator devised and bequeathed freehold and leasehold lands to trustees for a term of 1,000 years upon trust by mortgage or sale, or by and out of the rents and profits, or by any other reasonable means, to pay off a mortgage debt charged on the lands; and, subject to the said trust term, devised the lands to the use of testator's son for life, with remainder to his first and other sons in tail. Testator died in 1870, and his said son entered into receipt of the rents of the lands and paid the interest on the mortgage debt. No steps were taken by the trustees to pay off the mortgage debt until 1894, when an action was brought by them to administer the testator's estate so far as related to the lands subject to the trusts of the term.

Upon taking the accounts in chambers the remainderman (the infant son of the tenant for life) claimed that the leasehold lands should have been sold on the expiration of a year after the testator's death, and that the tenant for life should account for the rents thereof received by him from that date.

Held, that though the trustees had a discretion as to the mode of raising the mortgage debt, yet the interests of the remainderman—the leaseholds being a wasting security—had been prejudiced by the postponement of the raising of the charge, and that the court should adjust the burden of the charge between the tenant for life and the remainderman according to their interest in the property, and that consequently the tenant for life should contribute in the manner therein specified to the amount of the charge.—*Blake* v. *O'Reilly*, M.R. (Ir.).

24. *Tenant for life and remainderman—Money lent by testator to a trading firm for a fixed period—Expense of audit of firm's books under provisions of agreement for loan.*—The testator advanced money to two persons engaged in business, and it was stipulated that the testator should have no power to call the money in for a fixed term except in certain events, such as the business of the borrowers being carried on at a loss. It was also stipulated that the testator should have the right to inspect and examine the books and stock-in-trade of the firm at any time. The testator died having by his will given his property to certain persons for life with remainders over.

Held, first, that the duty of the trustee of the will was, in the absence of any special circumstances, to have an audit and stocktaking of the firm's business once a year; and, secondly, that the expenses of every such audit and stocktaking ought to be borne by the capital of the estate.—*Bennett, Re, Jones* v. *Bennett*, C.A., 419.

25. *Tenant for life and remainderman—Onerous and beneficial estates, devise of.*—A testator devised various real estates in England to A. for life, with remainder to his first and other sons in tail male. On some of the estates the charges exceeded the rents and profits, and the assignees of the tenant for life desired to give up possession of these estates while retaining the estates which returned a profit.

Held, that the estates being all given in one gift, the onerous estates could not be disclaimed.

Syer v. *Gladstone*, 34 W. R. 565, 30 Ch. D. 614, commented upon.—*Frewen* v. *Law Life Assurance Co.*, CH.D. NORTH, J., 682.

26. *Tenant for life and remainderman—Policy of insurance—Mortgage—Liability for premiums and mortgage interest—Apportionment of policy moneys.*—A testator gave the residue of his estate to trustees on trust for a tenant for life and remaindermen. Such residue consisted in part of a policy of insurance on the life of another person, which policy was subject to a mortgage securing a debt owing by the testator. The trustees paid the premiums and the interest on the mortgage accruing since the death of the testator out of the income of such residue. The person insured having died, and the policy moneys been paid to the trustees,

Held, that, as between the tenant for life and the remaindermen, the former was entitled to be repaid thereout the amount, not only of such premiums, but also of such interest; and that the residue of such moneys should be apportioned according to the rule in *In re Chesterfield's (Earl) Trusts*, 32 W. R. 361, 24 Ch. D. 643.—*Morley, Re, Morley* v. *Haig*, CH. D. KEKEWICH, J., 140.

27. *Tenant for life and remainderman—"Property not actually producing income"—Debt due to testator—Realized security insufficient to pay capital—Apportionment.*—A testator, after directing his property to be converted and the income to be paid to his wife during widowhood, gave his trustees power to postpone the conversion, and declared that the income produced by his estate previously to conversion should be applied as income under his will. The will then proceeded as follows: "But no property not actually producing income which shall form part of my estate shall be treated as producing income or as entitling any party to the receipt of income."

At the death of the testator there was a debt owing to him, in respect of which the trustees subsequently took from the debtor a mortgage of certain policies of assurance as security. These policies, while the tenant for life remained the testator's widow, were realized and produced a sum insufficient to pay the capital of the debt. There were also arrears of interest due.

Held, reversing the decision of Stirling, J., that the sum realized being, according to the well settled rule of the court, partly capital and partly interest, the widow as tenant for life was entitled to have the sum apportioned between capital and income.—*Hubbuck, Re, Hart* v. *Stone*, C.A., 289.

28. *Trust for sale—Power to postpone—Business—Time.*—A testator gave his residuary real and personal estate (which included a business carried on by the testator) to trustees to sell and convert, and that they "particularly shall with all convenient speed sell" the business aforesaid; the will contained a general power for the trustees to postpone the sale of any part of the testator's real and personal estate for so long as they should think fit.

Held, that this power did not authorize the sale of the business to be postponed for an indefinite time. Under the special circumstances the court authorized the postponement of the sale for two years.

In re Crowther, 43 W. R. 571, [1895] 2 Ch. 56, considered.—*Arnold* v. *Smith, Smith, Re*, CH.D. NORTH, J., 280.

See also ADMINISTRATION, 7; AUTRE VIE; CHARITY, 5-7; EXECUTOR, 2, 6; HEIRLOOMS; INLAND REVENUE, 20, 21; PROBATE, 8-10, 12, 16, 17, 19-21; VENDOR AND PURCHASER, 13.

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